



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO.158 OF 2017

BETWEEN

SHREE SAI INDUSTRIES LIMITED.....APPLICANT

AND

OSCAR ONGAYA.....RESPONDENT

(Being an application for extension of time to file a Notice of Appeal in respect of the intended appeal against Judgment and order of the Employment and Labour

Relations Court of Kenya at Nairobi (Abuodha, J.) dated 16th June, 2017

in

E & L.C.C. No. 768 of 2014)

R U L I N G

Shree Industries Limited (applicant) has moved this court under **Rule 4** of the Rules of this Court *inter alia* for an order of extension of time within which to file and serve a Notice of Appeal against the judgment and orders of Hon. Justice Aboudha dated 16th June, 2017 in ELRC No. 768 of 2014.

The main ground on which the application is predicated is that, after the matter was heard before the Employment and Labour Relations Court, the court directed that judgment would be delivered on notice. Notice of delivery of judgment was subsequently issued, but whereas the date for delivery of judgment was given as 16th June, 2017, the notice itself was received in the applicant's office on 19th June, 2017, 3 days after judgment had already been delivered. A copy of the hearing notice is annexed to the affidavit of Bina Rajendra, manager of the applicant.

The same confirms the applicant's deponment to that effect. According to the applicant, by the time they got a copy of the judgment to enable them peruse the same and make an informed decision on whether to prefer an appeal or not, the 14 days provided for a under the Rules had already expired, hence the filing of this application on 17th July, 2017. According to the applicant it has an arguable appeal with high chances of success.

Miss Kariuki, learned counsel appearing for the appellant, submitted that they were only late by a few days and the delay in filing the Notice of Appeal was not of their own making. She urged the Court to exercise its discretion in favour of the applicant by allowing this application.

The application is opposed by the respondent by way of the replying affidavit sworn on 24th July, 2017. The respondent does not deny that the judgment was delivered on 16th June, 2017, and further that the appellant was informed of the delivery of the judgment after it had been delivered. The thrust of his argument in opposition through his affidavit, and the oral submission of his learned counsel, Mr Khalwale, is that the appellant did not need to peruse the court file before filing a notice of appeal, and that the judgment itself was availed to the respondent within the 14 days within which they ought to have filed the Notice of Appeal. Learned counsel also contested the arguability of the appeal, and urged the Court to dismiss the application.

Having considered the application before me, the rival affidavits and submissions of counsel, my observation is that the applicant herein was late in filing its Notice of Appeal by only a few days. The notice of appeal ought to have been filed by 30th or 31st of July, 2017. The application for leave was filed only seven days late. Is this delay so inordinate as to disentitle the applicant of the favourable exercise of this Court's discretion?

The Court's power to enlarge time under **Rule 4** of this Court's Rules is discretionary. That discretion though unfettered, must be exercised judicially and there are some established principles which guide the Court in deciding on whether or not to extend time. In **Mwangi –v- Kenya Airways Limited, [2003] KLR 486** at page 487, this Court stated of this discretion and the manner it ought to be exercised as follows: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in, Leo Sila Mutiso –v-Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997 (unreported), the court expressed itself thus: -

'It is now well 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'.

These in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.

Applying those parameters to the facts of this case, I have no difficulty in arriving at the conclusion that the delay in this matter was not inordinate. It was a delay of about seven days only. Has it been satisfactorily explained? I believe so. The judgment was rendered in the absence of the applicant, and it took them a few days to get the judgment. Contrary to learned counsel for the respondent's submission that one does not need to peruse the judgment before filing the Notice of Appeal, it is, in my view important for a party to study the judgment because only then can one decide whether it would be prudent to file the appeal or not. I find the explanation tendered by the applicant plausible and satisfactory. As to whether the applicant has an arguable appeal, I have perused the annexed memorandum of appeal and in my view, the appeal cannot be classified as frivolous.

I am persuaded that locking out the applicant from exercising its right of appeal in the circumstances of this matter will not be fair. I am therefore inclined to allow this application, which I hereby do and grant the applicant leave to file and serve the Notice of Appeal out of time but in any event within 14 days from the date of this Ruling.

Given the applicant's social status, *vis a vis* that of the respondent, I order that each party bears its own costs of this application.

Dated and delivered at Nairobi this 29th day of September, 2017.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR