



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 111 OF 2018**

**BETWEEN**

**MOTORWAYS KENYA LIMITED.....APPLICANT**

**AND**

**KENYA ENGINEERING WORKERS UNION.....RESPONDENT**

*(An application for leave to file and serve the notice of appeal dated 6<sup>th</sup> March, 2018 out of time in an intended appeal from the Ruling of the Employment & Labour Relations Court at Nairobi (Wasilwa, J) dated on 15<sup>th</sup> February, 2018*

*in*

*ELRC No. 1897 of 2017)*

\*\*\*\*\*

**RULING**

In its motion on notice dated 11<sup>th</sup> April, 2018, the applicant seeks extension of time within which to file and serve a notice of appeal against the judgment of the Employment & Labour Relations Court (**Wasilwa, J.**) made on 15<sup>th</sup> February, 2018. A further order is sought to have the notice of appeal filed on 6<sup>th</sup> March, 2018 admitted and be deemed to have been properly filed.

The grant of such orders lies in the unfettered discretion of the court which is exercised on principles well settled in a long line of previous decisions of this Court. In one case the court stated thus:

*“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”*

-----See *Aviation Cargo Support Limited vs St. Mark Freight Services Limited (2014) eKLR*.

The Supreme Court examined several decisions of this Court, and comparable others internationally, in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* before laying out the following general approach to such applications:

*"From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant....., we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:*

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the*

*discretion of the court;*

*2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*

*3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*

*4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*

*5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*

*6. Whether the application has been brought without undue delay; and*

*7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."*

I will consider this matter in line with those principles.

Some facts are not in dispute. The judgment of the trial court was delivered with the knowledge of the parties and their respective counsel on 15<sup>th</sup> February, 2018. It granted monetary reliefs to three employees of the applicant who had been declared redundant. If any party was dissatisfied with that judgment, they ought to have filed a notice of appeal on or before 1<sup>st</sup> March, 2018 by dint of **Rule 75** of the Rules of this Court. But none of the parties complied. One month and 11 days later, this motion was filed.

In its attempt to explain the delay, the applicant's Managing Director swore an affidavit based on hearsay and belief. All he states in three paragraphs is that he was informed by his advocates, and believed it, that they received instructions to file an appeal but all they did was to apply for copies of the proceedings on 19<sup>th</sup> February, 2018. The advocates did nothing more until 6<sup>th</sup> March, 2018 when they noticed that there was no notice of appeal filed and they drew one up and filed it on that day. He was also advised and believed it, that there would be no prejudice which cannot be compensated in costs if extension of time is granted.

As expected, such explanation was firmly contested by the Deputy Secretary General of the respondent Union as unacceptable and he pleaded for dismissal of the application or, if the court was minded to extend time, an order for depositing the entire decretal amount in court first, and allowing them to demand further dues which the trial court omitted to grant.

In oral submissions before me, learned counsel for the applicant **Mr. Muchangi Nduati** submitted that the delay was barely one month and the reason for delay was explained as human error. He lay the blame on an unidentified court clerk in the law firm who forgot to file the notice of appeal. The clerk, however, did not file any affidavit to explain the omission. Counsel further submitted that the appeal had good chances of success since there were arithmetical errors made by the trial court which need to be corrected before the applicant pays the rightful amount to the employees. He also alluded to an invitation having been made to the three employees to resume work, but there was no evidential backing for that assertion, which was denied.

On the other hand, learned counsel for the respondent, **Mr. Jason Namasake** saw no basis for the assertion that any intended appeal would succeed. In his view, the trial court's judgment was based on the law and clear terms of a Collective Bargaining Agreement between the parties, which was not challenged. An extended delay in settling the decree would prejudice the three members of the respondent who were no longer in gainful employment. As for the delay of one month, counsel submitted that it was inordinate since there was no plausible explanation for it.

I have carefully weighed the affidavits on record and the submissions counsel. The period between 1<sup>st</sup> March when the notice of appeal was due and 6<sup>th</sup> March when one was purportedly filed would ordinarily be viewed as a short one. Any delay, however, even for one day, ought to be explained otherwise it is rendered inordinate. And there lies the 'achilles heel' of this application.

The explanation offered for the delay came through a person who knew nothing about the facts relating to the delay. It is the advocates who informed him about it and went further to blame their clerk. No reason was offered as to why either the advocate seized of the matter, or the nameless clerk who is supposed to have caused the delay, could not state so on their own oaths or affirmations. The absence of such affidavits deprives me of the proper basis for the exercise of my discretion. I also perceive that the applicant is economical with the truth. Lack of candour irritates a court of equity. Furthermore, nothing is said by the applicant or the advocates about the further delay caused in filing this motion the moment they discovered, more than a month earlier, that the notice of appeal had not been filed and that the leave of the court was necessary. It reduces such conduct to inactivity and not a mistake of counsel or inadvertent error.

As this Court has said many times before, lodgment of a notice of appeal is a matter of course, and a careful advocate would lodge the same as a matter of abundant caution soon after delivery of the judgment. Withdrawing it later or having it deemed as withdrawn for want of filing a substantive appeal is certainly a lesser evil. Needless to say, it is the foundational document that gives jurisdiction to this Court. In the case of ***Eliud Buku Thuku vs Beatrice Wambui Mwangi [2013] eKLR***, the Court added:

***"The applicant was represented by Counsel at the High Court when judgment was delivered on 23<sup>rd</sup> September, 2011. As was stated by Tunoi, JA. (as he then was) in Njoka Muriu & Another vs Evan Githinji Muriu & Another, Civil App. No. NAI 356 of 2003), a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client's interest. In Njagi vs Munyiri (1975) EA 179, this Court observed that a notice of appeal attracts a small fee and does not need to await instruction."***

As regards inaction by counsel, there are numerous decisions of this Court declaring that it will not glorify or aid indolence, including that of

counsel. An aspiring appellant ought to exhibit sufficient zeal and initiative towards compliance with the law. In the case of **Rajesh Rughani vs Fifty Investment Ltd. & Another [2005] eKLR** this Court held:

***“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.***

Similarly in **Bains Construction Co. Ltd. vs John Mzare Ogowo [2011] eKLR** the Court observed:

***“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences”.***

See also **Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR**,

In view of the absence of sufficient explanation to underpin the exercise of judicial discretion, I have no basis for granting this application. On that ground alone the motion is for dismissal. At any rate, this is a private matter between an employer and an employee. It cannot be said to raise matters of public interest. The employees who are members of the respondent are no longer in employment and the delay continues to be prejudicial to them. It seems to me that the main complaint is about the amounts awarded without considering payments made by the applicant. That is a matter of arithmetic. I am doubtful about the possible success of the intended appeal but, obviously, this is in the province of the full court. I will end by citing the full Court in the **Ramesh Shah case (supra)**, thus:

***“The authorities cited before us are consistent that the delay in taking the necessary steps to mount an appeal should not be inordinate and that there should be reasons given for any delay. The period and the reasons given therefor were indeed the two factors first considered by the learned single Judge and were found wanting. In effect they could not form the basis of exercise of his discretion in favour of the applicant. On a reference, the full court would have no basis to interfere with such finding. We think the two factors must take primacy of consideration if the time table laid in the rules for conduct of court business will have any meaning. As stated earlier, it would be a rare case where the arguability of the intended appeal would outweigh all other considerations, and it would at best, in our judgment, be considered in borderline cases”.***

All in all, there is no merit in the motion before me and I order that it be and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of September, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**