



IN THE COURT OF APPEAL

AT NAIROBI

GATEMBU, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 127 OF 2018

BETWEEN

MURATA SACCO SOCIETY LTD.....APPLICANT

AND

BANKING, INSURANCE FINANCE UNION (KENYA).....RESPONDENT

(An Application for extension of time to file Notice of Appeal and Record of Appeal out of time in an intended appeal from the Employment and Labour Relations Court at Nairobi (M. Mbaru, J)

in

Industrial Court Cause No. 616 of 2010

RULING

1. Murata Sacco Society Ltd, the applicant, has by its application dated 30th April 2018 applied, under Rule 4 of the Court of Appeal Rules and Section 3A of the Appellate Jurisdiction Act, for leave to lodge a fresh notice of appeal out of time and thereafter liberty to file its record of appeal. It intends to appeal against a judgment delivered on 7th October 2014 in which the Industrial Court determined that former employees of the applicant and members of the respondent Union were wrongfully terminated from employment and each one of them awarded three months gross salary in damages, two months' salary for each full year worked, interest and costs.
2. The background, in brief, is that after the delivery of the judgment by the Industrial Court on 7th October 2014, the appellant duly filed a notice of appeal on 13th October 2014 intending to appeal against the whole judgment. On the same date, it made a request, in writing to the Industrial Court, for copies of the proceedings and the judgment to enable it appeal to this Court.
3. On 8th July 2015, the applicant filed an application before this Court, under Rule 5(2)(b) of the Rules of the Court for an order to stay execution of the judgment of the Industrial Court. In a ruling delivered on 22nd July 2016, the Court allowed that application and ordered a stay of execution of the judgment and decree on condition that the applicant was to deposit Kshs. 5,000,000.00 in an interest earning account in the joint names of the advocates for the parties within 45 days.
4. The next development after that was on 22nd May 2017. The respondent presented an application dated 18th May 2017 to the Court in which it sought an order "to strike out the Notice of Appeal dated 13th October 2014 on the grounds that the Record of Appeal has not been filed and served within the prescribed time." That application was based on the grounds that a period of over three years had lapsed since the filing of the Notice of Appeal; that the delay in filing and serving the record of appeal was inordinate; and that the applicant was "enjoying the stay orders...". In opposing that application, the applicant explained that the delay in filing the record of appeal was caused by the fact that the proceedings of the lower court had not been supplied.
5. In rejecting the explanation offered by the applicant as to why there was delay in filing the record of appeal, the Court in its ruling dated and delivered on 19th January 2018 allowed the respondent's application and struck out the applicant's notice of appeal.
6. It is against that background that applicant now seeks leave under Rule 4 of the Rules of the Court to lodge a fresh notice of appeal and thereafter to file the record of appeal.

7. During the hearing of the application before me, Mr. K. N. Munyori, learned counsel for the applicant referred to the application; the grounds in support of the application; the supporting affidavit sworn on 30th April 2018 by the Chief Executive Officer of the applicant, James Kimani Mbui on which he based his submissions supported by authorities the net effect of which is that: the initial notice of appeal was struck out on account of a mistake by counsel who had assumed that the registry in the lower court required no prompting in the preparation and supply of proceedings once the request was lodged; that in striking out the notice of appeal, this Court took a different approach from that taken by the Supreme Court in Hassan Nyanje Charo vs Khatib Mwashetani and 3 others [2014]eKLR where it was held that a litigant should not be blamed for the laxity of the court processes over which the litigant may have no control.

8. It was urged that upon the earlier notice of appeal being struck out by this Court on 19th January 2018 the advocate for the applicant approached the lower court and found the court file had been misplaced and typing of proceedings had not started; that the delay in filing the intended appeal was occasioned by “*the delay to receive the certified proceedings*” from the lower court; that there are questions regarding lawfulness or otherwise of the termination of employment and questions as to legality of the awards made by the lower court to be raised in the intended appeal; that on the strength of the decision of this Court in Jedida Alumasa & 3 others v S.S Kositany [1997] eKLR , and notwithstanding that the earlier notice of appeal was struck out, the applicant is at liberty to restart the appellate process.

9. As to the legal principles applicable in an application for extension of time such as this, counsel referred me to the decisions of the Court in Hassan Nyanje Charo v Khatib Mwashetani & 3 others (above) and Nicholas Kiptoo Arap Korir Salat v IEBC [2014] eKLR. It was urged that unless the orders sought are granted, the respondent will execute the judgment of the lower court with the possible effect of destroying the applicant’s enterprise.

10. Opposing the application, learned counsel for the respondent Mr. J. Kariuki submitted that it was not until the respondent lodged an application to this Court on 2nd March 2018 seeking an order to discharge the order of stay of execution and to have the security of Kshs. 5,000,000.00 held in the joint names of the parties released that the applicant moved to file the present application; that the present application is intended to defeat the respondent’s said application and forestall the lifting of stay orders and the release of Kshs. 5,000,000.00 security to the respondent; that having regard to the ruling of the Court striking out the applicant’s initial notice of appeal, the applicant is in effect asking the Court to sit on appeal over its own decision; that in light of the ruling of the Court given on 19th January 2018, this Court cannot now, by reason of Section 7 of the Civil Procedure Act, adjudicate on the same grounds.

11. It was further submitted for the respondent that to date there is still no record of appeal in sight; and that in any event, the present application was not filed promptly.

12. I have considered the application, the submissions by counsel and the authorities cited. The principles governing the exercise of judicial discretion in an application of this nature were summarised by Waki J.A in the case of Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4 ... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of 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 delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997, Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 and Murai v Wainaina (No 4) [1982] KLR 38.”

13. As regards the question of delay, the full Court in its ruling delivered on 19th January 2018 when striking out the initial notice of appeal was not satisfied that the applicant had put forth a satisfactory explanation for the delay in filing the record of appeal. In that ruling, the Court stated:

“In the matter before us, it is common ground that the request for proceedings was made within time on 13th October 2014. The request was in writing and copied to the intended appellant, the applicant herein. After that request, however, there is absolutely nothing to show that the respondent made any effort to follow up and establish what became of the proceedings. What emerges from the replying affidavit is that the respondent and its advocates literally went to sleep and are still waiting to be roused by communication from the registrar of the Land and Employment Court as and when the proceedings are ready. With respect, we do not perceive that to be the attitude of a litigant desirous of pursuit of its rights by way of appeal to this Court. The times set by the Rules are meant to be obeyed and the non-reckoning of the time for preparation of proceedings ought to be the exception, and not the general rule. At any rate we find that he applicant’s submissions that there has been inordinate delay in filing of the record of appeal, running to over three years, is simply unanswerable.”

14. That ruling of the full court in my view addresses conclusively the question of delay for the period between 13th October 2014, when the initial notice of appeal was filed, and 19th January 2018 when that notice was struck out. The striking out of the initial notice of appeal did not however prevent the applicant from, as it were, going back to the drawing board and starting the process afresh provided it did so promptly. As Bosire, Ag. JA, as he then was, stated in Jedida Alumasa & 3 others vs S. S. Kositany [1997] eKLR:

“It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures, provided he can be able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal.”[Emphasis added]

15. In this case, the ruling by the Court striking out the initial notice of appeal was delivered on 19th January 2018. The present application was not filed until 30th April 2018. A delay of close to three and half months. The explanation offered, at paragraph 34 of the supporting affidavit, is that after the ruling on 19th January 2018 the advocate for the applicant checked up on the proceedings with the registry in the

lower court but did not get help; that he followed up with a letter on 23rd February 2018 whereupon the registry looked for the file which had been misplaced; that on 26th March 2018 the registry informed him that the typed proceedings were finally ready.

16. It is not clear why the applicant had to wait for all that before presenting the present application as I do not think the typed proceedings were necessary for the present application. As it is, despite the reference at paragraph 34(e) of the supporting affidavit to the typed proceedings as annexure JKM-1, they are not in fact annexed. The explanation offered for the delay in filing the present application is not, in my respectful view, satisfactory. There is merit, it would appear, in the respondent's assertion that the applicant was stirred into action to file the present application when the respondent moved to have the security deposit released.

17. It may well be that the intended appeal is arguable but in the absence of a satisfactory explanation as to the delay, I am unable to exercise my discretion in favour of the applicant. Accordingly, I dismiss the application dated 30th April 2018 with costs to the respondent.

Dated and delivered at Nairobi this 8th day of March, 2019.

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR