



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 70 OF 2017

BETWEEN

KENYA MEDICAL RESEARCH INSTITUTE.....APPLICANT

AND

MARIAH MUKWANA.....RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal, letter requesting for certified copies of proceedings, Judgment and Decree, Memorandum and Record of Appeal against the Judgment of the Employment & Labour Relations Court at Mombasa (Rika, J.) dated 13th October 2017

In

E&LRCC No.182 of 2016)

RULING

[1] From the above description of this application and the prayers in the Notice of Motion itself, it is evident that the applicant herein was late in taking all necessary steps a party dissatisfied with a decision of the court and who intends to appeal against such a decision should take. He has now moved this Court pursuant to *inter alia* **Rule 4** of the Rules of this Court for orders that time be extended to lodge and serve a Notice of Appeal from the judgment dated 5th December 2017 and that the Notice of Appeal dated 5th December 2017 be deemed as properly on record; extension of time to lodge and serve the letter requesting for copies of proceedings, judgment and decree in the same suit; and that time be extended within which to lodge and serve the Memorandum and Record of Appeal.

[2] The motion is predicated on the grounds on its face and supported by the affidavit of Hillary Ondatto, the applicant's head of human resources sworn on 8th December, 2017. The gist of the said grounds and depositions is that although the applicant informed its counsel then on record of its desire to prefer an appeal against the impugned decision in good time, she did not take any steps towards filing the appeal. The applicant through Mr Ondatto says it realised that the appeal had not been filed on 21st November, 2017 by which time they were already out of the time lines prescribed under the Court of Appeal Rules. The applicant therefore blames its former counsel for the lapse. It is the applicant's case that it has a good appeal and further, that the respondent will not be prejudiced if the application is allowed.

[3] The application is opposed by the respondent through her replying affidavit sworn on 20th June, 2018, and the grounds of opposition of even date. According to the respondent, the delay on the part of the applicant was deliberate and inordinate. She further deposes that the said delay has not been explained and she continues to suffer prejudice as she is unable to utilise the fruits of her judgment for purposes of offsetting her loan with Imarika Sacco. She prays that in the event the Court is inclined to allow the application, then the Court should order that she be given Ksh.2 million from the decretal amount which is held in a joint fixed deposit account in the names of the parties' advocates. She bases this request on the fact that part of her claim which relates to gratuity, leave pay and unpaid part salary was admitted by the applicant and she is entitled to the same. She urged us to dismiss the application terming it frivolous, vexatious and an abuse of the process of the court.

[4] At the hearing of the application, Ms Bonyo learned counsel appeared for the applicant while the respondent appeared in person. Ms Bonyo expounded on the grounds on the application and also addressed me on the law. She maintained that the delay involved was not inordinate; the same had been sufficiently explained and that they had an arguable appeal. She urged me to allow the application.

[5] On her part the respondent reiterated the contents of her affidavit and grounds of opposition. She maintained that the delay was not

justified and that she continued to suffer prejudice as her former employer had threatened to attach her car and house over failure to pay the unpaid loan. She entreated the Court to grant her the undisputed amount to enable her save her house and car from the auctioneer's hammer.

[6] The principles that guide the Court in determining whether to extend time pursuant to **Rule 4** of the Rules of this Court is now old hat. These are succinctly set out in this Court's decision in **Mwangi v. Kenya Airways** [2003] KLR 486 at page 489 as follows:-

*“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the rules. For instance in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi**, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed itself thus:-*

“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.”

These, in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

As stated in the above passage however, granting or denying extension of time is at the discretion of the Court. Such discretion though unfettered must be exercised judicially upon reason and not capriciously or whimsically. There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the courts as espoused in **Section 3A** of the Appellate Jurisdiction Act.

[7] It is the above principles that I will now apply to the circumstances pertaining to this matter to decide whether this application meets the required threshold. I have considered the application along with the rival affidavits, submissions by learned counsel and the applicable Law.

[8] The applicant concedes that the judgment now impugned was rendered in presence of its counsel on record who communicated the verdict to the appellant a few days later. According to the appellant, it informed its counsel then on record to appeal the decision but apparently the Notice of Appeal was not filed on time. The appellant decided to change counsel and this took some time as the process of picking another counsel had to abide by the laid down government tendering procedures. It also took a bit of time for the newly instructed counsel to take over the file from counsel previously on record. The application to extend time was eventually filed on 8th December, 2017, less than 2 months after expiry of the time limit for filing the appeal within time.

[9] Was this delay inordinate and has it been sufficiently explained? In my view, a delay of less than 2 months in the circumstances of this case cannot be said to be inordinate. The applicant is a state corporation and its freedom to pick and choose counsel to represent it is not unfettered. On the contrary, the same has to follow some stringent procedures which can result in delay. I find the reason advanced for the delay plausible and thus acceptable.

[10] From the judgment now impugned and the affidavits on record, there is no doubt that the intended appeal raises substantive issues that would merit consideration by this Court on appeal. It is not a frivolous appeal and in the interest of substantive justice, the parties should be accorded opportunity to canvass the appeal to enable the Court determine the said issues on merit.

[11] Lastly, on the issue of prejudice, the respondent both from her affidavit and the oral submission in Court has demonstrated that the delay in this matter continues to affect her adversely. Although the decretal amount has been secured in a joint interest earning account, the respondent has no access to that money. She has a Sacco loan which she has been unable to service and her car and house are in danger of repossession. Since some amounts are not disputed, in order to obviate further prejudice to the respondent I am persuaded to grant conditional leave to file the appeal out of time which I hereby do on the following terms:-

- (a) The applicant is hereby granted leave to file and serve the notice of appeal within 14 days from the date hereof;**
- (b) Ksh.1.5 Million from the decretal amount be released to the respondent within 14 days from the date hereof failing which the leave granted will stand vacated and the application dated 8th December 2017, will stand dismissed.**
- (c) Upon compliance of (b) above, the Memorandum and record of Appeal be filed and served within 30 days from the date of lodging of the Notice of Appeal.**

[12] Costs of the application will be in the appeal.

Delivered and dated at Mombasa this 20th day of September, 2018.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR