



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO.33 OF 2016

BETWEEN

CHARLES ONYINGE ABUSO.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....1STRESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Application for extension of time to file and serve a record of appeal from the award of the Employment & Labour Court at Mombasa, (Makau, J.) dated 5th September 2014

in

ELRCC. No. 370 of 2013)

RULING

The applicant, Charles Onyinge Abuso, has taken out, under Rule 4 of the Court of Appeal Rules, the Motion on Notice before me seeking extension of time to file a record of appeal. The short background to the application is as follows. On 24th August 2009, the applicant filed ***Mombasa High Court Civil Suit No. 288B of 2009*** against the 1st respondent, ***Kenya Ports Authority*** and the 2nd Respondent, the ***Attorney General*** for damages of ***Kshs 26,822,7000*** for unlawful dismissal and general and special damages for unlawful arrest, imprisonment and malicious prosecution. The bulk of the claim was made up of the salary and emoluments allegedly due to the applicant from the date of the dismissal to his expected date of retirement. In their separate defences dated 11th December 2009 and 24th November 2010 respectively, the 1st and 2nd respondents denied liability, with the 1st respondent contending that the applicant's dismissal was lawful and justified and that the claim for salary and benefits from the date of dismissal to the date of retirement was misconceived and unsustainable, while the 2nd respondent averred that the applicant's arrest and prosecution was not malicious but on probable cause.

On 29th October, the suit was transferred to the ***Employment and Labour Relations Court***, Mombasa, as ***ELRCC No. 370 of 2013***. Ultimately ***Makau, J.*** heard the claim and by an award dated 5th September 2014 found that the applicant's dismissal was unlawful and awarded him ***Kshs 2,298,689.15*** being 3

months salary in lieu of notice; half salary, commuter mileage allowance, and telephone allowance for the 6 months when he was interdicted; and lump sum pension. The claim for salary and benefits until retirement was found to be unsustainable and dismissed. As for the claim for damages for unlawful arrest, imprisonment and malicious prosecution, the learned judge dismissed it also, after he found that it was not proved.

Aggrieved by the award, on 19th September 2014 the applicant lodged a notice of appeal, which was within the time prescribed by **rule 75(2)** of the **Court of Appeal Rules**. The annexures to the applicant's affidavit in support of the application show that on 13th October 2014 the applicant's advocates wrote to the Deputy Registrar bespeaking copies of the proceedings and award. That letter was not copied to the applicant. Again on 11th November 2014, the applicant's advocates wrote another letter to the Deputy Registrar on similar terms as the first, but this time copied it to the respondent.

Nothing further appears to have happened until 14th June 2016, approximately one year and nine months from the date of the award, when the applicant filed the present Motion seeking extension of time to file the record of appeal. In his affidavit in support of the application, the applicant explained that his advocates did not receive the proceedings until February 2016 and that the failure to file the appeal on time was occasioned by circumstances beyond his control or that of his advocates. He also averred that he was dissatisfied by the award because the trial judge did not properly consider the remedies available to him.

The 1st respondent opposed the application vide grounds of opposition dated 31st October 2016 and a replying affidavit sworn on 12th January 2017 by **Turasha Kinyanjui**, its head of litigation and disputes department. It contended that the application for certified copies was made after 30 days from the date of the award and therefore the applicant was obliged to file the record of appeal within 60 days from the date of filing the notice of appeal; that the delay from the time the applicant alleges to have received the proceedings in February 2016 to 14th June 2016 when the application for extension of time was made was inordinate and unexplained; that the real reason why the applicant did not file the appeal in time was because he was waiting for the 1st respondent to pay the decretal amount first; that the 1st respondent paid the decretal amount in full on 18th May 2016 and it was only then that the applicant filed the application for extension of time dated 23rd May 2016, barely five days after payment of the decretal amount; and that the intended appeal did not have any chances of success.

The 2nd respondent did not file any response to the application, but in any event during the hearing of this application, the applicant explained that its intended appeal was only against the 1st respondent. **Mr. Adhoch**, learned counsel, for the applicant and **Mr. Omondi**, learned counsel, for the 1st respondent rehearsed the parties' position as set out above, with Mr. Adhoch adding that the proceedings received by the applicant in February 2016 had many mistakes that required to be corrected. He also invoked the overriding objective and urged me to allow the application. On his part Mr. Omondi submitted that in the absence of a certificate of delay, there was no evidence that the applicant had received the proceedings as he claimed. Counsel also submitted that the applicant had not deposed in any of his affidavits about the alleged mistakes in the proceedings or presented any evidence that indeed there were mistakes in the proceedings. The intended appeal, it was urged, was also not arguable as the applicant intended to pursue the baseless argument that he was entitled to salary and emoluments until the date he would have retired.

