



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE IN CHAMBERS]

CIVIL APPLICATION NO. 383 OF 2018 (UR 311/2018)

BETWEEN

KIRINYAGA CONSTRUCTION LIMITED.....APPLICANT

AND

KATHERINE WAIRIMU NDUNGU (suing as

Administrator of the Estate of FRANCIS

NDUNGU GITHINJI).....RESPONDENT

(An Application of Extension of time to file and serve Notice of Appeal and also the Record of Appeal out of time in the intended appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Hellen Wasilwa, J) dated 18th July, 2018

In

ENVIRONMENT & LABOUR RELATIONS

CAUSE NO. 1124 OF 2013

R U L I N G

Before me is a Notice of Motion dated the 19th December, 2018 and filed on the 21st December, 2018. It is expressed to be brought under Section 3A of the Appellate Jurisdiction Act, and Rule 1 (2), 4 and 41 of the Court of Appeal Rules (CAR) 2010, and any other provisions of the Law. Prayer 1 which sought to have the matter certified as urgent is now spent. That leaves prayer 2 and 3 as the substantive relief prayers with prayer 4 as the attendant prayer for costs. These read:

“2 That leave be granted to the Applicant to file and serve the Notice of Appeal and file and/or serve the Record of Appeal out of time against the Judgment and /or Decree in Nairobi Employment and Labour Relations Court Cause No. 1124 of 2013 made on the 18th day of July, 2018.

3. That in the alternative and without prejudice the time to file and serve the Notice of Appeal dated 29th July, 2018 and filed and served on 3rd August, 2018 (which is two (2) days past the prescribed time) be deemed to be duly extended.

4. That costs of this application be costs in the cause”.

The application is supported by grounds in its body, and a supporting affidavit deposited by **Robert Mwangi**. It has been opposed by a Replying affidavit deposited by **Katherine Wairimu Ndungu** on 14th February, 2019 and filed on the 22nd day of February, 2019.

The application was canvassed by way of oral submissions by learned counsel **Miss Njuguna**, leading **Miss Wangari**, for the applicant, while learned counsel **Mr. Wakhisi** holding brief for **Miss Wanjiru Ngige** appeared for the respondents.

The brief background to the application is that the proceedings undertaken in the ELRC in Cause Number 1124 of 2013 relate to the estate of one **Francis Ndungu Githinji**, formerly an employee of the applicant who died in the line of duty. The respondent in her capacity as the widow of the deceased lodged a claim against the applicant before the Labour Officer pursuant to the provisions of the Work Injury Benefits Act of 2007. After due deliberations, the Labour Officer awarded to the respondent a sum of Kenya Shillings one million, one hundred and sixteen thousand (1,116,000/=). The respondent moved to the ELRC in Nairobi and filed Cause No. 1124 of 2012 seeking to enforce the Labour Officer's award against the applicant.

After due deliberations the Hon. Lady Justice **Hellen Wasilwa**, in a Judgment delivered on the 18th day of July, 2018 affirmed the award granted in favour of the respondent by the Labour Officer.

The applicant was aggrieved by the said decision and filed a Notice of Appeal dated 29th July, 2018 and filed on 3rd August, 2018 intending to appeal against the whole of the said decision. It transpired that the said Notice of Appeal was filed two days outside the timelines stipulated in Rule 75 of the CAR hence the lodging of the application under consideration for purposes of regularizing that position.

Supporting the application, learned counsel **Miss Njuguna** reiterated the grounds in the body of the application and the contents of the supporting affidavit. In summary, the applicant contends that they were aggrieved by the intended impugned Judgment and timeously instructed their advocate to lodge the notice of appeal against the said decision; that due to inadvertence on the part of the said advocate, the notice of appeal and the letter bespeaking a typed copy of the proceedings were filed two (2) days outside the timeline set by the CAR; that in counsel's view a delay of two (2) days is not inordinate; that the said delay having been caused by their advocate's inadvertence should not be visited against the applicant; that the intended appeal has overwhelming chances of success; that the reason for the delay in complying with the timelines set by the rules has not only been sufficiently explained, but it is also excusable and in the interests of justice to both parties herein which in the circumstances of this application dictates that the applicant be granted the reliefs sought.

Opposing the application, **Mr. Wakhisi** submitted at length reiterating the contents of the replying affidavit. In summary, counsel contended and correctly so in my view that Rule 75 of the CAR obligated the applicant to file a Notice of appeal within fourteen (14) days of the date of the Judgment intended to be impugned; that applying the computation of time as provided for in Rule 3 (a) of the CAR, the fourteen (14) days lapsed on 1st August, 2018, hence the applicant's Notice of Appeal was lodged out of time; that without a valid notice of appeal on record, the applicant's intended appellate process cannot lie; that the Court has a discretion under Rule 4 of the rules of the Court to extend time within which the applicant's appellate process can be validated; but in deciding either way, the court has to ensure that the said discretion is exercised not only judiciously but also on sound, factual and legal basis. The court has a duty to balance the competing interests of the applicant with those of the respondent. In counsel's view, no legal or factual justifiable reason has been given by the applicant to justify the failure to lodge the notice of appeal in time and that the applicant's attempt to push that blame on to the advocate on record for them should therefore be rejected.

Further that the likelihood of the success of the intended appeal, is in doubt as all that the trial Judge of the ELRC did was to adopt and affirm the award of the Labour Officer granted many years back and against which the applicant filed no appeal; that no reason was given as to why it took four (4) months for the applicant to realize that its then initiated appellate process was hopelessly incompetent and needed to initiate an appropriate process to regularize the same; that the purported notice of appeal intended to be regularized was also lodged at a wrong forum namely the Court of Appeal Registry, instead of having it first lodged at the ELRC registry as the court appealed from before being lodged in this Court's registry as the court appealed to; and lastly that the request for leave to file a record of appeal out of time does not lie as none has been annexed to the application for consideration by the court before any appropriate order may be made with regard thereto.

Counsel relied on the case of **Stanley Kahoro Mwangi & 2 others vs. Kanyamwi Trading Company Ltd [2015] eKLR, George Kagima Kariuki & 2 others vs. George M. Gichimu & 2 others [2014] eKLR, Utalii Transport Company Limited & 3 others vs. NIC Bank Limited & another [2014] eKLR, Pasteur Dukuzumuremyi vs. James Karanja Kabia, Civil Appeal Number 63 of the Digest of Authorities, Monica Malel & another vs. Republic & 2 others [2009] eKLR, Annah Mwhaki Wairuru vs. Hannah Wanja Wairuru [2017] eKLR; and lastly, **Justus Oloo Ogeka & 6 Others vs. Kenya Union of Commercial Food and Allied Workers & 2 others [2018] eKLR**; all for the reiteration of the salient features of the respondent's submission namely that: the burden placed on the applicant to explain to the satisfaction of the court the failure to file the notice of appeal in time has not been sufficiently explained to warrant the exercise of such a discretion in favour of the applicant; that no evidence of the purported inadvertence on the part of the applicant's advocate has been demonstrated sufficiently to the required threshold set by the said rule; that chances of the success of the intended appeal have not been demonstrated; that the respondent risks either being denied or unnecessarily withheld from the enjoyment of the fruits of her Judgment if the application were to be allowed; that it took the applicant four (4) months to seek the court's intervention to regularize the intended appellate process; that the court has to balance the right of appeal intended to be validated and exercised by the applicant as against an equally weighty right of the respondent to enjoy the fruits of the Judgment delivered in her favour especially when there has been no demonstration that any prejudice is likely to be suffered by the applicant if the application under consideration were to be dismissed.**

In reply to the respondent's submissions, **Miss Njuguna** reiterated her earlier submissions and added that most of the submissions advanced by the respondent in opposition to their application go to the merits of the intended appeal. It will therefore be premature for her to respond to the same; that contrary to the respondent's assertion, the alleged inadvertence or mistake on the part of the advocate on record for the applicant has not only been sufficiently explained both in the affidavit in support of the Certificate of Urgency and the application but is also excusable in the interests of justice to both parties. Lastly, that nothing attaches to the complaint on the want of form of the notice of appeal as currently filed as that can be regularized once the leave sought by them is granted.

The substantive provision for accessing the relief sought are Section 3 A of the Appellate jurisdiction Act; Rules 1 (2), 4 and 41 of the Court of Appeal Rules, 2010. Section 3A enshrines the overriding objective principle of the Court. It provides:

“3A.(1) the overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) *The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

(3) *An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.*

The principles that guide the invocation of this principle have been crystallized by case law. See the case of **City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient**

Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008), which states that the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it; the case of **Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009**; that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness; that the principle aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

Rule 1(2) on the other hand which enshrines the inherent power of court provides as follows:

“1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

The principles that guide the court in the exercise of the above discretion have also been crystalized by case law. See the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR**, per **Musinga, JA**, as follows:

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their Constitutional mandate..... Inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.”

The Supreme Court in the case of **Board of Governors, Moi High School, Kabarak & Another versus Malcolm Bell [2013] eKLR** *inter alia* added the following observations:

“...inherent powers are endowments to the Court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional; it includes such powers as enable the court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode or discharge of duty is conscionable, fair and just.”

Rule 41 is merely a procedural rule and need no interrogation as it simply makes provision for the processing of applications presented to court for whatever relief. The substantive rule to be interrogated is **rule 4** of the Rules of the Court. It provides:

“4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The principles guiding the exercise of this jurisdiction are now well settled. I will highlight a few by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] eKLR**, **Odek, J.A.** held the view that the mandate under Rule 4 is discretionary, which discretion is unfettered and does not require establishment of “*sufficient reasons*”. Neither is it limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.

In **Nyaigwa Farmers’ Co-operative Society Limited versus Ibrahim Nyambare & 3 Others [2016] eKLR**, **Musinga, J.A.** stated that the principle that guide this Court in considering an application of this nature are, the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed. In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998] eKLR**, **G.S. Pall JA** (as he then was) added *inter alia* that an appellant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the CAR; that this order should be granted liberally unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable appeal; that the discretion granted under rule 4 of the CAR to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the court may think just and also that the intended appeal is an arguable one; and lastly that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it.

In **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board [2015] eKLR**, **K. M’Inoti J.A.**, made observations *inter alia* that to extend the time prescribed by the CAR for the doing of any act is subject only to the requirement that it must be exercised judicially as the discretion conferred by that rule is wide and unfettered. Quoting with approval the holding in **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai. 332 of 2004** the learned Judge added that being unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. For example, the period for the delay, the reason for the delay (possibly) the

chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the responses of the parties and also whether the matter raises issues of public importance which in the Judge's view are all relevant but not exhaustive factors.

There is also **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which **Odek, J.A.** held that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other proceedings relied upon by such an applicant that the intended appeal is safe. In **Joseph Wanjohi Njau versus Benson Maina Kabau-Civil Application No.97 of 2012**, it was observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; and lastly, in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013** it was stated that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, the power to do so is itself exercised sparingly and this should be done in circumstances that protect the integrity of the court process from abuse and in the process acting as a shield against actions that would amount to an injustice to litigants and also play a secondary role for ensuring that at the end of the day there should be proportionality.

I have given due consideration to the above principles in light of the above rival submissions. It is not in dispute that there is a Judgment in place having been delivered by the **Hon. Lady Justice Hellen Wasilwa** on the 18th day of July, 2018, in favour of the respondent. The applicant was aggrieved by the said Judgment and gave instructions to its advocates on record to promptly lodge an appeal against that decision. This position has been acknowledged both in the affidavit in support of the Certificate of Urgency and the supporting affidavit. Under the CAR an appellate process is initiated by the lodging of a Notice of Appeal. Rule 75 of the CAR requires such a notice of appeal to be lodged within fourteen (14) days of the date of the judgment, of which the applicant acknowledges not to have complied with, hence the application under consideration. Rule 75 of the Rules of the CAR provides *inter alia* as follows:

“75.(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant”.

The position in law as crystallized by the case law assessed above is that non-compliance with the above rule does not perse shut out a litigant from the seat of justice, hence the mandate donated to the court by Rule 4 of the CAR. In addition to the principles in the case law assessed above, I also have to bear in mind that where ends of justice dictates so in an application of this nature, it will be prudent for a court of law to allow such an application to enable parties ventilate their respective positions on merit because the right to a hearing has not only been a well-protected right in our Constitution but also acts as the cornerstone of the rule of law. See

Julius Kamau Kathekea vs. Weruguru Katheka Ayaga and 2 others [2013] eKLR; that the extension of time is not a right of a party but a discretionary remedy that is available to a deserving party who has discharged the burden of laying a basis to the satisfaction of the court, that the court should exercise its discretion to extend time in his or her favour. See **Paul Wanjohi versus Duncan Gichane Mathenge [2013] eKLR**; that a court is also entitled to consider other factors outside those envisaged under the Rule 4 procedures. See **Gachuhi Muithanji versus Mary Njuguna [2014] eKLR**; lastly, that the merits of the intended appeal are also a relevant factor for consideration. See Dominic **Mutei Kombo and 2 others versus Kyule Makau [2015] eKLR**.

Starting with the period of delay, it is not disputed that the period of delay was only two (2) days. In **George Mwende Muthoni vs Mama Day Nursery and Primary School, Nyeri CA NO. 4 OF 2014, (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months. In Aviation **Cargo Support Limited vs. St Marks Freight Services Limited [2014] eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within the sixty days stipulated within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply. In **Christopher Mugo Kamotho vs. the Hon. Attorney General [2009] EKLR**, the relief was withheld for the failure to explain why it took thirteen (13) days to apply for a certified copy of the proceedings on the one hand, and seeking extension of time soon upon being capacitated with a certificate of delay. In light of the above case law, it is my considered view that a delay of two days cannot in the circumstances be said to be such an inordinate delay that would justify the withholding of the relief sought of extension of time within which to validate the initiated appellate process.

The reason given for the delay is inadvertence on the part of the advocate on record for the applicant as acknowledge both in the affidavit in support of the certificate of urgency and the supporting affidavit. In **Lee G. Muthoga versus Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nai 236 of 2009** the Court ruled that it is a widely accepted principle of law that a litigant should not suffer because of his advocates' oversight. In **CFC Stanbic Limited vs. John Maina Githaiga & another [2013] eKLR**, wherein a litigant had given instructions to his advocate in good time to enter appearance, the court ruled that the default being clearly a mistake on the part of the advocate, the same should not be visited upon the litigant. See also **National Bank of Kenya Ltd & 2 others vs. Kisumu Papermills Limited [2006] eKLR**, where the court approved the observations of **Madan, J. in Murai vs. Wainaina (No.4) [1982] KLR, 38** *inter alia* that the door of Justice is not closed because a mistake has been made by a person of experience who ought to have known better. In light of the above case law, I am satisfied that the delay in complying with the prerequisites in Rule 75 of the CAR was occasioned by the applicant's advocate. The applicant should not therefore be penalized for the mistakes of his advocate especially where the delay is only of two (2) days.

As for the chances of the intended appeal succeeding, the draft memorandum of appeal indicates that the applicant intends to contend *inter alia* that the accident resulting in the death of the deceased was occasioned by the deceased's own negligence or that the deceased substantively contributed to the same by reason of intoxication; that the Judge not only misapprehended the facts but also misapplied the law to those facts and thereby arrived at a wrong decision on the matter; that the Judge fell into error when she ordered interest payable to run from 2007. In law, an arguable appeal need not be one that must ultimately succeed. See **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012**. Going by the content of the draft memorandum of appeal highlighted above, I do find that the intended appeal is arguable.

As for prejudice, the respondent cited the delay in accessing the fruits of the Judgment as one such form of prejudice. Although this is a relevant factor for consideration, it is my view that redress for this grievance lies in the execution process which the respondent can avail herself of.

As for the other factors that also need consideration, it is sufficient for me to stress that the right of appeal or the right to be heard which is a constitutionally entrenched right can only be withheld in exceptional circumstances. See **Richard Nchapi Leiyagu versus IEBC & 2 Others** (supra).

On want of form of the Notice of Appeal sought to be validated, it is a defect curable by striking out the defective copy currently on record and then extend time to file a proper one.

The prayer for leave to file a record of appeal out of time is premature considering the applicant's own admission in the supporting affidavit that they are yet to be supplied with a copy of typed proceedings to capacitate them to do so. It is therefore rejected.

The upshot of all the above assessment is that I find merit in the application, as withholding the relief from the applicant might prolong the litigation as the law allows any party aggrieved to seek redress from the full court. Such an eventuality in my view would defeat the overriding objective principle in Section 3A of the appellate Jurisdiction Act which advocates for speedy disposal of court business.

In light of all the above reasoning, I make orders as follows: the purported Notice of Appeal filed herein on 3rd August, 2018 be and is hereby struck out. The applicant has fourteen (14) days of the date of the ruling to file and serve a proper notice of appeal and thereafter to proceed according to law. The respondent will be compensated for by way of costs of the application, to be agreed or taxed.

DATED & Delivered at Nairobi this 8th Day of March, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR