IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CIVIL APPLICATION NO. NAI. 27 OF 2016

BETWEEN

MUGURE MAHINDA ……APPLICANT

AND

ALI MOHAMMED FARAH ……..RESPONDENT

*(An **application for extension of time to file Notice of Appeal out of time and for applying the Superior Court for copies f 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 (N. Nderi, J) dated 27th August 2015***

In

Employment & Labour Relations Court

Petition No.42 of 2012)

RULING

On the 6th day of May 2011 M. J. Anyara Emukule J. delivered a ruling in Nakuru **HCCCA Number 7 of 2007, Mugure Mahinda versus Ali Mohamed Farah**, in which the learned Judge upheld the respondent's preliminary objection, and dismissed the applicant's notice of Motion dated 24th day of February 2010, vide which the applicant had sought review and the setting aside of the order issued by the said High Court on the 29th day of June 2009 dismissing the applicant's application. The applicant was aggrieved by the said dismissal order and desired to appeal against it but was unable to comply with the timelines set out in Rule 75 of the Rules of the court hence the filing of the application under review.

The Application

The Notice of Motion is dated the 9th day of December 2015. It is expressed to be brought under Rule 4 and 42 of the Court of Appeal Rules, 2010. In it the applicant substantively seeks one relief, namely:

"(a) That leave be granted to the Applicant to file and serve the record of appeal in respect of

the appeal, herein".

It is grounded on the grounds in its body and a supporting and further affidavit. It has been opposed by a replying affidavit deposed by the respondent, Ali Mohammed Farah on the 29th day of February 2016 and filed in the Court's registry on the 14th March 2016.

Representation

At the hearing learned counsel O. H. J. Okeke holding brief for Mr. Duncan Mindo appeared for the applicant, while learned counsel Mr. Mongare Gekong'a appeared for the respondent.

Applicant's submission

In his submission before me Mr. Okeke reiterated the contents of the supporting affidavits together with annexures annexed thereto. In summary, it is the applicant's contention that she was aggrieved by the ruling delivered on the 6th day of May 2011. She initiated the appeal process against the said decision by the lodging of a Notice of Appeal dated the 19th day of May 2011 annexed to the supporting affidavit.

Second, her advocate applied for copies of proceedings on the 18th day of May 2011. It was not until the 21st day of April 2015 when these were supplied to her advocate. She did not however apply for leave to file the appeal record out of time timeously because the secretary to her advocate inadvertently just kept these in the office waiting for her (the applicant) to come and consult the advocate on the way forward. The said secretary did not also alert her advocate about the presence of the said typed proceedings. It was not until the 9th day of December when her advocate allegedly made inquiries about the said proceedings and that is when they were handed to him. He promptly prepared the application on the same 9th day of December 2015, but it was not until the 8th day of January 2016 that the application was lodged in the court's registry. The applicant has also cited poor health as supported by medical documents annexed to the further Affidavit and financial constraints since she retired from the teaching profession in 1986 as other impediments to quick processing of her appeal process.

Case Law

To buttress her arguments, she has relied on the following cases namely **Hilda Kaari Mwendwa versus Zakayo M. Magara & 2 others (2016)** eKLR; **Aviation Cargo Support Limited versus St. Mark Freight Services Limited [2014] eKLR;** ***Cyrus Muriithi Mathangani versus Rose Wanjiru Mbai*** **[2013] eKLR** and **James Migwi & another versus Susan Wanjiku Mwangi [2013] eKLR**, all for the propositions that: (i) although the orders sought under rule 4 of the Rules of the court call for the exercise of judicial discretion which is unfettered, it is however imperative for the applicant to demonstrate at least that there is merit in the intended appeal; that the extension of the time to file the record of appeal will not cause undue prejudice to the respondent, and lastly that the delay is not inordinate and it is explained; (ii) such exercise of discretion should be exercised flexibly with regard to the particular facts of each case; (iii) where there has been delay, it is not only the reasons for the delay that are to be given but also the steps taken by the applicant to ensure that such applicant came to court as soon as he/she was capacitated.

Respondent's submissions

In response to the applicant's submissions, Mr. Gekonga also reiterated the content of the replying affidavit. It is his argument that the applicant's application has not met the threshold for the exercise of my discretion in her favour for reasons that first, it has been brought in bad faith; second, there were no other follow up steps taken by the applicant's advocate to follow up on the letter requesting for typed proceedings of 13th May 2011 to enable her expeditiously prosecute her intended appeal process. Third, no action was taken by the applicant to expedite the progression of the intended appeal process despite being probed by the respondent's advocate. Fourth, no explanation has been given as to why the

applicant took eight (8 months) from 21st April 2015 when capacitated with typed proceedings to present the application under review. Fifth, no documentation has been exhibited by the applicant to show that age and ill health prevented her from communicating effectively and regularly with her advocates over the progression of the intended appeal process. Sixth, it is his contention that the intended appeal process is an abuse of the court process grossly intended to prejudice the respondent because the award forming the judgment delivered way back on 13th December 2002 was within the acceptable limits for that type of claim; the applicant has never shown any interest in prosecuting the intended appeal process. The application is merely an afterthought and one of the many numerous other applications employed by the applicant as a tactic to frustrate and prevent the respondent from enjoying the fruits of his judgment and lastly that the intended appeal raises no triable issues.

