



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: MURGOR, J.A.**

**CIVIL APPLICATION NO. 172 OF 2017**

**BETWEEN**

**ATTORNEY GENERAL.....APPLICANT**

**AND**

**COL. (RTD) RICHARD NCHAPI LEIYAGU.....RESPONDENT**

*(Application for extension of time to file and serve an Appeal from the Judgment of the Employment and Labour Relations Court at Nairobi, Nzioki wa Makau, J. dated 10<sup>th</sup> June 2015*

*in*

***Nairobi Industrial Court Petition No. 6 of 2013)***

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**RULING**

***The applicant, the Attorney General*** has brought this Notice of Motion dated 27<sup>th</sup> July 2017 under **Article 164** of the Constitution, and **rules 4** and **47** of the rules of this Court seeking for time to be extended within which to file and serve a notice of appeal and the record of appeal and that the Notice of Appeal dated 23<sup>rd</sup> March 2017 and filed on 24<sup>th</sup> March 2017 be deemed as filed and served within the required period.

The motion is brought on grounds that when the judgment concerning an employment dispute between the **Col. (Rtd) Richard Nchapi Leiyagu, the respondent** on the one hand, and, the applicant the **Chief of Kenya Defence Forces** and the **Ministry of Defence**, the 1<sup>st</sup> and 2<sup>nd</sup> respondents (*the Defence Forces*) in the trial court, on the other was delivered, Ms. Beatrice Akuno, the State counsel handling the suit failed to inform the Defence Forces of the judgment, and as a consequence did not lodge a Notice of Appeal and a Record of Appeal; that the Defence Forces did not become aware of the judgment until 12<sup>th</sup> May 2016 when it received a letter from Issa and Company Advocates for the respondent demanding payment of the decretal sums; that the applicant was instructed to file an appeal on 24<sup>th</sup> May 2016 but did not do so as they were yet to be supplied with copies of the proceedings and the judgment; that the failure to file the appeal was on account of the State Counsel’s mistake and the inability of the Registry to supply the proceedings; that the appeal has a high chance of success; that the applicant is desirous of pursuing the appeal and finally that no prejudice would be suffered by the respondent.

By way of an affidavit in support of the motion sworn on 27<sup>th</sup> July 2017 by Leah Odhiambo, State Counsel in the applicant's office it was further deponed that after the Defence Forces requested information on the status of the judgment, Ms. Akuno forwarded a copy of the judgment, following which she was instructed to appeal against the decision; that on 17<sup>th</sup> June 2015, Ms. Akuno applied for the proceedings and Judgment, which the applicant deponed are yet to be supplied. It was then deponed that the counsel proceeded on maternity leave leading to further delay in filing the appeal.

In a replying affidavit sworn by the respondent, on 16<sup>th</sup> August 2017, it was deponed that, when the judgment was delivered Ms. Akuno was in court and should have filed the Notice of Appeal on or before 24<sup>th</sup> June 2015; that on 14<sup>th</sup> June 2015 the respondent filed a party and party bill of costs, and on 14<sup>th</sup> July 2015 the Deputy Registrar issued a Notice of Taxation both of which was served on the applicant; that the applicant filed submissions in opposition to the party and party bill of costs on 21<sup>st</sup> September 2015; that thereafter, by a letter dated 19<sup>th</sup> June 2015, the respondent's advocates sent a draft decree to the applicant for approval. On 2<sup>nd</sup> July 2015, the Deputy Registrar issued a Decree, and on 12<sup>th</sup> May 2016, the certified Order was sent to the Chief of Kenya Defence Forces and a copy to the Permanent Secretary, Ministry of Defence, and that this was followed by two reminders.

The respondent further deponed that he filed a Judicial Review Application dated 28<sup>th</sup> July 2016, Misc Application No 301 of 2016 seeking an order of mandamus to compel the applicant to pay the decretal sum of Kshs 9,957,862.08 together with interest and costs, which was served on the applicant and the 2<sup>nd</sup> defendant on 3<sup>rd</sup> August 2016; that the applicant did not file a replying affidavit, and during the Judicial Review hearing on 23<sup>rd</sup> November 2016, did not oppose the application. It was deponed that the application was allowed by Aburili, J, in a ruling delivered on 23<sup>rd</sup> November 2016, which ruling and order was served on the applicant and the Defence

Forces together with a request for the remittance of the decretal sum, with reminders also having been duly sent and that the Defence Forces had failed to obey the court's orders compelling them to pay the decretal sums.

The respondent deponed that there were no convincing or compelling reasons given for the delay of 1 year and 9 months which was inordinate and inexcusable; that the applicant had not explained the delay from 24<sup>th</sup> May 2016 when it found out about the judgment until 24<sup>th</sup> March 2017 when the Notice of Appeal was filed; that there is nothing to show that the State Counsel in the applicant's office who was handling the suit had proceeded on maternity leave or the steps taken to file the appeal when she returned on duty; that this application was intended to delay the settlement of the decretal sum; that the intended appeal is frivolous and had no chance of success.

In the submissions, counsel for the State, Ms. Odhiambo for the applicants, reiterated the averments of the supporting affidavit and added that though there has been a delay, the applicant has a right to be heard on appeal, and to file the Notice of Appeal out of time. Counsel relied on the case of *Edith Gichugu vs Stephen Njagi Thiothi [2014] eKLR* in support of this contention.

In response, *Ms. Agwata* holding brief for Mr. Issa for the respondent relied on the replying affidavit, and reiterated the averments of the affidavit in reply. Counsel cited the case of *Macwatt Estates Limited vs Mbwani Limited [2001] eKLR* where this Court found an unexplained two year delay to be inordinate.

Ms. Odhiambo's reply was that the mistake of the applicant's counsel should not be visited on the Defence Forces; that the court should invoke its inherent powers to extend time, and that the question of providing proof that Ms. Akuno went on maternity leave did not arise, as this was a personal matter.

Under **rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the

extension sought was granted. These principles were outlined in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi –Civil Application No. Nai 251 of 1997* where this Court stated;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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 not in dispute that the judgment was delivered on 10<sup>th</sup> June 2015, and this application was filed on 27<sup>th</sup> July 2017, which period would amount to a delay of two years and one month.

At this juncture, I must determine whether that delay has been explained to my satisfaction. To do so, I consider it worthwhile to apportion the period of delay into three segments. The initial period between the date of the judgment and the date the Defence Forces became aware of it, the intervening period, that being the date the Defence Forces became aware of the judgment until the Notice of Appeal dated 23<sup>rd</sup> March 2017 was lodged, and the final period being the date the Notice of Appeal was lodged and the date when this application was filed.

Beginning with the initial period. On the date the judgment was delivered, the applicant’s counsel, Ms. Akuno was in court. But it was deponed that thereafter, the state counsel failed to inform the Defence Forces of the outcome of the judgment; that the Defence Forces only became aware of it on 24<sup>th</sup> May 2016 when they requested for a copy of the judgment, and confirmation that the notice of appeal had been filed.

The respondent’s response to this is that, the applicants had all along been aware of the judgment as they had participated in taxation and in judicial review proceedings after the judgment was delivered.

More particularly, the Defence Forces was notified of the Judgment by a copy of a letter dated 12<sup>th</sup> May 2016 addressed to the applicant and copied to it, enclosing a Certificate of Order against the Chief of Kenya Defence Forces dated 10<sup>th</sup> May 2016 and issued under the hand of the Deputy Registrar. A stamp borne on the face of the letter confirmed that it was received by “...the Legal Services Branch, Department of Defence...” on 16<sup>th</sup> May 2016.

As to the reason given that Ms. Akuno went on maternity leave, I have reviewed the material, and there is nothing to support this averment. Additionally, Ms. Akuno did not swear any affidavit accepting that the delay should be attributed to her mistake, and not to the Defence Forces.

Be that as it may, it would seem that arising from the State Counsel’s negligence, the Defence Forces only became aware of the judgment on 16<sup>th</sup> May 2016. The applicant’s plea is that the Defence Forces should not be penalized for their mistake. So as not to penalize the Defence Forces for the applicant’s inadvertence, I am prepared to find that the Defence Forces were not aware of the judgment until 16<sup>th</sup> May 2016, so that the delay in this regard would have been adequately explained.

That said, there is the delay of 10 months in the intervening period that requires to be explained. The applicant avers that on 24<sup>th</sup> May 2016 it was instructed by the Defence Forces to file an appeal. It was then averred that on 17<sup>th</sup> June 2015, (perhaps a typographical error), Ms. Akuno, the State Counsel briefed of the suit, applied for the proceedings and the Judgment which it was deponed were yet to be supplied by the Registry. A review of the materials does not disclose, following the letter of instruction, that a Notice of Appeal was filed or that a request for proceedings was ever made. The situation is further exacerbated by the fact that no Notice of Appeal was filed until 24<sup>th</sup> March 2017. Once again, nothing was produced to explain why it took several months from the date of instruction to file the Notice.

This leaves the final period comprising a further 4 months delay. No material was produced to explain the

cause of delay during this period. Of further concern is that, contrary to the applicant's averments, the materials do not disclose that the applicant ever applied for proceedings and the judgment. Therefore, the applicant's explanation that the delay was occasioned by the registry's failure to supply the proceedings and the judgment is baseless and lacks candor, as no such request was ever made.

I may add that, despite absolving the Defence Forces from blame in the initial period by attributing the delay to the applicant, I can find nothing that demonstrates that during both the intervening and the final period, the Defence Forces took an interest in the appeal, or any steps to show that it assiduously pursued the filing of the intended appeal by the applicant.

In ***Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98***, this Court stated thus;

***“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”***

As a consequence, I am not satisfied that the delay during the intervening period or the final period have been adequately explained by either the applicant or the Defence Forces. It is evident that no material has been placed before me to explain this remarkably lengthy delay. The parties are guilty of laches, and I am therefore disinclined to exercise my discretion to extend time to file the intended appeal.

In so far as the chances of its success is concerned, I am not persuaded after considering the various issues raised in the draft Memorandum of Appeal annexed to the application alongside the judgment that there is any certainty in respect of its success. In addition, the respondent would be placed in a position of extreme prejudice, not only because of the inordinate and unexplained delay in lodging the intended appeal, but also as a result of having expended significant effort in obtaining the subsequent orders of mandamus, pursuant to the judgment, so as to have the applicant and the Defence Forces compelled to pay the decretal sums together with interest and costs.

Accordingly, having taken all the requisite factors into account, I have come to the conclusion that the application for extension of time is not merited. I decline to exercise my discretion to allow the application, and order that the Notice of Motion dated 27<sup>th</sup> July 2017 be and is hereby dismissed with costs.

***It is so ordered.***

***Dated and Delivered at Nairobi this 8<sup>th</sup> day of December, 2017.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**