



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 90 OF 2019

BETWEEN

LORCAN BYRNE.....APPLICANT

AND

FRONTIER SERVICES GROUP EAST AFRICA LIMITED.....RESPONDENT

(Being an application for extension of time to file the Notice of Appeal from the Ruling of the

Employment and Labour Relations Court at Nairobi (H. Wasilwa, J.)

dated 18th February, 2019 in ELRC No. 924 of 2018)

RULING

This application by motion on notice dated 22nd March, 2019 is brought under **Rule 4** of this Court's Rules, seeking an order that the time for filing a notice of appeal against the ruling of the Employment and Labour Relations Court (ELRC) made on 18th February, 2019 be enlarged.

In support of this application, Mr. Kali, learned counsel for the applicant explained that the delay was occasioned by the need for clarification of the last two paragraphs of the said ruling; that these paragraphs seemed to dismiss the application for reference to arbitration on one hand and on the other, refer the matter to arbitration which, in his opinion, was contradictory; that this left the applicant in limbo on whether the ruling was in his favour or if he ought to appeal; that the case was finally placed for mention on 14th March, 2018 where the learned Judge clarified that she had only dismissed the prayer to strike out the suit; and that she allowed the prayer for reference to arbitration. The applicant explained that following this clarification and in view of the fact that the 16th and 17th of March, 2019 fell on a weekend, the notice of appeal was filed on 18th March, 2019; that the length of delay was 15 days which was occasioned by the reasons advanced.

Counsel submitted that the applicant had an arguable appeal since the learned Judge did not find that the contract had inconsistent clauses yet this was the key issue for determination; and that the learned Judge misdirected herself on the application in the case of **Charles Njogu Lofty V. Bedouin Enterprises Ltd** (2005) eKLR on the filing of the memorandum of appeal.

Mr. Weru, learned counsel for the respondent, opposed the application. He submitted that no draft memorandum of appeal has been filed; that on 18th February, 2019 when the ruling was delivered, counsel for the applicant was absent that is why he sought a mention date for clarification. He however conceded that he appeared before the learned Judge for a mention to clarify the said ruling as explained by the applicant. Counsel, nonetheless, maintained that the applicant did not act prudently and that he ought to have filed a notice of appeal as he sought clarification of the ruling. Lastly, it was contended that the appeal is not arguable as Alternative Dispute Resolution (ADR) mechanisms should be promoted.

The parameters within which to extend the time are those set by the decision of this Court in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi**, Civil Appeal No. 255 of 1997, wherein this Court laid down these guiding principles:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that, in general, the matters which this Court takes into account in deciding whether to grant an extension of time

are: first, the length of the delay; secondly the reason for the delay; thirdly possibly the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the respondent if the application is granted.”

Applying these principles to the instant case, on the length of delay, the decision sought to be impugned was made on 18th February, 2019. The last day for filing the notice of appeal was 4th March, 2019 being 14 days from the date of ruling. The notice of appeal was filed on 18th March, 2019 which was 14 days outside the prescribed time. This delay, in my view is not inordinate.

The reason for delay was attributed to the applicant seeking clarification of the last two paragraphs of the ruling which in his view were ambiguous. The applicant explained that he sought for a mention date to clarify the ambiguity of the ruling. To corroborate this fact, the applicant has annexed a mention notice dated 19th February 2019 showing that the matter was indeed scheduled for mention on 5th March, 2019. From the record, this matter failed to be listed for mention on the scheduled date which prompted the applicant to write to the Deputy Registrar, ELRC on 7th March, 2019 urgently requesting for another mention date. The applicant has also annexed a second mention notice dated 12th March, 2019 where the matter was scheduled for mention on 14th March, 2019. As soon as the clarification of the ruling was made by the learned Judge on 14th March 2019, counsel for the applicant stated that he sought instructions from his client and being a weekend, the earliest date he could file the notice of appeal was 18th March, 2019. This delay has sufficiently been explained and the reasons for delay are plausible.

On the chances of success, it is my observation that there is no draft memorandum of appeal annexed to the application though not mandatory, it would have been prudent for the applicant to have annexed his grounds of appeal to demonstrate the possibility of his intended appeal succeeding and to prove that he is deserving of the prayers sought in his application. However, counsel in his oral submissions alluded to the fact that certain clauses of the contract were inconsistent. This contention would appear to raise an arguable issue that ought to be determined on merit.

Lastly, the respondent has not demonstrated any prejudice that it would suffer in the event that the time for filing the notice of appeal is extended.

For these reasons, the application has satisfied the parameters set in the case of Leo Sila (supra) and is accordingly allowed. Costs to be in the appeal.

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR