IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J.A IN CHAMBERS)

CIVIL APPLICATION NO. NAI 184 OF 2016

BETWEEN

SAJ CERAMICS LIMITED ……...…… APPLICANT

AND

JOEL MAITHYA…...……RESPONDENT

(An Application seeking to file and serve Notice of Appeal out of time in an intended appeal from the Judgment of the Employment and Labour Relations Court (Wasilwa, J) dated and delivered on 30th June, 2016

in

ELR NO. 683 OF 2012)

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RULING

The applicant, **SAJ CERAMIS LIMITED** filed a Notice of Motion application under Section 7 of the Appellate Jurisdiction Act and Rule 4 of this Court's Rules. **JOEL MAITHYA**, was named as the respondent. The applicant sought the following orders:

> **"1. That the applicant be granted leave to file and serve Notice of Appeal out of time and/or that time for filing and serving Notice of Appeal be extended.**
>
> **2. That the cost of this application be provided for."**

The motion was supported by the affidavit of **JOSEPH NJOROGE MBUGUA,** the then and now counsel for the applicant who deponed that the applicant was a respondent in Nairobi Industrial Case No. 683 of 2012 which came up for hearing on various dates and judgment was consequently set for delivery on 29th June, 2016; that the judgment was however not delivered on 29th June, 2016 but was delivered on 30th June, 2016 without notice to the applicant; that he got to know of the judgment on 13th July, 2016 when he traced the file in the court registry; that he thereafter applied for a copy of the judgment so as to take instructions from the applicant; that had the applicant known of the outcome of the case, it would have filed a Notice of Appeal on time and finally that the applicant has ***" strong and good grounds for the intended appeal."***

In a replying affidavit dated 17th February, 2017, the respondent opposed the motion. He averred that the matter came up for mention on 29th June, 2016 and the Honourable trial Judge informed counsel in attendance that judgment would be delivered on 30th June, 2016 ***"as it was not ready"***; that the delay of 61 days in filing the instant application was inordinate; that the judgment was ready for collection as early as 16th July 2016; that the applicant is guilty of laches as inspite of knowing of the judgment on 13th July, 2016, it was not until 12th August, 2016 that it applied for copies of judgment. The respondent relied on this Court's decision in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR** for the proposition that although this Court's discretion in extending time is unfettered, an applicant must explain ***"… the reasons for the delay in making the application for extension and whether there were extenuating circumstances that could enable the court to exercise it's discretion in favour of the applicant."***

On 21st February, 2007 the motion came before me for hearing. Mr. Mbugua learned counsel for the applicant, reiterated the contents of the affidavit in support of the motion as well as the grounds on the face of the motion. He took the position that the applicant had good chances on appeal as although the respondent worked for only 9 years for the applicant, the learned trial judge applied a multiplier of 12 years thus presupposing that the total number of years worked was 12; that the respondent was awarded higher sums than he sought and finally, that although the respondent was awarded severance pay for 12 years, the respondent had not made such a plea.

The applicant relied on several authorities on the court's exercise of its discretion in granting extension of time including the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eklR.** In that case, Kariuki, JA

held as follows:

> ***"The order whether or not to grant extension of time or leave to file and serve a 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 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 vissiccitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact.***
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> ***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."***

The above position was restated by Waki, JA in **Wachiuri Wahome & Festus Gatheru Wahome & 6 Others [2016] eKLR** wherein the learned judge stated:

> ***"I have considered the application, the submissions of the parties and the authorities laid before me. The principles applicable in considering an application under Rule 4 are now old hat and I take them from my Ruling which the full court affirmed in Fakir Mohamed v Joseph Mugambi & 2 Others Civil Appln. 332/0 thus:***
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> ***The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso vs Mwangi, Civil Application No. Nai 255 of 1997 (ur),***

Mwangi vs Kenya Airways Ltd [2003] KLR 4 86, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General, Civil Applicaion No. Nai 8 of 2000 (ur) and Murai vs Wainaina (No. 4) [1982] KLR 38."

Mr. Ndolo, learned counsel for the respondent opposed the motion on the basis that the delay was inordinate, and that the applicant had no arguable appeal. As for the multiplier of 12 years, it was the learned counsel's contention that this may fall within the reach of a review application and not an appeal. Finally, on the unpleaded claim of severance pay, it was the respondent's contention that this falls within the prayer for terminal benefits which prayer was included in the respondent's statement of claim.

I have considered the motion, the oral rival submissions and the authorities cited before me. Rule 4 of this Court's rules empowers this Court on such terms as it thinks just to extend the time prescribed by the rules for the doing of any act. It is not in dispute that judgment in the trial court was delivered on 30th June, 2016. It is also not disputed that the trial court had initially reserved the judgment for 29th June, 2016 when it was not read as it was not ready. Further, I did not hear the respondent contend that the applicant's counsel was in court on 30th June, 2016 when the judgment was read nor that the applicant's counsel was aware that judgment would be read on 30th June, 2016. The applicant's counsel averred that he got to know that the judgment had been delivered on 30th June, 2016 on 13th July, 2016 from the court's registry in the course of following up the matter. What steps did he take after that? The applicant's counsel averred that he applied for a copy of the judgment which he obtained on 19th July, 2016 and that he got instructions to file an appeal from his client on 23rd July, 2016. From the record, the applicant moved with haste and filed an application for certification of urgency dated 3rd August, 2016. On 5th August, 2016 this Court certified the application as urgent thus paving the way for the filing of the instant motion dated 4th August, 2016.

Given the above chronology of events, it is my view that the applicant cannot be said to have been indolent. The judgment was delivered in the absence of applicant's counsel who was unaware of the date of 30th June, 2016 as the date for the delivery of the judgment. The judgment having not been delivered on 29th June, 2016, the applicant's counsel pursued the matter with a view to fixing it for mention, only to learn on 13th July, 2016 that the judgment was delivered on 30th June, 2016. Apart from diligently following the matter, he also took immediate steps to see that his client exercises its undoubted right of appeal by applying for proceedings and filing an application to have this matter certified as urgent. He cannot surely be accused of laches. In my view the delay in filing the Notice of Appeal has sufficiently been explained. I am further satisfied that the applicant took the necessary steps by coming to court to seek leave to file an appeal out of time. Accordingly, the applicant is granted leave to file and serve the Notice of Appeal within 7 days of today's date. Thereafter the appeal is to be filed within 30 days from today's date. Each party to bear its/his own costs.

Dated and delivered at Nairobi this 24th day of March, 2017.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR