



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 134 OF 2018**

**BETWEEN**

**RICHARD KIOKO KIUNDI.....APPLICANT**

**VERSUS**

**KENYA PIPELINE COMPANY.....DEFENDANT**

*(Being an application for extension of time to lodge and serve the memorandum of Appeal and the Record of Appeal out of time in an intended appeal against the decision (Monicah Mbaru, J.) delivered on 17<sup>th</sup> day of January, 2018*

*in*

*ELRC Cause No. 1282 of 2015)*

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**RULING**

From the date of the plaint, this dispute came to court on 18<sup>th</sup> June, 2003 and today 21<sup>st</sup> June, 2019, sixteen years later, it has not been resolved.

It is now before me as a single judge pursuant to **Rule 4** of the Court of Appeal Rules to extend time to lodge and serve appeal arising from the decision of Mbaru, J of 17<sup>th</sup> January, 2018 out of time. In that decision, the learned Judge dismissed the applicant's entire claim, save for salaries, emoluments and allowances due to him during the period of his suspension.

The applicant timeously lodged a notice of appeal on 22<sup>nd</sup> January, 2018 and served it on the respondent. On the same date, he applied for copies of the proceedings and the judgment. By a letter dated 13<sup>th</sup> February, 2018 the applicant was notified that the proceedings and judgment were ready for collection. Upon receipt of these, the applicant realized that the proceedings supplied did not include those for the period of 2005 and 2015 before the matter was transferred to the Employment and Labour Relations Court. The court was able to supply these on 27<sup>th</sup> February, 2018. Upon seeing the last day to lodge and serve the appeal approaching, the applicant wrote asking the Registrar to issue to him certificate of delay under **Rule 82(1)** but he declined.

The respondent opposed the application and argued that extension of time is not a right; that the applicant did not deserve it because he had sufficient time to bring the appeal after the proceedings and judgment were availed; that the applicant has not given plausible explanation for the delay, apart from blaming the court; and that since the case has been in court since 2003, any further delay would be prejudicial to the respondent.

The discretion of a single judge under **rule 4** is wide and unfettered, as repeatedly explained in a long line of cases with the leading one being **Leo Sila Mutiso v. Rose Wangari Mwangi**, CA No. Nai. 255 of 1997). That discretion, however, must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment. See. **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others**, CA. No. 14 of 2013.

Some of the considerations to be borne in mind while considering an application for extension of time include; the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of

a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. See **Imperial Bank Limited (In Receivership) & another V. Alnashir Popat & 18 others** [2018] eKLR.

In **Athuman Nusura Juma V. Afwa Mohamed Ramadhan**, CA No 227 of 2015, this Court stated thus, on that issue:

**“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.**

Applying these considerations to the matter at hand, it is my opinion that although the respondent ought to put the dispute behind it after many years, the applicant is equally aggrieved after pursuing his rights since 2003. The applicant had upto 16<sup>th</sup> April, 2018 to lodge the appeal. He did not, but as time drew close, he wrote asking for a certificate of delay. When that did not come, he applied in this motion for more time. The motion was filed on 8<sup>th</sup> May, 2019, just under 3 weeks after 16<sup>th</sup> April, 2019. The brief period has not been shown to be prejudicial.

The applicant has explained the delay sufficiently and without drawing any conclusion on the merit of the appeal, I can only say it is not frivolous. The applicant has all through shown commitment to have the dispute determined with finality on appeal.

For all these reasons, I allow the application and order that the appeal be filed within fourteen (14) days from the date of this decision. Costs shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of June, 2019.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**