



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SICHALE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 269 OF 2018

BETWEEN

KENYA TOURISM DEVELOPMENT CORPORATION.....APPLICANT

AND

MUTUA PATRICK NZOKA.....1ST RESPONDENT

MINISTER FOR TOURISM WILDLIFE.....2ND RESPONDENT

THE ATTORNEY-GENERAL.....3RD RESPONDENT

(An application for extension of time to file the record of appeal out of time in an intended appeal against the Judgment of Employment & Labour Relations Court of Kenya at Nairobi (M. Mbaru J.) dated 7th December 2017

IN

E.L.R.C CAUSE NO. 2344 OF 2012)

RULING

Before me is an application by **Kenya Tourism Development Corporation** (KTDC) (the applicant herein) dated **19th September 2018** seeking orders to extend time within which to file its record of appeal.

A brief background will give context to the motion. **Mutua Patrick Nzoka**, the 1st respondent herein, filed a claim against KTDC for unlawful termination. In a judgment delivered on **7th December 2017**, **Mbaru, J** found in favour of the 1st respondent as against the applicant and ordered *inter alia* payment of damages to the tune of **Kshs. 12,960,000/=** as well as unpaid salaries and allowances. Aggrieved, the applicant seeks to appeal against this decision.

According to the applicant's application and affidavit sworn by applicant's counsel, **Teddy Okeelo** in support of the motion dated **4th September, 2019**, the applicant filed its notice of appeal and the letter bespeaking typed proceedings and certified copy of the judgment, both dated **14th December 2017**, well within the statutory period. However, the proceedings were not ready for collection until **16th August 2018** and the certificate of delay was furnished to the applicant on **29th August 2019**.

Believing to be out of time, the applicant thereafter filed this application on **19th September 2018** on the grounds that the applicant: filed its notice of appeal within time; applied for certified copies of the proceedings timeously; and has on record a certificate of delay issued by the High Court excusing the 251 days it took to prepare and deliver the typed proceedings. The applicant contends that there was no inordinate delay and that no prejudice will be occasioned to the parties should the application be allowed as it is in the best interest of justice.

Appearing before me on 9th May, 2019, **Mr. Maloba** for the applicant relied on and reiterated the contents of the application and supporting affidavit to urge this court to exercise its discretion in the applicant's favour.

Opposing the application, **Mr. Ndolo** for the 1st respondent, termed the application as an abuse of the court process and an attempt to delay justice and to deny the 1st respondent the fruits of his judgment. Counsel explained that from the time the applicant was notified that the proceedings were ready for collection, on **16th August, 2018**, the applicant had sixty (60) days until **16th October, 2018** to file the appeal. In spite of the ample time to file the record of appeal, the respondent asserted that the applicant allowed time to lapse, for

which the applicant has failed to explain. Furthermore, counsel pointed out that the applicant had failed to demonstrate that the intended appeal was arguable as it had failed to attach to the application a draft memorandum of appeal. Counsel urged this court to dismiss the application with costs.

It is noted that the applicant filed and served the notice of appeal as well as the letter bespeaking the proceedings within time (**14th December, 2017**), the impugned judgment having been delivered on **7th December, 2017**).

However, the proceedings were not ready until **16th August, 2018** and a certificate of delay was issued on **29th August, 2018**. Counsel for the respondents did not contest the above sequence of events. However, it was the respondent's contention that the applicant having been notified of the availability of proceedings, had upto **16th October, 2018** to file the appeal. It was his view that the application dated **14th September, 2018** is an abuse of the court process.

I have considered the motion, the supporting affidavit and the rival arguments made before me.

For a start, the chronology of events given by the applicant is undisputed. It is also not denied that the applicant did not annex a draft Memorandum of Appeal.

Under Rule 4 of this Court's rules, the grant of an order of enlargement of time is a discretionary one. There are a number of reasons to be considered in the exercise of such discretion. In **Karny Zahrya & Another vs. Shalom Levi, CA No. 80 of 2018, Koome, J** stated:

Some of the considerations to be borne in mind while dealing with 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 the role of a 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. In **Athuman Nusura Juma vs. 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”. ”

The applicant filed the Notice of Appeal as well as the letter be speaking the proceedings within time. It would appear that after obtaining the certificate of delay, the applicant did not lodge an appeal but chose to seek an order of extension of time by filing the instant motion on **19th September, 2018**, well before time to file the appeal had run out.

Rule 4 of this Court's rules provide:

“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

or 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”.

Rule 75 (2) requires that a Notice of Appeal be filed within 14 days. The applicant complied with this rule. Rule 82 (1), on the other hand, requires that the appeal be lodged within 60 days of the date when the notice of appeal was lodged. The proviso to Rule 82 (1) is that where the letter bespeaking the proceedings has been copied and served upon the respondent, a certificate of delay issued by the registrar will exclude the period taken in typing the proceedings. All these, the applicant complied with. Its folly, it would appear that it failed to avail itself of the proviso to Rule 82 (1) of this Court’s Rules.

This was a mistake on the part of the applicant and this necessitated delay, to the extent that the period certified by the Registrar as having been necessary to prepare the proceedings did not aid the applicant, and hence the delay. I appreciate that there was no draft memorandum of appeal annexed to the affidavit in support of the Motion. However, in my view, that is, but one of the considerations that may be taken into consideration. I do not think that failure to do so is fatal to an application where the rules have given the court discretion to do justice.

I am of the view that this application is for allowing and I grant the applicant leave to file the record of appeal within 14 days from today’s date.

Each party shall bear his/its own costs.

Dated and delivered at Nairobi this 11th day of October, 2019.

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR