IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARARIUKI J.A. (In Chambers)

CIVIL APPEAL NO. 157 of 2015

BETWEEN

DANIEL WAIGANJO GITHINJI .....APPELLANT

AND

KENPIPE CO-OPERATIVE SAVINGS

& CREDIT SOCIETY LIMITED.....RESPONDENT

(Beinga an appeal from the Judgment and decree of the Industrial Court of Kenya, Nairobi (M. Onyango, J) delivered on 30th day of September 2014

in

INDUSTRIAL CAUSE NO.1088 OF 2011)

****

RULING

1. Daniel Waiganjo Githinji, **the applicant**, filed in this court on 13th July 2015 a notice of motion dated 6th July 2015 seeking the following orders

1. ***(spent)***

2. ***That the Honourable Court be pleased to deem as duly filed and served the Record of Appeal filed on 30th June 2015 and served on 6th July 2015 arising from the judgment of Hon. Lady Justice Maureen Onyango delivered on 30th September 2014 at Nairobi in the Industrial Cause No.1088 of 2011***

3. ***That the costs of the application be provided for***

2. The notice of motion was supported by an affidavit sworn by the applicant on 6th July 2015. On 11th September 2015, the respondent filed on replying affidavit opposing the said notice of motion.

3. The background emerging from the notice of motion and the supporting and replying affidavits shows

that the applicant was employed by the respondent on 27th February 1992 as an accounts clerk. His employment was terminated on 17th September 2007 whereupon he lodged a claim against the respondent in the Industrial Court seeking a declaration that the termination of his services with the respondent was wrongful, irregular and unlawful. On that account, he claimed payment of emoluments totaling Shs.151,625/= and entitlements of Shs.7,832,718 and general damages for breach of contract, punitive, exemplary and aggravated damages and costs and interest.

4. After hearing the dispute, the Industrial Court (**Hon. Lady Justice Maureen Onyango**) determined the applicant's claim and held that the applicant was entitled to three (3) month's salary in lieu of notice in the sum of Shs.469,725/= which was awarded to him. There were other claims but their determination has no bearing on the application before me.

5.The applicant was dissatisfied with the decision of the Industrial Court and consequently filed a **notice of appeal** on 13th October 2014 as required by rule 75 of the Rules of this Court manifesting his intention to appeal and challenge the Industrial Court decision.

6. It is not disputed that the notice of appeal was filed and served in compliance with the Court of Appeal Rules.

7. The applicant lodged the record of appeal on 30th June 2015. Under the rules of this court, the record of appeal was way out of time. It is plain to see that it is on account of that lateness that the applicant found it necessary to apply for enlargement of time to appeal.

8. The issue for determination by me as a single judge sitting in chambers pursuant to the rules of this court is whether the application for enlargement of time has merit, in which case it will be allowed and time for appealing enlarged, or whether it is wanting in merit in which case it shall be dismissed.

9. The Rules require a party to a suit desirous of appealing to this court to give notice of appeal and serve it as required by the rules. This the applicant has done in compliance with the rules.

10. Under rule 82(1) of this Court's Rules, appeal must be lodged within sixty (60) days of the date of lodgment of the notice of appeal. In the instant case, the sixty days run from 13th October 2014 when the notice of appeal was lodged and elapsed on 13th December 2014.

11. The proviso to rule 82 stipulates that

> ***"where an application for a copy of the proceedings in the High Court has been made in accordance with subrule (2) within thirty (30) days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."***

By dint of rule 82(2) of this Court's Rules an appellant shall not be entitled to rely on the proviso to sub-rule (1) (supra) unless his application for such copy was in writing and a copy of it was served upon the respondent.

12. When the application came up for hearing before me on 18th February 2016, learned counsel **Mr. Njenga Mungai** of the firm of **Njenga Mungai & Associates** Advocates appeared for the applicant while learned counsel **Ms Lwila** of the firm of **Wekesa & Simiyu Advocates** appeared for the respondent.

13. Mr. Njenga urged the court to extend the time under rule 4 of this court's Rules to enable the applicant's already lodged record of appeal to be deemed as duly filed. He invoked sections 3(2), 3A and 3B of the **Appellate Jurisdiction Act**, Chapter 9 of the Laws of Kenya. The Sections stipulate –

> ***"3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the***

just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

2. ***The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***

3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

a. ***The just determination of the proceedings;***

b. ***The efficient use of the available judicial and administrative resources;***

c. ***The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and***

d. ***the use of suitable technology.***

14. Mr. Njenga pointed out that the firm of Wari & Associates Advocates applied for the proceedings on 20th November 2014. He conceded that the application letter was not served on the advocates on record for the respondent (to who it was not copied) as required by rule 82(2) (supra). The advocates on record for the respondent in the Industrial Court were Messrs Wekesa & Simiyu advocates.

15. The effect of the applicant's failure to serve the respondent's advocates with the letter seeking the proceedings is that the appellant became duty bound to lodge the appeal within sixty days from the date of filing the notice of appeal, that is to say not later than 13th December 2014.

16. Mr. Mungai pointed out that the record of appeal could not be compiled for filing in compliance with the rules as the Registrar of the High Court did not have ready the proceedings applied for until 4th December 2014 when he wrote to the applicant's advocates notifying them that the proceedings were ready for collection on payment of the requisite court charges. If the applicant's advocates had collected the proceedings soon after receipt of the Registrar's letter of 4th December 2014, the applicant would have been out of time only marginally if he applied for extension of time then and I speculate that it would have been unlikely that the court would have been disinclined to enlarge time then.

17. Perusal of the Certificate of delay exhibited by the applicant as annexture **DWG5** shows that it was not until 10th February 2015 that the court charges for the proceedings were paid following which collection of the proceedings occurred on 10th March 2015. The applicant took time to compile the record of appeal after receipt of the proceedings and it was not until after three months and twenty days that he lodged the record of appeal on 30th June 2015.

18. Mr. Njenga blamed the delay on the advocates who were on record for the applicant at the time because, according to his instructions, they did not keep the applicant abreast of what was happening and for their failure to serve the letter bespeaking the proceedings upon the respondent's advocates. He did not however assign reasons that militated against prompt collection of the proceedings after the Registrar of the court advised on 4th December 2014 that they were ready nor why the record of appeal was not compiled and lodged soon after collection of the proceedings on 10th March 2015.

19. Ms Lwila, learned counsel for the respondent, opposed the application. She relied on the respondent's replying affidavit and urged the court to dismiss the application which she termed as a classical case of indolence and tardiness. Miss Lwila drew the attention of the court to the fact that the applicant's advocates who on 14th November 2014 applied for proceedings as evidenced by the annexture DWG 3 in the applicant's notice of motion were Wari & Associates whose head paper did not (ostensibly in breach of the rules of conduct binding members of the Bar) indicate the names of the partners in the

firm nor indicate the physical location of the chambers of the said advocates. In the letter dated 19th January 2015 annexed to the application and marked as DWG4; the said advocates seem to have assumed a different name, to wit, C. K. Wari & Associates and even then, their letterheads did not reflect the names of the partners or the firm's physical address. Ms Lwila also drew the attention of the court to the fact that although the claimant in the industrial court was Daniel Githinji Waiganjo, the notice of appeal was drawn by Daniel Waiganjo Githinji who also filed the application now before me seeking extension of time. Counsel wondered whether Daniel Githinji Waiganjo and Daniel Waiganjo Githinji was one and the same person. It was also Ms Lwila's submission that the current advocates for the applicant, Muthoni G. M. & Co. did not place themselves on record to replace C. K. Wavi & Associates Advocates. The notice of change filed by Njenga Muchai & Associates Advocates purporting to replace Muthoni G. M. & Co., she said, may very well be misplaced. Ms Lwila urged me to strike out the application and/or dismiss it with costs.

20. I have carefully perused the application and the replying affidavit and duly considered the rival submissions of counsel.

21. The issue I am called upon to decide is whether the applicant has made out a case for the court to exercise its discretion under rule 4 of this court's rules to extend time as prayed in prayer 2 of the notice of motion which seeks an order –

> ***"2. That the honourable court be pleased to deem as duly filed and served the record of appeal filed on 30th June 2015 and served on 6th July 2015 arising from the judgment of the Hon. Lady Justice M. Onyango delivered on 30th September 2014 at Nairobi in the industrial cause No. 1088 of 2011."***

22. Rule 4 (supra) stipulates –

> ***"rule 4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.***

23. The application also invokes Sections 3(2), 3A and 3B of **The Appellate Jurisdiction Act**, Cap 9 of the Laws of Kenya. The overriding objective of the Appellate Jurisdiction Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate, and affordable resolution of the appeals governed by the Act. Section 3B of the Act provides that the court shall handle all matters before it for the purpose, inter alia, of attaining (a) the just determination of the proceedings (b) the efficient use of the available judicial and administrative resources (c) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

24. It is salient that the Court of Appeal Rules are designed to set time lines in litigation with a view to ensuring expeditious determination of disputes. It goes without saying that tardiness in the court process is a recipe for ridicule and ultimately loss of public confidence in the judicial intervention. It was

Lord Griffiths who stated (in the case of **Ketterman v. Hansel** [1988] 1 All ER 38) that –

> ***"another factor that a Judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their heads matter than by allowing an amendment at a very late stage of the proceedings..."***

25. Although Lord Griffiths was dealing with an application for amendment of pleadings, the sentiment expressed holds true of an application such as the instant one because in both, the issue relates to use of

discretionary power to allow a party to file pleadings or record late. The sentiment expressed in **Ketterman's** case (supra) captures the aims set out in section 3B of the Appellate Jurisdiction Act whose purpose is to further the overriding objectives specified in Section 3A of the Act.

26. In considering whether to exercise its discretionary power to extend time under rule 4 of this Court's Rules, the court will be persuaded to do so if the applicant shows that the delay was not inordinate or has satisfactorily been explained and further (and possibly) that there are chances of the appeal succeeding and the degree of prejudice to the respondent if time is extended will be none or will be negligible, always bearing in mind that each case must be viewed and decided on its own merits. As correctly stated in the case of **Mwangi v. Kenya Airways Ltd** [2003] KLR 48

> ***"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap 9) gives the single Judge 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 so long as the factor is relevant to the issue being considered."***

27. In **Peter Njuguna Njoroge v. Zipporah Wangui Njuguna** (Civil application No. Nai 138 f 2013) (unreported) I considered a similar application under section 4 of this court's rules. I stated –

> ***"The discretionary power of the Court under rule 4 is required to be exercised judicially with the object of serving justice to the parties. The policy of the Court is to sustain an appeal. As long ago as 1986, Apaloo JA, as he then was, stated in Gatu V. Muriuki [1986] KLR 211 that"***
>
> ***"the Court ought to be inclined to exercise its discretion to enlarge the time to appeal where the applicant has shown prima facie that he has arguable case for consideration."***
>
> ***"More recently, Githinji JA in WASIKE V. KHISA [2004] KLR 197 re-echoed this when he held that the discretion of the Court under rule 4 is unfettered and must be exercised judicially and that it is not every delay in taking appropriate step required that would disentitle a party to extension of time. It is only unreasonable delay which is culpable, he stated, that would disentitle an applicant to an order for extension of time and whether or not delay is unreasonable depends on the circumstances of each case."***
>
> ***"The jurisprudence that has emerged from decisions of this Court on interpretation of rule 4 shows that the factors to be considered in deciding whether to exercise the discretionary power in favour of an applicant include the length of delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice including the need to facilitate access to justice under Article 48 of the Constitution and also the need to ensure under Section 3A (1) of the Appellate Jurisdiction Act, Cap 9, that the overriding objective of the Act (Cap 9) and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals. For the purpose of furthering the overriding objectives the Court is enjoined to handle all matters for the purpose of attaining the aims set out in Section 3B(1) of the Act which include the just determination of the proceedings."***
>
> ***"In Gulam Hussein N. Cassamand and Another v. Shashikant Ramji (Civil Application No. Nai 1 of 1981) the Court acknowledged that human errors or mistakes including errors by legal advisors can constitute acceptable excuse for not acting within the timelines set in the rules or the orders of the Court. In that case, C. B. Madan, JA, as he then was, held that errors by a legal advisor can be pardoned."***
>
> ***"In Belinda Murai and 9 Others vs Amos Wainaina (Civil Application No. Nai 9 of (1978)) (unreported) C.B. Madan stated in relation to mistakes and the Court's unfettered discretionary power to extend time under rule 4."***

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice"

28. Applying these principles to the instant application, has the applicant made out a case for extension of time?

29. The applicant does not dispute that he did not comply with the proviso to rule 82(1) which required him to serve on the respondent a copy of his letter bespeaking the proceeding. The effect of this failure is that the applicant cannot take advantage of the proviso to rule 82(1) which allows exclusion of time (taken by the court in preparing the proceedings) from the sixty (60) day period for lodging appeal as stipulated in sub-rule (2) of rule 82. In effect, as the applicant ought to have filed the appeal within 60 days of the date of filing the notice of appeal, and as the notice of appeal was filed on 13th October 2014, that period expired around 13th December 2014.

30. After failing to lodge the appeal on 13th December 2014, the applicant secured a certificate of delay from the superior court. It shows that the proceedings were ready for collection early in December 2014. A letter dated 4th December 2014 was addressed to the advocates acting for the applicant advising them of this fact and requesting them to pay the requisite charges to facilitate collection. The advocates for the applicant did not pay for the proceedings until 10th February 2015 and it was not until 10th March 2015 that they collected the proceedings. No reason has been assigned either for the delay in making the requisite payment or for the delay in collecting the proceedings more than 3 months after advise that they were ready. One would have expected that upon receipt of the proceedings, the applicant would swing into action and compile and file the record of appeal pronto. But alas! It was not until 30th June 2015 that the record was filed! Again, no reason has been assigned for this delay. In these circumstances, does the applicant deserve the extension he seeks?

31. This is classical case of dilatoriness and indolence on the part of the applicant. It would be remiss of me to exercise my discretion to grant the extension sought.

32. Moreover, the advocates on record for the applicant, Muthoni C. M. & Co., do not seem to have placed themselves on record (to replace Messrs C. K. Wari & Associates Advocates who acted for the applicant) in compliance with the rules! Consequently, the memorandum of appeal and the record of appeal filed by Muthoni G. M. & Co. have not been filed by counsel on record. The notice of change of advocates by Messrs Njenga Mungai & Associates, the advocates now acting for the applicant should have been to replace C. K. Wari & Associates who gave the notice of appeal and were on record for the applicant but not Muthoni G. M. & Co. Advocates who were never on record. But no matter. The application has no merit and must be dismissed.

33. In the result, I dismiss with costs to the respondent, the applicant's notice of motion dated 6th July 2015.

Dated and delivered at Nairobi this *26th day of February 2016*.

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

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

REGISTRAR