



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: SICHALE, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO NYR 35 OF 2017**

**BETWEEN**

**LUCY WANGARI KARIUKI.....APPLICANT**

**AND**

**KANGUNU FARMERS CO-OPERATIVE**

**SOCIETY LIMITED.....RESPONDENT**

*(An application for extension of time to file and serve the Notice of Appeal*

*and Record of Appeal in an intended appeal from the judgment*

*of the Employment and Labour Relations Court at Nyeri*

*( Ong'aya, J.) dated 4<sup>th</sup> November, 2016*

*in*

**CAUSE No 145 of 2015**

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**RULING OF THE COURT**

**LUCY WANGARI KARIUKI** (hereinafter 'the applicant') has moved this Court by way of a **Notice of Motion** dated **22<sup>nd</sup> March, 2017**, brought pursuant to **Rule 4, 42 and 43** of this Court's Rules (hereinafter 'the Rules') seeking the following orders:-

***"1. That the applicant be granted an extension of time to lodge and serve a notice of appeal and record of appeal out of time.***

***2. Costs and incidental to this application be costs in the appeal".***

The grounds adduced in support of the application and which appear on its face are that:- the applicant is desirous of lodging an appeal, that the ensuing delay was occasioned by failure on the part of **KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS UNION** (hereinafter 'KUCFAW' and her legal representative before the trial court) to inform her of the outcome of the judgment which was rendered in her absence, that KUCFAW failed to lodge a Notice of Appeal as required; and that the intended appeal has high chances of success. The said grounds are amplified further by way of the applicant's **Supporting Affidavit** sworn on **22<sup>nd</sup> March, 2017** with **annextures** thereto.

Like any other application, the present one had a background, which in brief was that the applicant once worked with **M/S KANGUNU FARMERS CO-OPERATIVE SOCIETY LIMITED** ( hereinafter 'the Respondent') in various capacities namely:- **Assistant Recorder** and that of **Secretary Manager**, between **1<sup>st</sup> October, 1999** and **5<sup>th</sup> December, 2013**. The applicant's employment came to an end on the former date following her suspension to pave way for investigations on suspected improper conduct allegedly attributable to her. Thereafter, the respondent undertook the requisite investigations whose findings were that:- the applicant was not qualified to hold the office of Secretary Manager, and that she was dishonest. In short order, the applicant was dismissed from employment. The said dismissal triggered

proceedings before the **EMPLOYMENT AND LABOUR RELATIONS COURT** (hereinafter 'the ELRC') wherein the applicant sued the respondent for unfair and or unlawful dismissal from employment. A Memorandum of Response was duly filed by the respondent.

Upon considering all the pleadings, supporting documents, evidence tendered; and the applicable law, the learned trial judge dismissed the applicant's claim and ordered that each party should bear its own costs. Regrettably, the applicant only came to learn of the said outcome much later as I have already indicated hereinabove. She was dissatisfied and would have timeously lodged an appeal against the said decision were it not for the delay in relaying the same to her.

At the hearing of the application, **MR J.N. MBUTHIA**, learned counsel appeared for the applicant. The firm of **M/S C.M. KING'ORI ADVOCATES** was absent notwithstanding service of a Hearing Notice. The said firm was on record for the respondent. In the same vein, no reply to the applicant's motion had been filed as at the date of the hearing. In the circumstances learned counsel sought leave to proceed *ex-parte*, which I duly granted. Counsel submitted that the instant motion had been brought under **Rule 4, 42 and 43** of the **Rules**, that the applicant was desirous of having leave extended to enable her file a Notice of Appeal and Record of Appeal; and that the costs and other incidentals thereto, be deemed as costs of the appeal.

I was also addressed on the cause of the delay in lodging the Notice of Appeal and the Record of Appeal, with counsel submitting that the same was occasioned by the failure of the applicant's representatives to lodge the said documents timeously following the delivery of the trial court's judgment on **4<sup>th</sup> November, 2016**. It was also submitted that as at **January, 2017** when the applicant visited KUCFAW's offices, none of the above mentioned documents had been filed, neither was an explanation forthcoming for the omission. Furthermore, the applicant was not aware of the date of judgment. As such, when she learnt of the foregoing lapses, she instructed learned counsel; who in turn lodged a **Notice of Appeal** on **16<sup>th</sup> February, 2017**, which was by then time barred.

Counsel wound up by submitting that the applicant had an arguable appeal in view of the averments set out at **paragraph 8** of her **Supporting Affidavit** to wit:- lack of a fair hearing and failure to consider the applicant's claims for gratuity and unpaid leave allowance. In conclusion, learned counsel submitted that the intended appeal was not frivolous.

I have considered the application, the supporting affidavit, annexures thereto, submissions by counsel and the law. Consequently, I am convinced that I am being urged to exercise my discretion pursuant to **Rule 4** of the **Rules** which states as follows:-

**"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 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".***

Applications premised upon **Rule 4** of the **Rules** are determined by this Court based on two principles. The same are to the effect that the powers of the court are discretionary and unfettered whilst applying its mind to such an application. The onus is therefore upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the exercise of discretion in his favour. Case law abounds on the subject including but not limited to: - ***FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS-CIVIL APPLICATION NO NAI 332 / 04 (unreported)*** where this Court rendered itself thus:

***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of "sufficient reason" was removed by amendment in 1985. As it 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 also ***MWANGI V KENYA AIRWAYS LTD (2003) KLR 48.***

I discern two factors which worked against the applicant in her quest to arrive at the doors of this Court in good time. First, was the legal representation which the applicant was accorded, namely a union representative seconded by KUCFAW. This point is pertinent as the failure to inform the applicant of the outcome of her case in good time ultimately led to the delay in lodging the Notice of Appeal and the Record of Appeal for want of instructions. Secondly, while acknowledging and taking judicial notice of the fact that a cross-section of union representatives are well versed with court rules and procedures; another cross-section, with due respect, remains woefully out of touch with the same. It is difficult in this instance to ascertain whether the former or latter case applied here. Suffice to say that a union representative who is knowledgeable in the law and its attendant procedures would not be able to advance a litigant's case in the absence of proper instructions. Conversely, a union representative who was not knowledgeable in the law and its attendant procedures, and equally failed to notify a litigant about the outcome of a case, would not be of assistance. Thus, I am persuaded that the failure of the applicant's union to inform her about the outcome of the suit before the trial court led to the present state of affairs.

Turning to the questions of delay, the degree of prejudice which the respondent is likely to suffer if the application is granted; and the chances of success of the intended appeal: - I note that a year and 2 months have gone by since the judgment of the trial court was delivered. The said period is not inordinate in my considered view. As for the degree of prejudice that the respondent is likely to suffer, were the application to be granted: - minimal I would say, as in the long run the intended appeal may affirm the trial court's findings or depart from the same. Either outcome will bring with it closure to the matter as opposed to the prevailing situation where one party is still eager to ventilate her grievances. It is not my place to gauge the prospects of success (or lack of) in the intended appeal, as those will be determined by this Court at the appropriate time.

As a result, I find merit in the applicant's motion dated **22<sup>nd</sup> March, 2017**, and I accordingly allow the same. For the avoidance of doubt, the applicant shall file and serve the respondent with her Notice of Appeal within **14 days** from the date of this Ruling; followed by filing and service of her Record of Appeal within **60 days** of the said service. In default, the motion shall stand dismissed. Costs shall abide the

outcome of the intended appeal.

*Dated and delivered at Nyeri this 7<sup>th</sup> day of February, 2018*

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**