



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 281 OF 2015 (UR 239/2015)

BETWEEN

HILDA KAARI MWENDWA.....APPLICANT

AND

ZAKAYO M. MAGARA.....1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an application for extension of time to file Notice of Appeal out of time and for applying in the Superior Court for copies of proceedings and Judgment pending the lodging, hearing and determination of the Intended Appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi dated 25.08.15 by Hon Lady Justice Maureen Onyango and delivered on 27.08.15 by Hon. Justice Nduma Nderi

in

NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT

PETITION NO. 42 OF 2012)

RULING

[1] This is an application by **Hilda Kaari Mwendwa** (applicant) seeking two principle orders to wit; - extension of time within which to apply for copies of proceedings and judgment pending before the Employment and Labour Relations Court and extension of time within which to lodge a Notice of Appeal. This application is predicated on the inherent powers under the provisions of Sections 3A and 3B of the Appellate Jurisdiction Act, as well as Rules 4, 42 & 75 of the Court of Appeal Rules.

[2] Briefly stated, the applicant was employed by the 2nd respondent on or about the 16th August 2008. On 23rd September 2010, she was transferred to the Muranga Branch offices of the 2nd respondent. It

seems the applicant was not happy with the transfer, so she wrote a letter appealing against the said transfer on account that she had two school going children and that she was also recuperating from the effects of a recent surgery she had undergone. The appellant's appeal against the transfer was unsuccessful, so she reported at the new duty station on 30th September 2010; but requested for a day off. She was therefore expected on duty on 4th October, which never happened, thus after the applicant stayed away from duty for 10 days, her services were terminated.

[3] The said termination of services was the basis of the applicants' suit by way of a petition before the Employment and Labour Relations Court in which she sought several declaratory orders, key among them was a declaration that the abrupt transfer violated her rights and it was null and *void ab initio*. She also prayed for an award of twelve months gross remuneration as damages for wrongful termination. The matter was heard by Maureen Onyango J., but the judgment was read by Nduma Nderi J., on 27th August 2015. In the said judgement, it was held *inter alia*, the applicant was not able to demonstrate how her rights were infringed upon through a transfer as the applicant had through her letter of appointment agreed to work in any station of the respondent. As regards the prayer for unfair termination, the fact that the applicant collected the transfer allowance with no intentions of reporting to the new duty station militated against granting any order for compensation for unlawful termination. However the applicant was awarded one months' salary in lieu of notice and the respondent was ordered to issue the applicant with a certificate of service and to recover the transfer allowance paid to the applicant.

[4] The applicant is aggrieved by the said judgment and wishes to appeal, but was late to file the Notice of Appeal as required by the Rules. It is against this background the applicant files the notice of motion that is supported by the following grounds;-

- a) **That, the applicant's intended appeal is arguable and with good prospects of success.**
- b) **That, the applicant has a credible and reasonable explanation on why she did not apply for certified copies of proceedings and Judgment within the required period and file the Notice of Appeal on time.**
- c) **That, this honourable court has discretion under Rule 4 of the Court of Appeal Rules to extend time limited by the Court of Appeal Rules for doing any act authorised or required by the said rules.**
- d) **That, the applicants were never served with the Notice of delivery of the Judgment.**
- e) **That, the Application has been made without unreasonable delay.**
- f) **That, it is in the interest of justice that the Applicant be granted leave to file and serve her Notice of Appeal out of time.**

[5] The said motion is also supported by the sworn deposition of **Donald B. Kipkorir**, learned counsel for the applicant and it elaborates the above grounds in greater details. During the hearing of the application, Miss Omollo held brief for Mr. Kipkorir; she submitted that their firm was not aware of the delivery of the judgment and only became aware of it towards the end September, 2015 when they were served with a copy thereto. That was after they wrote several letters to the court registry inquiring when the judgment would be delivered. They annexed copies of the said letters including a dated 28th August 2015, which seems to acknowledge judgement was delivered on 27th August 2015, but they were seeking a typed copy. Learned counsel concedes that, indeed there was delay but it was not inordinate and further that in the interest of justice, time be extended within which to file the Notice of Appeal and the record of Appeal.

[6] The application is strongly opposed by the respondents through their learned counsel, **Mr. Mabonga**. According to Mr. Mabonga, both parties were duly served with the notice of delivery of judgment which is annexed to the respondents' replying affidavit; judgment was to be delivered on the 20th August, 2015;

when both parties attended court, Wasilwa J., could not however deliver the judgment as the file was not in court; the judge therefore requested both parties to return to court on the 27th August, 2015 and a further notice to that effect was served by the court to both parties. The judgement was delivered on the 27th August, 2015 by Nduma Nderi J., on behalf of Maureen Onyango J.,

[7] Counsel pointed out that it took the applicants' counsel over one month to request the registrar for the proceedings. Furthermore the present application was filed on the 18th November, 2015 and no cogent explanation is offered for the said delay. If the applicants were candid with their predicament, they would have admitted their mistakes in failing to attend court after they were notified and also the fact that they were aware of the delivery of judgment by 28th August 2015, as per the letter to the registrar. Learned counsel stated and correctly so, that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court. In this case the reason for the delay especially in filing this application after a delay of over two months is not satisfactory thus counsel urged me to dismiss the application so as to discourage parties who abuse the court process. The respondents will be prejudiced as the applicants' prayers were disallowed on merit and litigation must come to an end.

[8] I have duly addressed my mind to the motion before me, the grounds on its face, the rival affidavits and the oral submissions by both counsel. The orders sought herein under Rule 4 of this Court's Rules, call for exercise of judicial discretion which is unfettered. However it is imperative for the applicant to demonstrate at least the following:-

a) There is merit in the intended appeal.

b) Extending the time to file the record of appeal will not cause undue prejudice to the respondent.

c) The delay is not inordinate and it is explained (See Wasike v Swala 1984 KLR 591).

[9] I wish to state on the outset the prayer for extension of time for the applicant to request for certified and typed proceedings and judgement of the High Court in order to file an appeal to the Court of Appeal from a decision of the High Court is not covered Rule 4 of the Court of Appeal Rules. This Court extends time that is limited by the Court of Appeal Rules or by the decision of a Superior Court. There was no decision made by the Employment and Labour Relations Court regarding the time within which the applicant was to seek the court proceedings. Consequently, it is my view that Rule 4 is clearly inapplicable in as far as the first prayer is concerned.

[10] The next issue and the key one, is whether sufficient reason(s) have been given by the applicant to justify an extension of time within which to lodge the Notice of Appeal. Counsel for the applicant avers that failure to lodge the Notice of Appeal in time was caused by the court registry's omission to serve the applicant's counsel on record with a Notice of delivery of the Judgment. Judgment was delivered on 27th August, 2015, thus the Notice of Appeal should have been filed within 14 days as required under rule 75 of the Court of Appeal rules. These averments are not supported by the court records which show two notices of delivery of judgment were served on both counsel; the first one is dated 13th August, 2015, addressed to both counsel and judgment was to be delivered on the 20th August, 2015. It is clear that this notice was served on both parties as the same has been signed and stamped by counsel for the applicant as well.

[11] The second notice is dated 21st August, 2015, informing parties that Judgment would be delivered on the 27th August, 2015. Unfortunately, it is not clear whether the said notice was served and received by the applicant as there is no evidence it was served. Be that as it may, it is stated in the respondents replying affidavit which was not denied by the applicant that both counsel were in court on 20th August 2015, they were informed by Wasilwa J., the judgment would be delivered on the 27th August 2015. Counsel for applicant did not attend court but the fact that they wrote to court on the 28th August 2015, asking to be furnished with a copy of the judgment is a clear indicator that they were aware the judgment

was delivered on 27th August 2015. The contention by counsel for the applicant that they came to know judgment was delivered towards the end of September, 2015 when they received a copy of the Judgment is not factually correct. As is seen from their letter dated 28th August, 2015 to the Deputy Registrar, requesting for a copy of the judgment, the applicants' counsel was aware of the judgment thus a Notice of Appeal should have been filed in compliance with Rule 75 of the Rules.

[12] The present application was filed on the 18th November, 2015 that is almost six weeks late; in my view no cogent explanation has been offered for this delay any delay must be explained by the party in default. In the case of;- **Rael Munyaka & 6 Others v Waitaluk Land Disputes Tribunal & 3 others {2007} eKLR** Onyango Otieno JA while considering a similar application as this one for extension of time, stated and rightly so that every delay must be explained by a party at fault. Timelines are set for purposes of achieving timely dispensation of justice, predictability and uniformity or equality of arms meant for all the parties.

[13] On the second limb of whether the applicant satisfied me that the intended appeal is not frivolous; in evaluating the material before the High Court, I am conscious that the pronouncements that I make, at this stage should not deeply delve into the merits of the appeal, which is province of the three Judges. Regarding the chances of the intended appeal succeeding, the applicant did not avail a draft memorandum of appeal to assist me gauge that, but looking at the judgement, which I do with abundant caution while recognizing my view does not at all count, I am not persuaded of its aguability. See the case of;-

Geoffrey Makana Asanyo v National Bank of Kenya Ltd. Civil Application No. NAI. 132/99 (UR). It was held that:

“..... it is clear to us that a learned single Judge has no power to reject an application on the basis that it lacks merit or substance.”

This Court also stated in the case of: AFRICAN AIRLINE INTERNATIONAL LTD. V EASTERN SOUTHERN AFRICA TRADE & DEVELOPMENT BANK (PTA BANK) 2003 KLR 140, the Court stated thus:

“We wish to emphasize that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to facts of a particular case. No doubt in some cases, it may be material to have regard to the merits of the appeal: because it may be wrong and indeed an unkindness to the appellant himself, to extend his time for appealing, after he has allowed the time to lapse, to enable him to pursue a hopeless appeal this is why a single Judge is entitled to examine whether there was any material on record which may be Judicially considered. The process of analysis of such material, however, and the pronouncement with finality that the intended appeal has no substance, lacked merit or was frivolous, remains within the province of the full court....”

[14] For the foregoing reasons, I am not persuaded the instant applicant deserves the exercise of this court's discretion. Therefore I find the notice of motion dated 18th November, 2015, lacking in merit and it is hereby dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 22nd day of February, 2016.

MARTHA K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR