



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO, (P) IN CHAMBERS)**

**CIVIL APPLICATION NO. 275 OF 2018**

**BETWEEN**

**KENYA RAILWAYS CORPORATION.....APPLICANT**

**AND**

**TELKOM KENYA LIMITED.....RESPONDENT**

*(Application for extension of time to file and serve the record of appeal in*

*an intended appeal from the judgment of the High Court of Kenya*

*at Nairobi (Onguto, J.) dated 2<sup>nd</sup> February, 2018*

*in*

*HCCC No. 621 of 2016)*

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**RULING**

This is an application pursuant to **Rule 4** of the Court of Appeal Rules for extension of time to file and serve the record of appeal from the judgment and order of the High Court (Onguto, J).

The judgment in the case before the High Court was delivered on 2<sup>nd</sup> February, 2018. A notice of appeal was filed within time on 8<sup>th</sup> February, 2018. On the same day the applicant requested for typed proceedings. This was also within time. The applicant was then supplied with a copy of the typed record of proceedings on 28<sup>th</sup> March, 2018 and subsequently a certificate of delay on 18<sup>th</sup> April, 2018. The certificate excluded the 20 days taken to prepare and supply the certified copies of proceedings and judgment; that is the period between 8<sup>th</sup> February and 28<sup>th</sup> March, 2018.

The statutory period of 60 days from 28<sup>th</sup> March, 2018 lapsed on 28<sup>th</sup> May, 2018 and this application brought on 27<sup>th</sup> September, 2018, constituting a delay of approximately 122 days. The delay was explained by Mr. Muturi, learned counsel, who submitted that it was due to inevitable administrative challenges outside the control of the applicant and its advocates; that the advocate who previously had the conduct of the matter, Mr. G.M Nyaanga abruptly resigned from the firm and did not hand over. In addition, counsel explained that the law firm was relocating its operations from its previous offices to new ones between 31<sup>st</sup> May and 2<sup>nd</sup> June 2018 in the process of which some files were misplaced. Several internal memos have been exhibited in proof of this fact. The file was however eventually traced on 28<sup>th</sup> August, 2018. It is averred that immediately upon tracing it, the firm commenced the process of studying the voluminous file and preparation of the memorandum and record of appeal. Contemporaneously, counsel stated, the firm sent a letter dated 28<sup>th</sup> August, 2018 to the respondent's advocates requesting for a meeting to discuss the matter for a possible settlement. In counsel's view the application has been brought without undue delay and that the mistake which was adequately explained was inadvertent and excusable.

On the public interest aspects of the appeal and chances of its success, counsel submitted that the applicant should not be denied a chance to pursue an appeal which it strongly believes is merited and it stands to suffer irreparable loss if the orders sought are not granted; that the intended appeal will be challenging the award of Kshs. 217 million.

Ms. Weru, learned counsel, for the respondent opposed the application and submitted that the explanation for delay occasioned by the sudden resignation of Mr. Nyaanga was not credible because: Mr. Nyaanga tendered a notice of resignation in February, 2018 indicating that he would leave the firm by 31<sup>st</sup> August, 2018; that it was incumbent upon the applicant's advocates to make relevant arrangements for hand - over of the files and that the applicant has not demonstrated why action was not taken to file the record of appeal by 18<sup>th</sup> June, 2018 which does not warrant the exercise of this Court's discretion as sought.

Counsel dismissed the averment that the file went missing insisting that this was not plausible because of the following chronology of events: on 23<sup>rd</sup> May, 2018 the applicant's advocates filed their submissions to the respondent's bill of costs which was during the time the applicant's advocates allege to have been moving offices; that on 4<sup>th</sup> June, 2018 the applicant's advocates attended court before the Deputy Registrar for mention to take a ruling date for the respondent's Bill of Costs and were also present on 27<sup>th</sup> June, 2018 to take the ruling; that after delivery of the ruling the applicant's advocates wrote to the respondent's advocates on 6<sup>th</sup> July, 2018 indicating their intention to challenge the said ruling on taxation on the bill of costs; that on 31<sup>st</sup> July 2018 the respondent's advocates wrote to the applicant's advocates demanding payment of the decretal sum which letter was acknowledged; and that on 28<sup>th</sup> August, 2018 the applicant's advocates wrote to the respondent requesting for a meeting to discuss the terms of settlement of the decretal sum. From these events it was counsel's contention that between April and August 2018 the applicant's file was always available and active; that the delay was inordinate; and that the applicant is undeserving of the discretionary and equitable remedy.

The discretion of a single judge under **Rule 4** is wide and unfettered. The Court in deciding whether to grant an extension of time considers: first, the length of delay; second, the reason for delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourth, the degree of prejudice to the respondent if the application is granted. See: **Leo Sila Mutiso v. Rose Wangari Mwangi**, Civil Application No. Nai. 255 of 1997.

The delay in bringing this application after the proceedings were availed was about 4 months. Whether 4 months' delay can be considered inordinate will depend on the peculiar circumstances of each case, the explanation offered for the delay and whether the other party will be prejudiced.

The applicant has offered an honest explanation how counsel who had the conduct of the matter abruptly left their chambers; how the file got misplaced in the process of moving offices and how there was an attempt at a settlement. The first two are situations that are not uncommon in the private practice. An employer may have very little or no control over employees turn over and attrition. Relocation of chambers and offices, just like moving houses come with its own challenges, including loss or damage of essential items. The explanation proffered, in my judgment is plausible. The delay is not inordinate and the respondent does not to suffer any prejudice that cannot be ameliorated by an award of damages.

Apart from the huge sums of money, (over Kshs 200,000,000) awarded, the issues to be resolved in the intended appeal are not idle but include whether there was valid agreement between the parties; whether the claim and proceedings were not barred by the statute of limitations; and whether the applicant acknowledged indebtedness to the respondent. These, I reiterate are triable issues. The applicant has demonstrated its commitment to lodge the appeal immediately.

For the foregoing reasons I grant leave to the applicant to lodge and serve the record of appeal within seven (7) days from the date of this ruling. Costs of this application to the respondent.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of November, 2018.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**