IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 106 OF 2015

BETWEEN

VITALIS OMONDI OTHUON…….…….....APPLICANT

AND

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION……..……..…
RESPONDENT

(An Application for extension of time within which to file and serve a Notice of Appeal as well as the Record of Appeal out of time arising from the Judgment of the High Court of Kenya at Nairobi (Nzioka wa Makau, J) delivered on 14th June 2013 in Industrial Cause No. 99 of 2012)

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R U L I N G

The applicant, **Vitalis Omondi Othuon**, acting in person, filed the notice of motion dated 24th April 2015, seeking an order for enlargement of time within which to file and serve the notice of appeal, and the record of appeal.

The application is predicated on some four grounds on its face and supported by the applicant's affidavit which is undated. The judgment the applicant seeks to appeal against was rendered on 14th June 2013.

In his statement of claim filed on 19 four main prayers which included one for November 2009, the applicant sought reinstatement to his previously held position, *as if* his employment had not been terminated. He nonetheless sought several other prayers "*in the alternative to the demand for reinstatement*". These prayers were for terminal dues; any other statutory entitlement; and that he be issued with certificates of service.

After considering the matter and the evidence before the court, the learned Judge declined to award the prayer for reinstatement, and instead granted the alternative prayers sought by the applicant. The award

included an amount Ksh.1,633,886.80/= together with costs and interest until payment in full.

The applicant did not prefer an appeal against that award. Instead, he instructed his advocates then on record to file an application for review.

An application for review was filed but according to the applicant, the same did not ask for a review of the judgment to include an order of reinstatement. The application was allowed, but it was only for correction of some errors on its face. According to the applicant, he came to learn of the outcome of the review application in October 2013, by which time, the time prescribed for filing of the notice of appeal had already expired.

Due to some differences between him and his advocates, the advocate refused to allow him to act in person until 18th March, 2015 and this prolonged the delay in the filing of the notice of appeal. In his view, the delay of twenty two (22) months had therefore, been sufficiently explained, and this Court should consequently grant him the extension of time he seeks.

The application is opposed by the respondent vide the replying affidavit of Justus Wabuyabo sworn on 11th June 2015. It is the respondent's contention that having filed the application for review and seen it through, the applicant is debarred in law from filing an appeal from the same judgment.

On the issue of delay, the respondent maintained that a period of twenty two (22) months is inordinate by any standards, and further that the delay involved has not been adequately explained, and the same should not be countenanced by this Court.

On the issue as to whether the applicant's appeal has good chances of success, the respondent's averment is that the intended appeal is devoid of merit and has no chances of success.

The respondent's case is also that it will be greatly prejudiced if the applicant is allowed to reopen the case as it paid the monies as ordered by the court and has already closed its file. Reopening the matter, learned counsel for the respondent submitted, would infringe on the respondent's legitimate expectation that disputes against it would be determined timeously. The respondent urged the court to dismiss this application. These sentiments and averments were buttressed by the applicant in his oral submission in court and by Mrs. Kinara, learned counsel for the respondent.

I have considered these submissions, the rival affidavits of the applicant and the respondent, and the law applicable in this matter.

To start with, it is now well settled that the Court has unfettered discretion to grant or not to grant extension of time under **Rule 4.** This holds true today as it did in 1997 when this Court expressed itself as follows in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No. Nai 251 of 1997:-**

> ***"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 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."***

Ordinarily therefore, what I should be endeavoring to answer is whether the delay in this case was inordinate; whether the same has been sufficiently or adequately explained; whether the respondent stands to suffer prejudice if the application is allowed; and finally whether the applicant's intended appeal has any chances of success.

In this case, there was a delay of about twenty two (22) months. That delay, unless adequately explained, would be properly deemed as inordinate.

How has it been explained?

According to the applicant, he decided to instruct his counsel to file an application for review of the judgment. The application for review of the judgment was predicated on **Section 3** and **16 of the Industrial Court Act 2011, Rule 32(1) b** and **32(3) of the Industrial Court (Procedure) Rules 2010.** Under **Rule 32(1) b,** an aggrieved party can move the court to review a decree, an order, or judgment of the court on account of some mistake or error apparent on the face of the record.

According to the notice of motion for review, paragraph one of the claim contained an error as it stated that the claim was filed on 19th November 2009, while the same had been filed on 25th January, 2012. There was another error in that paragraph 10 of the award/judgment was incomplete.

It is worth noting that grounds (iii) on the face of the application stated that

> *"the rest of the judgment is okay"*. The application was supported by applicant's affidavit which confirmed that the amendments would not alter the judgment in any way. The said application was allowed and the offending parts of the judgment were corrected.

According to the applicant however, his instructions to his counsel was to challenge the contents of the judgment itself. I do not wish to delve into those details as that is not necessary for purposed of this ruling.

It was the applicant's explanation that his differences with his then counsel on record were as a result of counsel not applying for a full review of the judgment to include an order for reinstatement to his former job. He averred that this disagreement took too long to settle and his counsel refused to file a notice to cease acting for him to enable the applicant to file the notice of appeal in person.

The notice to cease acting was filed on 18th March 2015, and this application was filed on 24th April 2015. This would therefore, place the delay at about five weeks.

His submission was that an advocates fault, or misdeed should not be visited on an innocent client. Even if I am prepared to find the delay herein as having been sufficiently explained, that would only satisfy the first two requirements a party must satisfy under **Rule 4 of this Court's Rules**. That would bring me to the issue of prejudice to be occasioned to the respondent, and finally to the issue of probability of the applicant's appeal succeeding.

On the issue of prejudice, it is common ground that the award in respect of payment of damages has already been satisfied. The applicant has already pocketed the money. According to the learned counsel for the respondent, their act of settling this part of the award, gave the respondent the legitimate expectation that the matter had been settled.

Reopening the same will subject the respondent to grave prejudice.

I am inclined to agree with learned counsel on that aspect. If the applicant felt strongly that the award was inadequate and he wanted to lodge an appeal against it, then he should not have taken the money. He cannot keep the money, and then re-open the matter to seek reinstatement. He cannot have his cake and eat it. That would be subjecting the respondent to double jeopardy.

On the issue of the probable success of his appeal, the less I say about it, the better. This is so because the applicant still has recourse to have this application heard by a full bench, which may differ with me. As far as I am concerned however, once a party seeks orders in the alternative, it gives the court the latitude to deny the main prayers and grant the alternative prayers.

If then a party is granted the alternative prayers, then it cannot fault the court for opting to grant the alternative prayers in lieu of the main prayers sought. I am not convinced that the applicant herein has an appeal with any probability of success.

In my considered view, this application fails to meet the threshold set for applications of this nature to succeed.

For these reasons, I must decline the plea for extension of time sought. I find this application devoid of merit and dismiss the same with costs to the respondent.

Dated and delivered at Nairobi this 13th day of May, 2016.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR