



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WAKI, VISRAM, & KARANJA, JJA)

CIVIL APPLICATION NO. 33 OF 2016

BETWEEN

CHARLES ONYINGE ABUSO.....APPLICANT

AND

KENYA PORTS AUTHORITY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Being an application for leave to appeal out of time from the

Judgment of the Employment & Labour Relations Court

at Mombasa (Makau, J.) dated 5th September, 2014

in

ELRCC No. 370 of 2013.)

RULING OF THE COURT

[1] Being aggrieved by the Judgment of the Employment and Labour Relations Court (ELRC) (**O.N. Makau, J.**) delivered on 5th September, 2014 in Cause No. 370 of 2013, Charles Onyinge Abuso (the applicant), moved with expedition to this Court and filed a Notice of Appeal dated 16th September, 2014, within the time prescribed under **Rule 75(2)** of the Rules of this Court.

[2] The applicant also wrote to the Registrar of the Court requesting to be supplied with certified copies of proceedings to enable him to prepare and file the record of appeal. It is conceded that the letter bespeaking the proceedings was not copied to the respondents (Kenya Ports Authority and the Attorney General).

[3] On 11th November, 2014, having not received the proceedings, learned counsel for the applicant wrote a reminder to the Registrar of the High Court requesting for the said proceedings. This time round the letter was copied to the respondents as required by the Court of Appeal Rules (the Rules). It is not clear what happened thereafter but after a lapse of about two years, the applicant filed a motion on notice under **Rule 4** of the said Rules seeking extension of time to file the record of appeal. It is noteworthy however that there was no certificate of delay from the Deputy Registrar of the ELRC to confirm when the record was ready and when the same was supplied to the applicant.

[4] Being a single Judge application, the same landed on **Kathurima, JA's** docket. Having considered the same and the replying affidavit of the 1st respondent, the learned Judge found that the delay from the date the applicant 'alleged' to have received the proceedings i.e. in February, 2016, to 14th June, 2016 when the application for extension of time was filed was inordinate and no sufficient explanation had been given for the delay. The Judge observed that the application had actually been filed only a few days after the applicant received the decretal amount he had been awarded by the trial court, and it was possible that the delay was deliberate and was actuated by the waiting for the decretal amount, as such payment would have been held up had the appeal been filed before the said payment.

[5] After considering the relevant law in this field including the provisions of **Article 159(2) (d)** of the Constitution and the overriding

principle spelt out in **Sections 3A** and **3B** of the Appellate Jurisdiction Act, the learned Judge declined to exercise his discretion in favour of the applicant and dismissed the application.

[6] Dissatisfied with the dismissal of his application, the applicant decided to move to this Court in what in our view is an alien procedure that is not prescribed by the Court of Appeal Rules. It bears restating the correct procedure here for the benefit of learned counsel for the applicant. Once an application for extension of time under Rule 4 of the Rules is dismissed, a party desirous of being heard by full court must move the Court by way of oral application at the time the ruling is made or by a letter to the Registrar of the court requesting for hearing by full Court. The procedure is clearly set out in **Rule 55** which provides as follows:-

“55. Reference from decision of a single judge

(1) Where under the proviso to Section 5 of the Act, any person being dissatisfied with the decision of a single judge-

(a) in any criminal matter, wishes to have his application determined by the Court; or

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter

(2) At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced”

As is clear from the above provision, the said letter must be sent within 7 days of the refusal to extend time by the single Judge. In this case, the Ruling dismissing the motion for extension of time was made on 10th March, 2017. No oral application was made. The letter seeking reference to full Court ought to have been written by 17th March, 2017. No such letter was sent to the court and instead, the applicant moved the Court by way of a fresh application dated 21st April, 2017, asking the Court to “review and or vary” the ruling and decision of Kathurima, JA sitting as single Judge.

[7] Learned counsel for the respondents opposed the application and urged us to dismiss it for being incompetent and bad in law. Even on the merit of the application, learned counsel for the respondents maintained that the delay had not been explained and the letter bespeaking proceedings had not been copied to them, and the reminder which had been served on them was served long after the 30 days prescribed in **Rule 82(5)** of the Court of Appeal Rules.

[8] We have keenly considered the application before us, the rival affidavits and the submissions by both counsel. As a starting point, we need to satisfy ourselves that the application in question is properly before this Court before we delve into the merits of the same. We have outlined the relevant Rule above. Clearly this application broke all the rules pertaining to references from a decision of a single Judge. We fail to understand why learned counsel would violate all the relevant rules of procedure and expect to succeed in his application. Rule 55 is clear and needs no amplification. Even if we were to deem the route followed to get the application before us proper, the application was filed outside the 7 days prescribed under Rule 55 of the Rules. This was not a simple infraction or oversight which can be overlooked. Nor was it a simple case of non-compliance with Rules of the procedure. It flouted substantive law because as stated, the application itself was filed outside the 7 days within which the letter seeking reference should be sent to the Registrar of the Court. The procedure was improper and even if the Court was to close its eyes and assume that the procedure could be countenanced, the court would still not have jurisdiction because the application was out of time and no extension of time was sought.

[9] That being the case we are not persuaded that we should go into the substantive merits of the application itself. Our finding is that this application is irredeemably incompetent and the only option open to the court is to dismiss it. We order that it be and is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 19th Day of July, 2018.

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR