



IN THE COURT OF APPEAL

AT NYERI

[CORAM: KANTAL, JA (IN CHAMBERS)]

CIVIL APPLICATION NO. 77 OF 2016

BETWEEN

JULIUS MACHARIA MWANGI.....APPLICANT

AND

GITHAMBO TEA FACTORY LTD.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LTD...2ND RESPONDENT

(Being an application for extension to file appeal out of time from the Ruling in the High Court of Kenya at Embu (J.M. Bw'Onwonga, J) dated 9th March, 2015

In

EMBU ELC No. 53 OF 2014)

RULING

In the Motion on Notice brought under Rule 4 of the Rules of the Court I am asked to grant leave to the applicant to file an appeal out of time and to grant any other order I may deem fit. In the grounds in support of the Motion and in the affidavit of **Julius Macharia Mwangi**, the applicant, it is stated that the decision intended to be appealed was delivered on **9th March, 2015**; that a Notice of Appeal was filed on **6th March, 2016**; that proceedings were applied for on **17th March, 2016** (this is probably 2015); that the proceedings were ready on **15th June, 2015** but that the applicant was not notified that the proceedings were ready; further that instead of proceedings filed at the High Court being moved, the respondent had applied that the matter be referred to arbitration and that the Judge ruled accordingly thus referring the matter to arbitration. The applicant contends that he was cheated by the respondents which according to him as per paragraph 5 of the supporting affidavit:

“that the respondent being a corporation has a lot of muscle and strength, it can influence an arbitration proceedings”.

The applicant says that he has an arguable appeal which has high chances of success and attaches a memorandum of appeal where various grounds are raised.

Mr. Karinga Ndungu who is a lawyer from the firm of **J. K. Kibicho and Co. Advocates** on record for the respondents swore a replying affidavit on **12th February, 2019**. He says amongst other things that the delay of more than one and half (1½) years by the applicant in instituting an appeal is inordinate, unreasonable and unjustified. He further says that the letter bespeaking proceedings was not served on them and that the respondent would suffer prejudice if the application is allowed as it has been almost 4 years since the ruling was delivered.

I heard the motion on **18th February, 2019** when learned counsel **Mr. J Kimwere** appeared for the applicant while learned counsel **Mr. Karinga Ndung'u** appeared for the respondents. According to **Mr Kimwere** the applicant is aggrieved by the decision to refer the matter to arbitration as according to him, the arbitral clause adopted by the court in making the ruling to refer the matter to arbitration was not in the original contract.

When I asked counsel why there was delay in bringing the application or in filing record of appeal, he stated that he and the applicant had not

been notified that proceedings were ready.

In opposing the application, **Mr. Ndungu** referred to principles applicable in applications for extension of time and submitted that the applicant had not explained the delay. He wondered why there was no evidence of the applicant making any follow up to obtain proceedings.

Rule 4 of the rules of the Court donates an unfettered discretion to a Judge considering an application for extension of time. Judicial pronouncements have been made over time interpreting rule 4 and apart from recognizing that the decision whether or not to extend time is discretionary, principles that have been recognized which the court should take into account are: first, the length of the delay, secondly, the reason for the delay and, thirdly, the chances of the appeal succeeding if the application is granted and, fourthly, the degree of prejudice to the respondent if the application is granted.

In the motion before me, the Judge of the High Court allowed a Preliminary Objection taken by the respondents and referred the matter before him to arbitration. The applicant filed a Notice of Appeal within time and applied for proceedings soon thereafter. It is stated in the affidavit and in submissions before me that proceedings were ready on **15th of June, 2015**. I note that the Notice of Motion was filed on **28th October, 2016**, a period of about one year and four months after proceedings in the High Court were ready. When I asked counsel for the applicant what efforts had been made to check or to collect the proceedings, he had no answer, stating only that the applicant was not notified that proceedings were ready.

I have perused the record and note that the firm of **Kimwera Josphat & Co. Advocates** were on record for the applicants and filed the plaint at the High Court. **Mr. Kimwera** advocate from that firm is still on record for the applicant and is the lawyer who urged the application.

Applying the principles that I have recognized in an application like this one, the period of delay of one year and four months has not been explained at all. I can see no reason why a litigant who has applied for proceedings to appeal would sit back without checking whether those proceedings are ready to enable the applicant to take the necessary steps in filing a record of appeal. It is not made any better here where the applicant was and is represented by the same advocate who does not give any explanation why he did not collect proceedings which were ready soon after being applied for. So delay is not explained and it is obviously inordinate. I have not been given any valid reason for the delay. I agree with learned counsel for the respondent that without any evidence that there was a follow up to obtain proceedings, I should not exercise my discretion in favour of the applicant.

On the chances of the appeal succeeding, I note that the dispute was referred to arbitration and I see no reason why the applicant would resist participating in arbitration proceedings. His fear that the respondent occupies a superior position to his seems to me to have no basis.

For all these reasons, I am not satisfied that the applicant is entitled to my exercise of discretion in his favour and I dismiss the motion with costs to the respondent.

DATED & Delivered at Nyeri this 13th day of March, 2019.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR