



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 236 OF 2018

BETWEEN

MILLIE G.A. ODHIAMBO

JACQUILINE ANAM

JEFFEREY MAGANYA

ANDIA ADEKA (sued in their capacity as The

Trustees of the CRADLE-The children Foundation.....APPLICANT

AND

TONNY MOSES ODERA.....RESPONDENT

(An application for extension of time to file an appeal against the Award of the Employment and Labour Relations Court of Kenya at Nairobi (James Rika, J.) dated 18th August 2016

in

Cause No. 1373 of 2010)

RULING

The motion before me dated 1st August 2018 and lodged at the Courts' registry on 10th of the same month seeking extension of time for the filing of a notice of appeal was preceded by another, dated 16th May 2018 by the same applicant; Millie G.A. Odhiambo, Jacqueline Anam, Jeffrey Maganya, Wanjau Muriu and Andia Adeka all sued in the capacity as Trustees of the CRADLE, The Children's Foundation. That earlier application, being No. Nai 145 of 2011 (Ur 121/2018), as framed, was omnibus in character as it sought also an order of stay of execution of the impugned judgment or award of the Employment and Labour Relations Court at Milimani (Rika, J.) dated 18th August 2016. When that application came before the Court (Waki, Nambuye & Murgor, JJ.A) on 26th July 2018, that anomaly was pointed out to Mr. Namachanja the applicant's learned counsel who then withdraw the prayer for enlargement of time, as under our Rules such application is to be heard by a single Judge. The Court proceeded to accept the applicants offer for the deposit of the decretal sum estimated at Kshs. 900,000 in an interest earning account held by the advocates for the parties. That offer was made quite graciously given there was no attendance by or for the respondent. The said sum has since been deposited as directed, and there is therefore subsisting a stay of execution of the impugned award pending appeal.

The applicant did file a notice of appeal on 14th May 2018, which was some 21 months after the impugned award and the delay appears on the face of it to be long and inordinate, a fact Mr. Mbugua, learned counsel who appeared before me for the applicant readily concedes. The applicant, however, explains the delay as having been occasioned by a number of factors which are in the grounds on the face of motion as well as Mr. Namachanja's supporting affidavit. The matter was heard by Rika, J. on 18th April 2016 in the absence of the applicant's counsel as the notice of the hearing to be conducted during the Judicial Service week, was sent to said counsel by post but was received on 27th April 2016, after the scheduled hearing. They made attempts to trace the file to find out what transpired but in vain only to receive a letter from the respondent's advocates dated 25th August 2016 demanding payment of the decretal sum within seven days, at pain of execution.

The applicant thereafter made a number of applications before the court below seeking stay of execution or to extend time for filing an appeal, but they were all unsuccessful. The last such application, which was dated 29th May 2017, was dismissed on 2nd May 2018 (nearly a year later), which alone slashes a year out of the length of delay in bringing the current application, as the fault or delay was with the court below, and not the applicant.

The respondent is far from impressed with the reasons given by the applicant and has little sympathy for the procedural missteps that the applicant's advocates made. In a replying affidavit sworn on 2nd October 2018, he accused the applicant of trying "to create loops of litigation" for the sole purposes of delaying justice to the respondent and of "*trying to import their casual, negligent and lackadaisical conduct*" displayed at the trial court into this Court. He accuses the applicant of inequitable conduct and that "the claim has been long and dormant and now borders on cruelty on the part of the applicant." He urges the Court to dismiss the application for being devoid of merit. Mr. Rabala, the respondent's learned counsel addressed me in terms empathic of those averments.

Much as I am not particularly impressed by the fact that the applicant's advocates spent so much time backing the wrong horses and climbing the wrong trees in their attempt to remedy the ex- parte hearing, I have come to the conclusion upon scrutiny of all the material in the record, that they were guilty of delay in getting to the proper destination but were certainly not indolent. They kept in motion, but in the wrong direction, and that may speak more to a want of thoroughness or lack of proper strategy but not of laziness or indifference. I am also not sure that I would in conscience punish the applicant under those circumstances when the blunders were of the advocate's making. Moreover, as I have indicated, a year was lost awaiting a ruling of the court below which, when it came, was of no comfort to the applicant.

In short, I consider that the delay here is explained to my satisfaction. I think also that on the issue of whether there is an appeal with a likelihood of success, it is enough for me to say that the applicant's uncontroverted averment is that the hearing leading to the impugned award proceeded ex-parte as notice of it arrived more than a week after the event. Considering the centrality of the right to be heard, it, being at the very heart of the constitutional guarantee of fair trial, I cannot say that what the applicant intends to urge on appeal is some trifling, shadowy point. The applicant does deserve their day in court. My discretion, which is free and unfettered to ensure the doing of justice, flows in that direction.

In view of the fact that the decretal sum has already been deposited in a joint interest earning account, I do not think that the respondent stands to suffer any real prejudice were I to extend time, which I hereby do.

The applicant's notice of appeal dated 14th May 2018 is accordingly deemed as properly filed.

Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 20th day December, 2018.

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR