IN THE COURT OF APPEAL

AT NAIROBI

KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 82 OF 2017 (UR 60/2017)

BETWEEN

TRIBE HOTEL LIMITED…….APPLICANT

AND

ANGELA WOKABI MUOKI……...RESPONDENT

(Being an application for extension of time to file a Notice of Appeal against Ruling and Orders of the Employment & Labour Relations Court at Nairobi (Monica Mbaru, J) dated 29th September, 2016

in

ELRC No. 1712 of 2014

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R U L I N G

Angela Wokabi Muoki (Respondent) filed a claim being **Employment Cause No. 1712 of 2014** at the Industrial Court of Kenya in Nairobi, claiming several reliefs from the Tribe Hotel Limited (Applicant) her former employer.

The matter was heard, and in a judgment rendered on 29th September 2016, the learned Judge (M. Mbaru J) entered judgment in the Respondent' favour in which she was awarded most of the reliefs she had prayed for. The applicant being aggrieved with the said judgment promptly applied for the court proceedings with a view to preferring an appeal against the judgment. The Notice of Appeal was nonetheless not filed within the prescribed time hence the application before the court dated 11th April, 2017.

In the Notice of Motion the applicant prays that the time for lodging the Notice of Appeal against the judgment and decree in question be extended. The Motion is premised on three grounds on its face to the effect that failure to lodge the Notice of Appeal in time was caused by the mistake of the applicant's previous counsel, that the intended appeal has high chances of success; and that the respondent will not suffer prejudice if the application is allowed. The Motion is supported by the affidavit of EYORU SALEM MUKULU, the applicant's Human Resources Manager sworn on 11th April, 2017.

The deponent states that the Respondent instructed the firm of Taibjee & Bhalla Advocates who were on

record in the matter to file the Notice of Appeal and they believed that the same had been filed o time. They only realized later in November that the Notice of Appeal had been filed late. They immediately changed advocates and instructed the firm of B.M. Musyoki, Counsel presently on record to pursue the matter.

He entreats the court not to visit the mistakes of former counsel on the applicant. The Notice of appeal was late by only about 20 days, and that the appeal has good chances of success. Mr. Musyoki, learned counsel who prosecuted the application urged the court to find the delay excusable in the circumstances. On the prospects of the appeal, he urged that the learned judge had made a grave error of law when she imposed a fine against the applicant as contemplated in Section 51(1) of the Employment Act, which provision only allows for the fine upon conviction for failure by the employer to issue a certificate of seizure. There having been no conviction in this case, the fine did not lie, and even if there was conviction, the money should have gone to the state and not to the Respondent. He also pointed out, as a strong point on appeal, the fact that the respondent had been awarded the maximum 12 months compensation for wrongful dismissal, and should not therefore have been awarded a further 3 months' salary in lieu of notice.

He urged me to find that these are serious points of law that ought to be canvassed fully on appeal, and the applicant should not be denied that chance.

The application was opposed by the applicant vide her replying affidavit sworn on 13th July, 2017. She deposes that the applicant failed to file the appeal because they had filed an application for review which was nonetheless dismissed; there was inordinate delay in filing this application, which she said was six months which has not been explained; that the appeal is not arguable and finally that she stands to suffer great prejudice and loss if the orders sought are granted. She urged us to dismiss the application with costs.

In his oral address to court, Mr. Kamotho learned counsel for the respondent posited that the delay had not been sufficiently explained. He further submitted that the applicant had filed a review application before the ELRC Court, which application was dismissed and they ought not to have come to court of Appeal.

On the merit of the case, Mr Kamotho said that the intended appeal lacks merit, as the Kshs 100,000/= was imposed as punitive damages and not as a fine as claimed. He also refuted the proposition that the award of 12 months damages and 3 months' salary in lieu of notice amounted to double jeopardy. He urged the court to disallow the application.

I have carefully considered the application along with the able submissions of both counsel.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 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: - 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'.***
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> ***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 the above criteria to the present application, first and foremost, the Court must consider the reasons advanced for failure to comply with the timelines provided for in the Rules. Whereas the respondent says that the delay involved about six months which delay has not been explained, it is clear from the record that the Notice of Appeal in this matter was filed on 31st 2016. The letter bespeaking the proceedings, which was copied to counsel on record for the respondent was sent to the deputy registrar of the Employment and Labour relations Court only 8 days after delivery of the impugned judgment. The question that comes to play therefore is which delay is of concern to us for purposes of this application. Is it the 20-day delay or is it the six month delay? It is not in dispute that the applicant pursued an application for review of the judgment, which application was determined on 30th March, 2017. This application was filed less than 2 weeks after the Ruling on the review application. That cannot be said to be inordinate delay. The applicant could not have known the fate of the application before the Ruling was delivered and could not there pursue the appeal. They cannot therefore be blamed for any delay in filing the application.

On the delay in filing the Notice of appeal, as stated earlier, it was about 20 days. The letter bespeaking the proceedings had been sent to the respondent's counsel with promptitude. The respondent was therefore aware all along that there was an appeal lurking somewhere in the background.

According to the applicant, its previous counsel on record was to blame for this mix and current counsel on record took up the matter immediately he came into the matter. Do we punish the respondent for this 20-day delay caused by mistake of counsel? Learned counsel mentioned that they had to pay the decretal amount after threats to commit the respondent's directors to jail for contempt of court, yet they are convinced that they have a good chance of succeeding on appeal. I am of the view that given the circumstances of this matter, the delay cannot be said to be inordinate. I find the reason given for the delay satisfactory.

On the prospects of the appeal succeeding, all I can say at this stage is that the intended appeal raises some substantial points of law which this Court should be given an opportunity to address. These would include the interpretation of section 51(1) of the Employment and Labour Relations Act. Can the fine envisaged under that section be converted to exemplary damages and paid to the claimant? Does the 12 months' salary maximum compensation include any payment of salary in lieu of notice? Let the Court be given an opportunity to pronounce itself on these issues.

Lastly, on the question of possible prejudice to the respondent, she was aware all this time that the matter had not been concluded, even as she continued enjoying 'the fruits of her judgment' as her counsel on record has been in this matter all along.

On the whole, I am satisfied that this is a good case deserving of favourable exercise of my discretion. I allow the application and order that a fresh Notice of Appeal be filed and served on the respondent's counsel within 7 days from the date of this Ruling.

Costs of the application will be in the intended appeal.

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