I have carefully considered the application, the grounds of opposition and the replying affidavit, the award of the Employment & Labour Relations Court, the submissions by learned counsel and the law. Before 1985, an applicant seeking extension of time was required to present "**sufficient reasons**" why he did not take required steps within the stipulated time. The requirement of sufficient reasons was removed by an amendment to the rules, which henceforth meant that the Court has unfettered discretion in considering whether or not to extend time. Much as the Court has unfettered discretion, however, it is accepted that the discretion must be exercised judiciously and on reasons, rather than capriciously or on whim. Accordingly the applicant is obliged to place before the Court some material upon which the Court can exercise its discretion in his favour.

As regards the factors that guide the Court in the exercise of the discretion to extend time, the Court stated thus in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, CA No. Nai. 255 of 1997:

“It is now 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”.

It is necessary to point out that the above are only some of the considerations and do not constitute a closed catalogue. (See Mongira & Another v Makori & Another [2005] 2 KLR 103).

There is no dispute that the applicant lodged his notice of appeal on 19th September 2014, within the prescribed time. Under **Rule 82 (1)** of the Court of Appeal Rules, he was obliged to file the record of appeal within 60 days from the date of lodging the Notice of Appeal, meaning on or before 18th November 2014. The only way the applicant would have been able to file the appeal after that date was by complying with the proviso to rule 82, which required him to apply in writing within 30 days of the date of the award to the trial court for copies of the proceedings and in addition to serve a copy of the letter bespeaking the proceedings, upon the respondents. (See Christine Wangari Muga v David Mwaura & Another, CA No. 190 of 2013). The record shows that the applicant applied for proceedings on 13th October 2014 by a letter which was not copied to the respondents and there is no evidence of service of the letter on the respondents as required by the proviso. The second letter bespeaking the proceedings which was copied to the 1st respondent is dated 11th November 2014, which is clearly outside the 30 days allowed by the rules from the date of lodging the notice of appeal.

In the circumstances the applicant is obliged to explain the delay from 18th November 2014 when he should have filed the appeal, to 14th June 2016 when he filed the application for extension of time. That is a delay of about one year and seven months. All that the applicant has stated is that he was waiting for certified copies of proceedings. Having failed to comply with the proviso to rule 82, the applicant was not entitled to wait for certified copies of proceedings beyond 18th November 2014. He has not deponed to having made any mistake in reading the rules or in computing time.

The applicant further states that he obtained the proceedings in February 2016. The actual date is not given, and there is no evidence of receipt of the proceedings. In addition, when I asked counsel for the applicant whether he had already filed the appeal, because under rule 4 nothing stops the applicant from filing the appeal and then applying for extension of time, the answer was in the negative. Even after he allegedly received the proceedings in February 2016, the applicant took a whole four months to apply for extension of time. The applicant did not explain that delay in his affidavits and his counsel merely stated from the bar that the proceedings had mistakes and required to be re-typed. Again, there was no evidence presented in support of that claim. In these circumstances, I would agree with the 1st respondent that the more plausible reason for the delay in filing the appeal is that the applicant was waiting first for payment of the moneys that he was awarded by the trial court, and after that approach this Court in the hope that he could be awarded more.

I do not think it is necessary to spend time on whether the intended appeal is arguable, although I note that the main plank in the applicant's intended appeal is the claim that the learned judge erred by declining to award him salary and emoluments from the date of his dismissal to the date of his expected retirement. That proposition appears to run counter to the judgment of this Court in Justice H. Kalpana Rawal v The Judicial Service Commission & Others, CA No. 1 of 2016. Be that as it may, in Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No 227 of 2015, I stated as follows regarding the role of a single judge in determining the merits of an intended appeal in an application for extension of time:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions

on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

(See also ***Hon John Njoroge Michuki & Another v Kentazuga Hardware Ltd, CA No Nai 16 of 1998*** and ***Gladys Wanjiru Ngacha v Teresia Chepsaat & 4 Others, CA No 94 of 2009***).

While bearing in mind the provisions of ***Art 159(2)(d)*** of the ***Constitution*** and the overriding objective spelt out ***in Sections 3A and 3B*** of the ***Appellate Jurisdiction Act***, each case must be looked at on its own merit and circumstances. (See ***LSK v. Centre for Human Rights & Democracy and 12 Others, SC Pet. No. 14 of 2013***).

As regards the relative prejudice to be suffered by each party, the respondent submits that by virtue of the applicant’s delay, it has fully settled the award and that it stands to suffer prejudice if it has to engage in litigation by instalments. On the other hand the applicant states that he stands to suffer more prejudice. When all is said and done, the applicant was obliged to place before me some material on the basis of which I could exercise discretion in his favour. The delay he has occasioned is inordinate and remains unexplained.

I have come to the conclusion that I must dismiss this application with costs to the 1st respondent. It is so ordered

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