



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 97 OF 2018 (UR 84/2018)

BETWEEN

NEW KENYA CO-OPERATIVE CREAMERIES LTD.....APPLICANT

AND

JOHN KAHIATO BARI

JAMES WACIURI

BENARD KANADEA

JACKSON WARUI NJAU

EMMANUEL KAKULA1ST RESPONDENT

(All suing on behalf of themselves and representatives of all former employees

of the Kenya Co-operative Creameries Limited)

THE ATTORNEY GENERAL.....2ND RESPONDENT

(An application for leave to file an appeal out of time pursuant to Rule 4 of the Court of Appeal Rules and Article 48 of the Constitution against the Ruling and Order of the Employment and Labour Relations Court at Nairobi (H. Wasilwa, J.) dated 21st November, 2017

in

H.C.C.C. No. 1299 of 2013)

RULING

[1]. This application for extension of time to file a notice of appeal, memorandum of appeal and the record of appeal is mainly brought under Rule 4 of the Court of Appeal Rules which gives the Court discretion to extend time.

[2] The discretion to extend time is unfettered. However, the discretion is exercised judicially and upon the settled principles as laid by this Court in **Wasike v. Swala [1984] KLR 591** and other decisions and also as laid down by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7Others [2014] eKLR**. In appropriate cases, the element of public interest may be considered. The constitutional principle in Article 159 (2) (d) of the Constitution that justice shall be done without undue regard to technicalities of procedure, is also a paramount guiding principle in the administration of justice.

[3] The application is supported by the affidavit of **David Mukii Mereka**. The 1st respondent opposed the application without filing a replying affidavit. The 2nd respondent supports the application

[4] The applicant intends to appeal against the ruling of the Employment and Labour Relations Court dated 21st September, 2017. The date

of delivery of the ruling was on 21st November, 2017, amended by the Court to read “**21st November, 2017**”. The Ruling shows that it was read in the presence of the 1st respondent’s counsel but in the absence of the applicant’s counsel.

[5] As regards the issue of delay, the applicant’s counsel explains in the supporting affidavit, *inter alia*, that the matter was not listed in the cause list on 21st November 2017; that a counsel attended court on 21st November 2017 but the ruling was not delivered; that applicant’s counsel was thereafter served with a mention notice for 29th November, 2017 but the matter was not listed; that the file was missing in the registry for better part of December 2017; that after the applicant’s counsel eventually perused the court file and filed a notice of appeal on 16th January, 2018 and an application for extension of time on 5th February, 2018; that on 21st February, 2018 the court declined to hear the application and gave the applicant 30 days to move to this Court and ultimately, the present application which is dated 29th March 2018 was filed on 3rd April 2018.

The applicant’s counsel states that the delay was occasioned by the fact that the ruling was delivered in the absence of the applicant’s counsel; the court file was missing and the fact that the applicant did not know that it had lost the case. **Mr. Wathome**, learned counsel for the 1st respondent did not make any submissions in respect of delay.

[6] By **Rule 75(2)** of the Court of Appeal rules, the notice of appeal should have been filed within 14 days of the date of the decision. Thus, it should have been filed by 5th December, 2017. The notice of appeal was filed on 16th January, 2018 and an application to extend time was filed on 5th February, 2018. The factors relied on which contributed to the delay, particularly failure to issue notice of date of the delivery of the ruling and the missing court file have not been refuted. I am satisfied the delay which is not unconscionable has reasonably been explained.

[7] As regards the merits of the intended appeal, the dispute relates to the terminal benefits of former employees of Kenya Creameries Co-operative Limited (KCC Limited) of about Ksh.109,640,442 and unremitted dues of about Ksh.92,803,457. It was contended by the applicant at the trial that Kenya Commercial Bank, the debenture holder, sold the assets of KCC Limited and KCC Holdings Limited to Government of Kenya in 2004 and thereafter the milk processing business was transferred to New Kenya Co-operative Creameries Limited (**the applicant**) in 2005 in which the Government was a shareholder. The applicant further contended that the applicant did not assume any debts or liabilities of KCC Limited including liabilities of former employees. The 1st respondent on the other hand contended at the trial, that the Government of Kenya only effected a change of name and that the assets and liabilities were transferred to the applicant.

By the impugned Ruling, the learned Judge held that KCC Limited and the applicant remained in principle one entity and the applicant being a Government parastatal was liable for any dues payable to the claimants represented by the 1st respondent. The applicant has filed a draft memorandum of appeal raising 11 grounds and states that serious issues of law on the liability of the applicant including the interpretation of section 3 of the **Transfer of Business Act** arise. On the study of the impugned ruling and the grounds of the intended appeal, it is clear that the intended appeal is not frivolous.

[8] Nevertheless, the 1st respondent’s counsel contended that an appeal does not lie as it is premature to appeal on one issue when the other issues remain for determination. It is clear that the learned Judge determined the issue of liability leaving the issue of quantum to be determined later. There is no doubt that the impugned decision of the court is a preliminary decree. Section 68 of the Civil Procedure Act provides:

“where a party aggrieved by a preliminary decree does not appeal from that decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

Thus the applicant is entitled to appeal against a preliminary decree which fixed liability to satisfy the claim on the applicant.

[9] The applicant states that the 1st respondent will not suffer any prejudice if the application is allowed; that the applicant will suffer greatly if it is made to pay money which it is not liable to pay; and that the matter has gained considerable public interest and has even been debated in Parliament. A newspaper report was annexed. The only prejudice proffered by the 1st respondent is the delay in recovery of the terminal dues by the claimants. It is apparent that there is an underlying public interest in the dispute. It is also clear that it is the public interest that this long standing dispute should be finally determined by this Court.

[10] In the premises, the application is allowed. Time for lodging the notice of appeal is extended and the notice of appeal filed on 16th January, 2017 is deemed as properly filed. Time for filing a memorandum of appeal and the record of appeal is extended. The memorandum and the record of appeal to be filed within 30 days from the date hereof. The costs of the application to be costs into appeal and at the discretion of the Court.

Dated and delivered at Nairobi this 18th day of May, 2018

E. M. GITHINJI

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR