



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

(CORAM: G.B.M. KARIUKI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 218 OF 2014 (UR 170/2014)

BETWEEN

BENSON WAFULA WASWA APPELLANT/APPLICANT

AND

LUCY KAGURE WANJOHI RESPONDENT

***(Application for extension of time within which to file a notice and record of appeal out of time in an intended appeal from the Judgment of the Industrial Court of Kenya at Nakuru, (Ongaya, J.)
Delivered on 30th April, 2014***

in

H.C.C.A. NO.66 OF 2005)

RULING

1. Benson Wafula Waswa (**the applicant**) applied to this Court on 11th August 2014 by way of notice of motion seeking orders that this Court be pleased to –
 1. (*spent*)
 2. ***Extend time within which to lodge and serve the notice and record of appeal***
2. The application was made on the grounds that following the dismissal with costs of the applicant's claim by the Industrial Court on 30th April 2014, the applicant did not lodge appeal within the time stipulated by the rules because he was in Sudan for 4 months.
3. In his affidavit sworn on 11th August 2014 in support of the application, the applicant averred that he visited his advocates on 25th July 2014 and was handed a copy of the judgment delivered by the Industrial Court on 30th April 2014. He avers that he instructed his advocates, **M/s Andambi & Co.**, through his letter to them dated 28th July 2014, to appeal against the said judgment. He does not give the date when he gave the instructions but he contends that he has a good appeal against the decision of the Industrial Court dismissing his claim with costs. He further avers that the respondent is not likely to suffer any prejudice if the application is allowed.

4. It is glaring that the applicant has not stated when he went to or came from Sudan but it is apparent that it was before 25th July 2014 as he was in Kenya on the latter date and collected from his advocates a copy of the judgment delivered by the Industrial Court on 30th April 2014.
5. The application was opposed by **the respondent**, K.K. Security, whose correct name according to the judgment of the Industrial Court is “**K. K. Security Company Limited.**” In its replying affidavit sworn on 11th March 2015 by Henry Bwire, the respondent’s Corporate Affairs Manager, the respondent casts aspersions on the applicant’s allegation that he was in Sudan for 4 months. Further, the respondent contends that the applicant had legal representation in the Industrial Court and that his advocates should have taken the necessary action to obviate delay which has led to the making of this application. It was the respondent’s contention that the applicant has not “*demonstrated any efforts made towards communicating with his advocates while in Sudan in an attempt to follow up on the litigation and has therefore not shown seriousness in the matter and does not therefore deserve the order he seeks.*” The respondent does not think the intended appeal raises triable issues.
6. When the application came up for hearing before me on March 15th, 2016, learned counsel **Mr. J. Ombati** held brief for Mr. Andambi for the applicant. He urged the Court to allow the application to facilitate determination of the appeal on merit. It was his submission that the appeal has chances of success and that it raises triable issues. He reiterated the averments in the affidavit in support of the application and contended that the applicant was in Sudan for 4 months and that “*he has shown interest in pursuing the appeal.*” In his view, the respondent will not suffer any prejudice if the application is allowed.
7. Relying on the replying affidavit, learned counsel **Mr. George Kamau** on behalf of the respondent in opposing the application submitted that the applicant did not show that he had made a follow up of the matter and had not annexed either a copy of the proposed notice of appeal or memorandum of appeal. Moreover, he said, the applicant had not applied for the proceedings as no copy of letter bespeaking the proceedings was annexed. In counsel’s submission, the application was an afterthought to forestall payment of costs awarded to the respondent following dismissal of the applicant’s claim. It was counsel’s submission that the applicant was casual in the manner in which he dealt with the matter.
8. I have perused the application and the replying affidavit. I have also given due consideration to the rival submissions made by counsel for the parties. The burden reposed on the applicant to show that he deserves the order for extension of time which he seeks. It was incumbent on the applicant to show that the delay in giving notice of appeal was not inordinate or that there is plausible explanation for it. The standard of proof is that obtaining in civil proceedings, to wit, on the balance of probabilities.
9. The power to extend time under rule 4 of this Court’s Rules is discretionary. The rule states –

“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 of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

10. The rules of this court set timelines in litigation so as to ensure expeditious determination of disputes. Tardiness in court process invites ridicule and results in waning of public confidence in judicial intervention. It goes without saying that in modern day, legal business ought to be conducted efficiently. Negligent conduct in litigation has been said to be antithetical to the interest of justice. In **Eastleigh Mattresses Ltd Versus Stephen Mihang’o Kariuki & 2 Others** [Nairobi Civil Application No 208 of 2014] [unreported] I pointed out that –

“this court will be persuaded to exercise its discretionary power under rule 4 to extend time to file notice of appeal out of time if the applicant shows that the delay was not inordinate or has been satisfactorily 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 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 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 fact is relevant to the issue being considered.”

11. It was in **Leo Sila Mutiso versus Rose Helen Wangari Mwangi** [Civil Application No Nai 255/97 that this court in the ruling of the single judge held that –

“it is now well 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 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.”

12. In **Mukenya Ndunda v Crater Automobiles Ltd** [Nairobi Civil Appeal No.101 of 2014] (unreported) this court pointed out in paragraphs 14 and 15 of the ruling in the case that –

“...where a litigant has been tardy or flippant or has without sufficient cause, failed to observe the rules of procedure, the Court will be disinclined to exercise its discretionary power to forestall the consequences of non-observance with the rules. The new dispensation ushered in by Article 159 (3) (d) of The Constitution did not do away with the principle of fairness which is the basis in our jurisprudence nor did it oust the need for consistency and precedent.

Emphasizing the importance of rules of procedure, Lord Radcliffe put it thus in Esso Petroleum Co. Ltd v. Southport Corporation. (1956] AC 218 at pg 241 on the issue –

“Proper use of them (i.e. rules of procedure) shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them pedantry or mere formalism, I do not see what part they have to play in our trial system.”

So as to further the overriding principles, the Court is enjoined to determine appeals justly. Undue regard to procedural technicalities should not thwart administration of justice (Article 159 (3)(d) of the Constitution).

13. In the instant application, judgment was delivered on 30th April 2014. The applicant was represented by counsel. No letter bespeaking the proceedings has ever been written to the court by the applicant or his counsel. No explanation is given for this default. The applicant was enjoined by rule 75 of the Rules of this court to give notice of appeal within 14 days of the date of delivery of the judgment on 30th April 2014. That period expired on 14th May 2014. The reason why no notice of appeal was given by the applicant (and possibly why the applicant’s counsel did not apply for the proceedings within 30 days of the date of delivery of the judgment) is because the applicant was in Sudan (and, ostensibly, his advocates did not have instructions to pursue an appeal). When did the applicant go to Sudan and when did he come back to Kenya. It is said that the applicant was in court during the hearing of the matter on 4th March 2014 as well as on 13th March 2014. He was however not in Court on 26th March 2014 when the court gave the date for delivery of the judgment. The applicant had a duty to be candid and to make full disclosure of all the relevant factors militating against his ability to comply with the rules. He failed to show when he went to and returned from Sudan. These dates are important as they will show the court when the applicant was in Kenya or was outside Kenya and hence whether he was proactive or had gone into a slumber. Without these facts, it is impossible to determine whether the attendant delay was attributable to indolence and lethargy or was due to the fact of the applicant being absent from Kenya. It was the duty of the applicant to place these facts before the court. He did not.

14. Ostensibly, after returning to Kenya from Sudan, and after obtaining a copy of the judgment on

25th July 2014 from his advocates, the applicant states that he instructed the latter in his letter of 28th July 2014 to appeal. But it was not until 11th August 2014 that the instant application was made. Even assuming that the period between 24th July 2014 and 11th August 2015 was not inordinate, the delay of 2 months and 25 days between 30th April 2014 and 25th July 2014 has not been satisfactorily explained. The applicant merely states that he was in Sudan for 4 months. He does not state when he left Kenya for Sudan or when he returned to Kenya. In effect, he has failed to show that time for appealing run out when he was in Sudan. It was his duty to satisfactorily explain to the court the cause of his failure to give notice of appeal and to lodge the appeal within the time stipulated by the rules. Where a litigant has a good excuse for the failure to comply with the rules, he must candidly state the facts in explanation for the delay to enable the court to make a decision in his favour. If he does not, the court cannot assume that he has a good excuse. In absence of such explanation, the position of such applicant may not appear any different from that of a person who has no valid excuse for the failure to comply with the rules. In the instant application, the applicant does not show when he went or returned from Sudan. These were vital facts which have been kept away from the court. The applicant has failed to satisfy the Court that his being out of Kenya impeded his ability to pursue the intended appeal. Consequently, his application fails. It is dismissed with costs.

Dated at Nakuru this 12th day of May, 2016.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR