REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: M'INOTI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO.45 OF 2016 (UR 38/16)

BETWEEN

DEVKI STEEL MILLS LTD…….....……..….....APPLICANT

AND

KENYA ENGINEERING WORKERS UNION……RESPONDENT

(Application for extension of time to file and serve notice and record of appeal from the award of the Employment & Labour Court at Mombasa, (Rika,J.) dated 9th December 2014 in ELRCC. No. 154 of 2013)

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RULING

In this Motion on Notice, the applicant, ***Devki Steel Mills Ltd***, has applied for extension of time to file and serve a notice and record of appeal against the award of the ***Employment & Labour Relations Court (Rika, J.)*** dated 9th December 2014. In the award, the learned judge held that the applicant had unfairly declared its 246 employees, who are members of, and represented in this application by the respondent, the ***Kenya Engineering Workers Union.*** Accordingly he awarded them their salaries for May 2013 and for 5 days worked in June 2013.

It is common ground that the applicant had a Recognition Agreement with the respondent and had concluded with it a Collective Bargaining Agreement. Sometimes in 2013, the applicant notified the applicant that it would close down its plant for maintenance for 30 days with effect from 30th April 2013. In a meeting held on 31st May 2103, the applicant and the respondent agreed that the employees would proceed on leave from 30th April 2013 to 31st May, 2013, reporting on duty on 3rd June 2013; that in the event of any changes the applicant would notify the respondent and the employees; and that the applicant would pay all the employees one month's salary in advance, to be recovered from their salaries upon the re-opening of the plant.

On 31st May 2013, the applicant informed the respondent and the employees that the plant would not re-open as scheduled due to lack of raw material. Effectively therefore the applicant announced a redundancy situation. The applicant proposed to pay the employees' terminal benefits and to re-employ them once the raw material became available. The respondent contended that subsequently the applicant

reneged on the agreement and terminated the employees' contracts of employment. Accordingly the respondent filed a claim in the Employment and Labour Relations Court seeking an order for reinstatement of the employees and a further order to deem the amounts paid to the employees by the applicant as advance to be recovered when they resumed their duties.

In its response the applicant averred that it individually advised the employees that the plant could not reopen on 3rd June 2013 due to lack of raw material, upon which they requested to be paid their final dues pending the re-opening of the plant, which the applicant duly paid. The applicant further contended that it was ready to re-open the plant on 1st August 2013 and the employees were free to resume duty then.

The court referred the dispute to the ***County Labour Officer, Mombasa***, who after hearing the parties submitted to the court a report on 11th November 2014 and recommended that the applicant pays the employees' salaries for the month of May 2013 and for 5 days that they had worked in June 2013. The court scheduled the claim for mention on 25th November 2014 when the respondent accepted the recommendation by the County Labour Officer. The applicant on its part did not attend court. On 9th December 2014, the court made an award in terms of the recommendations by the County Labour Officer and ordered the applicant to pay the respondents within 21 days of the award. It however did not make any order on costs.

The applicant was aggrieved and on 18th December 2013applied to the court for stay of execution. By a ruling dated 27th July 2015, the court granted an order of stay of execution on condition that the applicant deposits Kshs 3 million in a joint account in the names of its advocates and the respondent, which I was informed, was duly complied with.

Nothing more appears to have happened in the matter until about one year later when, on 20th July 2016 the applicant took out, under ***rule 4*** of the ***Court of Appeal Rules***, the Motion now before me seeking extension of time to file and serve a notice and record of appeal. The grounds on which the application is made is that the applicant's advocates, ***Messrs. Maira & Ndegwa Advocates*** are based in Nairobi and that they instructed a firm of advocates in Mombasa, ***Wandai Matheka & Company Advocates***, to handle the intended appeal. The latter advocates successfully applied for stay of execution, but did not file the notice of appeal or the record of appeal within the prescribed time and failed to respond to correspondence from the Nairobi advocates inquiring the status of the appeal. The applicant contends that the failure to act within the set time is an excusable mistake by counsel; that it has a strong appeal with great chances of success; and that it risks losing the Kshs. 3 million already deposited in a joint account with the respondent. The applicant annexed to the affidavit in support of the application copies of correspondence between the firms of advocates in Nairobi and Mombasa regarding the filing of the intended appeal.

The respondent opposed the application by an affidavit sworn on 16th February 2017 by its Secretary General, ***Charles Natili***, contending that the applicant was not diligent and was only delaying the respondents from the fruit of their judgment. He averred that more than two years had elapsed since the award was made and that other than applying for stay of execution, the applicants had not taken any steps towards the filing of the intended appeal. In the respondent's view, the applicants were only spurred into action by the respondent's letter dated 2nd June 2016 threatening to have the deposit of Kshs 3 million released to it. Lastly the respondent stated that the applicant had not presented any good reason why the appeal was not filed as required by the rules and that in any event the delay involved was inordinate.

When they appeared before me on 21st February 2017, ***Mr. Muchiri,*** learned counsel for the applicant and ***Ms. Mwae*** for the respondent rehashed the parties' respective cases as outlined above and cited authorities in support of their respective positions.

I have duly considered the application. Under rule 4 of the Court of Appeal Rules, this Court has unfettered discretion to extend the time prescribed by the rules for taking any action or step. As has always been stated, although that discretion is unfettered, it must be exercised judicially and not capriciously; upon reason and not on whims, sympathy, or sentiments. In ***Fakir Mohamed v. Joseph***

Mugambi & 2 Others, CA No. Nai. 332 of 2004, this Court stated as follows regarding the factors that guide it in the exercise of discretion under rule 4:

> ***"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 also ***Muchugi Kirigo v. James Muchugi Kirigo & Another, CA No. Nai.356 of 1996).***

Today, by dint of ***Article 159 (2) (d)*** of the ***Constitution*** and the overriding objective in ***Section 3A*** and ***3B*** of the ***Appellate Jurisdiction Act***, this Court strives to ensure that an intended appeal, where circumstances justify it, is not defeated by mere failure to adhere strictly to the prescribed timelines but is heard and determined on merit. (See ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 6 Others, CA No. 228 of 2013)***. Nevertheless, that is not to say that Article 159 and the overriding objective are a panacea in all sundry cases. In ***LSK v. Centre for Human Rights & Democracy and 12 Others, SC Pet. No. 14 of 2013*** the Supreme Court expressed itself thus regarding Article 159(2)(d) of the Constitution:

> ***"Indeed, this Court has had occasion to remind litigants that Article 159 (2)(d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis".***

(See also ***City Chemists (Nbi.) & Another v. Oriental Bank Ltd, CA No. Nai.302 of 2008).***

The applicant, who has not complied with the prescribed timelines, is obliged to place before me some material on the basis of which I can exercise the unfettered discretion conferred by rule 4 in his favour. In ***Ratnam v. Cumarasamy [1964] 3 All E R 933,*** the rationale for this requirement was stated thus:

> ***"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."***

One of the issues that I have to consider is the period of delay and the explanation for that delay. As I have noted earlier, the award that the applicant intends to challenge was delivered on 9th December 2014. Rule 75 (2) of the rules of this Court required the applicant to file a notice of appeal within 14 days from the date of the award. No such notice of appeal was filed. It bears repeating, as was stated in ***Bi-Mach Engineers Ltd v. James Kahoro Mwangi, CA No. 15 of 2011***, that the filing of a Notice of Appeal is a simple and straight forward task; in fact it entails no more than filling in a prescribed form (See ***Form D***, Court of Appeal Rules). One of the annextures to the affidavit in support of the application is a copy of a Notice of Appeal dated 10th March 2015, which appears never to have been lodged in court because it does not bear the date it was lodged. Accordingly the applicant is applying for extension of time to file a notice of appeal one year and seven months from the date of the award. The prescribed period is 14 days. I have no doubt in my mind that on the face of it, the delay involved here is plainly inordinate. However, I must also consider the reason for that delay.

The applicant's advocates, Maira & Ndegwa Advocates blame the advocates they entrusted the brief to, Wandati Matheka & Company Advocates, for failing to act with due diligence, but on the same breath claim that failure to file the notice of appeal and the record of appeal on time was occasioned by a mistake. I have no doubt that in appropriate cases a genuine mistake on part of counsel is a good ground

for extension of time. (See ***Belinda Murai & 9 Others v. Amos Wainaina, CA. No. Nai. 9 of 1978)***. But in this case, I ask myself, where or what was the mistake? I would have expected the responsible advocate from Wandati, Matheka & Company Advocates to depose in an affidavit the nature of the mistake or the reason that prevented them from filing a notice of appeal for one year and seven months. Unfortunately, all that the applicant has placed before me is an affidavit by Susan Maira, Advocate, shifting the blame to the Mombasa advocates for dilatoriness, but still calling the same conduct a mistake.

It has been accepted by this Court that sheer inaction by counsel *per se* does not constitute an excusable mistake. (See ***Rajesh Rughani v. Fifty Investment Ltd & Another (2005) eKLR)***. I'm afraid that there is absolutely nothing on record by the advocate who is alleged to have made a mistake, to explain the nature of the alleged mistake. In the absence of a plausible explanation for the delay, it remains inordinate and incapable of justifying extension of time.

The other consideration I have to bear in mind is the respective prejudice that each party stands to suffer. The applicant contends that it stands to lose Kshs 3 million while the respondent avers that the former employees of the applicant have been kept away from the fruits of their judgment for far too long and that they are suffering prejudice. The applicant obtained a stay of execution to enable it file and prosecute its appeal. Instead, it went to sleep, and I agree with the respondents, that it woke up only after the respondent threatened to ask for the deposit to be released to the former employees. As at the hearing of this appeal, the applicant had not even obtained the proceedings. I note with alacrity that the award to be appealed from was a bare 4 pages long and I do not expect the proceedings would have been any much longer. As this Court stated in ***Portreitz Maternity v James Karanga Kabia, CA No. 67 of 1997:***

> ***"That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."***

Under the Constitution, what the above statement means is that the Court must consider not only the right of the applicant to be freed from undue technicalities and to have its appeal heard on merit, but also the equally important constitutional value and principle recognized by Article 159 (2) (b), which demands that justice shall not be delayed.

As regards the chances of the intended appeal succeeding, a single judge is obliged to avoid purporting to determine with finality in an application for extension of time the merits and demerits of the intended appeal. See ***Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA. No. 227 of 2015*** and ***Hakika Transporters Services Ltd v. Albert Chulah Wamimitaire, CA No. 1 of 2016).***That is the reason why the Court has described that as a "possible" consideration.

Having carefully considered this application, I am not persuaded that the applicant has placed before me any material on the basis of which I can exercise discretion to extend time in its favour. Accordingly this application fails and is hereby dismissed with costs.

Dated and delivered at Mombasa this 10th day of March, 2017.

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR