IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (NAMBUYE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 5 OF 2019 (UR 5/2019)

BETWEEN

MOROO POLYMERS LIMITED..................RESPONDENT/APPLICANT

AND

WILFRED KASYOKI WILLIS........................CLAIMANT/RESPONDENT

(An Application for extension of time to file a notice of Appeal for stay of execution of the

Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Byram Ongaya,J.)

Dated 14th December, 2018 *in ELRC No. 2241 of 2017)*

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R U L I N G

Before me is a notice of motion dated the **7th day of January, 2019** and filed on the **10th January, 2019.** It is premised on **Rule 4, 5(2)(b),41, 75(1)** of the Court of Appeal Rules (CAR), Order 43 of the Civil Procedure Rules (CPR) and all other enabling provisions of the law. Five reliefs are sought inclusive of an attendant prayer for costs. Prayer 1 is spent. Prayer 3 and 4 dealing with stay of execution of the decree and purportedly premised on **Rule 5(2) (b)** of the CAR can only be anchored on a valid notice of appeal. There is none in place, hence the applicant's application for capacitation to initiate the intended appellate process. In this regard, the citing of the said **Rule 5 (2) (b**) together with prayer 3 and 4 sought thereunder is therefore premature. They also do not fall for consideration by a single Judge. They are accordingly struck out.

Order 43 (CPR), simply makes provision for the category of orders appealable from the High Court to this Court as of right and those that are appealable only with the leave of the High Court. It therefore has nothing to do with the procedure falling under the jurisdiction of the Court as provided for in the CAR. It is accordingly struck out. That leaves prayer 2 for consideration together with the attendant prayer for costs. These read:

> ***" 2. That this Honourable Court be pleased to extend time for filing the notice of appeal to this Court, pursuant to Rule 4 of the Appellate Court Rules, against the Judgment dated 14th December, 2014, of the Employment and Labour Relations Court sitting at Nairobi, in Employment Cause No. 2241 of 2017, <u>Winfred Kasyoki Willis V.</u> <u>Maroo Polymers Limited.</u>***
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> **…..**
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> ***5. That costs of this application be in the cause..."***

The application is supported by grounds in its body and a supporting affidavit of **Dinesh Shah,** described as a director of the applicant. It has not been opposed by the respondent who I was informed collected a copy of the application from the applicant's advocates office three days of the filing of the same in court.

The application was canvased by way of oral submissions by learned counsel. **Mr. J. Omangi** for the applicant. There was no appearance for the respondent who was served through her mobile phone number 0723568220 on 26th February 2019 as per the content of the Return of Service deposed by a Process Server attached to the court, **Eunice Wangari** on 6th March, 2019 and filed on the same day. Being satisfied

that the respondent had due notice of the hearing date for the application, allowed **Mr. Omangi** to prosecute the application.

In a brief submission, **Mr. Omangi** reiterated the content of the supporting documents and submitted that judgment intended to be impugned was delivered on 14th December, 2018; that the deponent of the supporting affidavit who is a director of the applicant left the jurisdiction on vacation with his family, hence the inability of his advocate to get through to him and appraise him of the content of the judgment; that he only came back to the jurisdiction in early January 2019 when his advocate appraised him of the content of the judgment and immediately gave instructions to his advocate on record to initiate the appellate process; that by the time the said instructions were given, the time stipulated in the CAR for initiating an appellate process had lapsed hence the application under consideration, filed on 10th January, 2019, a period of twenty seven (27) days from the date of the intended impugned judgment, and thirteen (13) days from the date of the lapse of time for lodging a notice of appeal. Further, that the delay in initiating the appellate process was unintentional and therefore excusable; and that the intended appellate process will be expedited as soon as capacitated to do so.

Having struck out **Order 43** of the CPR and Rule **5(2) (b)** of the CAR for the reasons given, my invitation to intervene can only lie under **Rules 4, 41** and **75(1)** of the CAR Rule **41** is merely procedural, providing for the types of applications that fall for consideration by the Court under the CAR and therefore need no further interrogation. While Rule **75(1)** of the CAR on the other hand is the substantive rule making provision for the filing of a notice of appeal which is a core document in the appellate process. In fact it is the corner stone of the appellate process as in law an appeal to this Court is deemed to have been initiated upon the filing of a valid notice of appeal filed in accordance with **Rule 75(1**) of the CAR. **Rule 4** on the other hand is the substantive rule for the exercise of jurisdiction to extend time for transacting any business under the CAR. 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 in ordinate 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 submissions made above by **Mr. Omangi**. The position in law is that whether such an application is defended or not, the applicant has to satisfy the prerequisite for the exercise of jurisdiction under **Rule 4** before any relief can be granted in favour of such an applicant. It is not in dispute that there is a Judgment in place having been delivered by the **Hon. Mr. Justice Byram Ong'aya** on the 14th day of December, 2018, in favour of the respondent. A Director of the applicant deposes that he was aggrieved by the said Judgment and has now given instructions to their advocate on record to initiate the appellate process out of time hence the application under consideration. **Rule 75** of the CAR requires a notice of appeal to be lodged within fourteen (14) days of the date of the judgment, of which the applicant acknowledges was not complied with because its director and the proper person to give instructions for initiating the appellate process was out of the jurisdiction; that instructions to initiate the said appellate process were given immediately the said director came back to the jurisdiction and was appraised of the contents of the judgment. **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 crystalized 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 Dancan 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 judgment was delivered on 14th December, 2018. Fourteen (14) days within which the notice of appeal ought to have been filed lapsed on 28th December, 2018. The application seeking the court's intervention was filed on 10th January, 2019, which is a period of twenty seven (27) days from the date of the judgment and thirteen (13) days from the date of the lapse of the time for filing a notice of appeal. 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.

The uncontroverted reason given for the delay is the absence of the applicant's director from the jurisdiction. This was the person mandated to give such instructions and which he gave promptly as he came back to the jurisdiction and was appraised of the content of the judgment. In light of the above reasoning, I am satisfied that the delay in complying with the prerequisites in Rule 75 of the CAR was occasioned by the absence of the director of the applicant from the jurisdiction. They moved with due diligence to initiate the appellate process as soon as he came back to the jurisdiction, that is within thirteen (13) days, which I find not only sufficiently explained but also not inordinate and therefore excusable.

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 learned trial Judge failed to appreciate: the existence of discrepancies in both the pleadings and the evidence; that the company is a legal entity; that the defence on record was not considered; erred in arriving at an erroneous award in the circumstances; failed to properly evaluate and appreciate the applicant's written submissions; and also for shifting the burden of proof. Going by the content of the draft memorandum of appeal highlighted above, I do find that the intended appeal is arguable notwithstanding that it need not ultimately succeed.

As for prejudice to be suffered by the respondent, none has been pointed out as the respondent neither filed a response to the application nor attended court to oppose the application.

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), and which circumstances I find none prevailing herein to warrant the withholding of the reliefs sought.

The upshot of all the above assessment is that I find merit in the application and the same is hereby allowed in the following terms that; the applicant has fourteen (14) days of the date of the ruling to file and serve a notice of appeal and thereafter to proceed according to law.

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