



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 323 OF 2014 (UR 246/2014)

BETWEEN

FRED V. MWARA APPLICANT

AND

UNGA LIMITED RESPONDENT

(An application for extension of time within which to file and serve the Notice of Appeal and the Record of Appeal against the Judgment/Award of the Industrial Court at Nairobi (James Rika,J) dated 8th April, 2013 In Industrial Cause No. 1219 of 2010)

RULING

1. The applicant herein has approached this Court under the provisions of **Rule 4** of the Court of Appeal Rules (the Rules) seeking leave to file a notice of appeal and record of appeal out of time against the award dated 8th April, 2013 of the Industrial Court now known as the Employment and Labour Relations Court.
2. Following his summary dismissal as a silo attendant, the applicant filed a claim against the respondent in the trial court seeking *inter alia* damages for wrongful dismissal. At the conclusion of the trial, the learned Judge (Rika, J.) by an award dated 8th April, 2013 dismissed the applicant's claim with no orders as to costs. It is that decision that is the basis of the intended appeal.
3. The reasons for the delay as deposed by the applicant's advocate, M/s Judith A. Guserwa, is that after receiving instructions from the applicant to lodge an appeal against the award on 30th April, 2013 she instructed an associate in the firm, one Mr. Orwa Collins, to file both the notice of appeal and record of appeal on 6th May, 2013. The said advocate did file the notice of appeal on 6th May, 2013. However, he left the firm abruptly without filing and serving the record of appeal on time. Ms Guserwa deposed that the said delay was neither intentional nor inordinate and that the intended appeal is arguable.
4. In opposition, Mr. Dickens Mitawia Ouma, learned counsel for the respondent, deposed that the application lacked merit on the grounds that there has been inordinate delay on the applicant's part because he had taken over 21 months after the delivery of the award to file the current application;

the explanation given is unreasonable; there is no proof on record that the applicant had applied for certified proceedings in writing or service of such application on the respondent as required under **Rule 82 (1) & (2)** of the Rules. In respect of whether the appeal is arguable, the applicant has not set out any grounds he intends to rely on to enable the court weigh the same. Mr. Ouma deposed further that in the event leave is granted the respondent would be highly prejudiced since the matter was determined by the trial court long time ago and litigation ought to come to an end.

5. I have considered the motion, the affidavits, submissions of both counsel and the law. Whether or not the order for extension of time should be granted lies entirely in my unfettered discretion. That discretion must however be judicially exercised and in doing so I recall the guiding principles often cited which I take from **Leo Sila Mutiso -vs- Rose - Civil Application No. Nai. 255 of 1997 (unreported)** as follows:

“It is now 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 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”.

6. As succinctly put by M’ inoti, J.A. in **Joseph Wanjohi Njau -vs- Benson Maina Kabau [2013] eKLR** the length of delay must be considered in light of the explanation that has been advanced. It is not in dispute that the award was delivered on 8th April, 2013. The applicant in his further affidavit admitted that he instructed his advocate on record to file the notice of motion on 30th April, 2013, 22 days after the decision. **Rule 75(2)** of the Rules requires that a notice of appeal should be filed within 14 days of the impugned decision, that is on or before 22nd April, 2013. No explanation has been given for the delay in giving the said instructions and filing of the notice of appeal out of time on 6th May, 2013. The only explanation given is that M/s Guserwa instructed an associate to file the notice of appeal and record on 6th May, 2013 which he failed to do so. I cannot help but note that the current application dated 10th December, 2014 has been brought about 19 months after the expiry of the requisite time frame to file the Notice of Appeal. Again the reason advanced by the applicant’s advocate at the bar that her associate failed to file the application within reasonable time contrary to her instructions does not hold much weight. Questions that linger in my mind are, all this while where was applicant? Was he following up on his matter? As I understand the applicant’s position is that he attributes the delay to the said associate. In **Bi-Mach Engineers Limited -vs- James Kahoro Mwangi [2011] eKLR** Waki, J.A observed,

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment.”

I therefore find that the length of delay was inordinate and no reasonable explanation was advanced.

7. On the arguability of the intended appeal no grounds were placed before me by the applicant to enable me determine the same.

8. I would in the circumstances be disinclined to exercise my discretion in favour of the applicant. There must be an end to litigation and the reopening of this matter after the unexplained delay would be prejudicial to the respondent. The application is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 11th day of March, 2016.

ALNASHIR VISRAM

JUDGE OF APPEAL

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

DEPUTY REGISTRAR