It was also Mr. Gekonga's argument that litigation that which spans over a period of more than 19 years with a judgment of fourteen (14) years old should be brought to an end in the interests of justice to both parties. The applicant is guilty of laches as her first move to appeal against the judgment was dismissed on the 29.6.02. It was not until the 24th day of February 2010, eight (8) years later that the applicant sought review of the said order.

Applicant's reply to respondent's submission

In reply to the respondent's submission Mr. Okeke urged that the errors and omissions in the failure to institute the appeal process timous are not attributable to the applicant, but partly attributable to the court in its failure to supply a typed copy of the proceedings in time and partly due to her advocate's failure to make a follow up on the prompt supply of the proceedings. Mr. Okeke also urged me to invoke the overriding objective principle to meet the ends of justice to both parties.

Analysis

Rule 4, under which my jurisdiction to intervene has been invoked provides;

> ***"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 a time should be construed as a reference to that time as extended".***

G. B. M. Kariuki JA in his decision in Aviation Cargo Support Limited versus St. Mark Freight Services Limited simply put it as follows:

> ***"The order when or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the court to exercise its discretion in favour of an applicant the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable. In normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time".***

As for the parameters for the application of the overriding objective principle this court has expressed itself on the applicability of this principle in the decision in the case of **City Chemist (Nbi) & another v. Oriental Bank Limited Civil Application No. Nairobi 302 of 2008 (UR 199/2008**

> ***"The overriding objective thus confers on the court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any of or the attributes of the overriding objective. The overriding objective does***

not however facilitate the granting of orders seeking leave of extension of time to file record of appeal where the applicant has not shown to the satisfaction of the court that the delay is not inordinate or has been explained to the satisfaction of the court."

In the light of all the above, it is my view that there is no dispute that the litigation under review spans over a period of nineteen (19) years while the fruits of the judgment withheld from the respondent spans over a period of fourteen (14) years. It is apparent that the applicant's move to seek the court's intervention with regard to that judgment have all along been met with dismissal orders. The reasons for the said dismissals, were captured in the ruling intended to be appealed against thus:-

"The appeal was dismissed on 5th November 2007. The applicant moved to court to set aside the orders of dismissal and on 12th May 2010, the orders of dismissal were set aside on condition that the appeal be prosecuted within 1 days. These orders were not complied with. The application for extension of time was dismissed on 29th June 2009…. Thereafter the applicant went to sleep. The application for review is dismissed……".

The application for extension of time within which to prosecute the appeal were dismissed on 29.6.09. It was not until the 24.2.010 that a review of the said orders was made and subsequently dismissed on the 6th May 2011. The applicant promptly sought a typed copy of the proceedings for appellate purposes. These were not supplied until the 21st day of April 2015. The applicant has exhibited a certificate of delay to that effect. It is therefore my finding that the applicant has satisfactorily explained the delay in presenting the application between the 6th day of May 2011 when the dismissal order was rendered up to the 21st day of April 2015 when a typed copy of the proceedings was availed to her.

The applicant is also obligated to explain any delay between the date when capacitated to take action to the date when the action is taken. That is between the 21st day of April 2015 when the typed copy of the proceeding was availed to her and the 8th day of January 2016 when the action was taken over a period of eight (8) months. The applicant has blamed old age, ill health, and inadvertence in her advocate's office. There is no demonstration as to how old age hampered her progression of the intended appeal process. As for the health issues, the applicant has indeed annexed documents to her further affidavit which appear to show attendances at the Aga Khan hospital. But there is no attendant covering letter or medical report to show how these attendances affected the applicant's movements between her home and the advocates office to impress upon her advocate to progress her appellate process. As for inadvertence on the part of her advocate, there has been no deposition from the alleged secretary or any other authorized person from her advocate's office to explain what actually happened.

Mr. Okeke has urged me not to penalize the applicant for wrongs committed against her by her advocate's office. In **Owino Ger versus Marmanet Forest Co-operative Credit Society Ltd [1987**] eKLR the court observed thus:

"Indeed clients should not rely on the mistakes of advocates. The reasons given must be adequate, the prejudice to the respondent considered, as well as the chances of the appeal succeeding.

…. True enough at one time, the discretion to extend time was exercised within strict boundaries, and mistakes of advocates and their clerks for whom they were responsible, were not matters which would attract the exercise of the discretion. Very strict rules were observed as to the quality of the reasons to be given for the extension of time. Mr Muthoga cited examples of decisions of this nature. But fortunately the tide changed originally with the decision in Gatti v Shoosmith [1939] 3 All ER 916, and taken in the same spirit was the amendment of rule 4 of this court's rules. It was wise to leave this court with an unfettered discretion to examine the quality of all the mistakes which may occur, whether by an advocate and his firm or a client himself. But even before the amendment it was foreshadowed by such important decisions as Belinda Murai v Amos Wainaina, Civil Application No. 9 of 1978

when an advocate's bona fide error on a point of law was held to be a mistake in the nature of a special reason. Again in <u>Cassam v</u> Sachania, Civil Application No. 21 of 1982 an advocate's wrong interpretation of a rule led to the exercise of the discretion. Other examples are Peterson Mbogori & Another v Farhax T Aliwala Mombasa Civil Application No. 34 of 1983 and Kisee Maweu v Liu Ranching & Farming Co-operative Society Ltd, Civil Application No. 2 of 1983. On the other hand when too many mistakes have been made, the court has not hesitated to decline to extend time; See Stephen Muriithi Gitahi v Jesse Mugo Gitahi, Civil Application No. 51 of 1984 and the recent decision in Kirpal Signh Sirha v Barclays Bank Ltd, Civil Application No. 115 of 1986."

Also in **<u>CFC Stanbic Limited versus John Maina Githaiga & Another [2013] eKLR the following observation was made:</u>**

"On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant.

This Court is guided by the case of <u>LEE G. MUTHOGA V HABIB ZURICH FINACNE (K) LTD & ANOTHER, CIVIL APPLCIATION NO. NAI 236 OF 2009,</u> where this Court held:

'It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight."

See also Nambuye, J.A in her Ruling in <u>CATHERINE NJUGUINI KANYA & 2 OTHERS versus COMMERCIAL BANK OF AFRICA LTD, CIVIL APPLICATION NO. NAI 366 OF 2009</u> where in the following observation was made:-

"As correctly observed by the learned Judge, litigants place a lot of trust in the good workmanship of their agents but sometimes this fails and where there has been apparent failure on the part of the advocate in the performance of that role, a court of law has to play a balancing act so as not to visit the sins of such advocate on to his client. As observed by the learned Judge such lapses do occur. In <u>MAINA versus MUGIRIA [1983] KLR 78,</u> Chesoni Ag JA (as he then was)byway of Obiter had this to say:-

'It is unfortunate that advocates' sins and omissions are sometimes visited on their clients, who are left without the remedy they sought but to sue the advocate for professional negligence, but where the litigant shows that his default has been due to the advocates' mistake in an application of this nature, unless injustice would be occasioned to the other party the court should consider the applicant's case with broad understand. In Joseph Njuguna Muniu versus Medicino Gionvanni [1998] e KLR and Lee Muthoga versus Habib Zurich Finance (K) Limited and Joseph M. Githoro Nai 236 of 2009 (UR) this Court excused the advocate's failure to diarize hearing dates resulting in default orders being made against their clients. In granting reprieve in the Joseph Njuguna case (Supra) the court observed that such administrative mistakes sometimes do occur in offices of busy practicing advocates and when these do occur the business of the court is to note that it has power to revoke the expression of its coercive power where that has been obtained by failure to follow any of the rules of procedure and also that there are no limits or restriction on the judge's discretion except that it be exercised or withheld on terms as may be just, the main concern of the court being to do justice between the parties."

Applying the above reasonings to the circumstance of this application; it is my view that the applicant needed not to instruct her advocate afresh to present the application for leave to appeal out of time after the advocate was supplied with a typed copy of the proceedings. It is also the advocate's fault that the secretary did not depose an affidavit to that effect explaining the reasons for the delay in failing to

hand over the typed proceedings to the advocate promptly these had been supplied with a view to filing an application for leave to appeal out of time. The applicant has no control over the running of her advocates office. Mr. Okeke was therefore right when he urged that the applicant should not be penalized for the mistakes of her advocates' office. It is appreciated the litigation has taken long and the Respondent unduly kept out of reach of the fruits of the judgment rendered in his favour. However interests of justice demand that the applicant be given an opportunity to progress her quest for the appellate process on its own merits.

In the result and for the reasons given above, I am inclined to exercise my discretion in favour of the applicant on the conditions that:-

1. The Notice of appeal is filed and served within 7 days of the ruling.
2. The Record of appeal is filed within 21 days of the ruling.
3. Costs of the application to the Respondent to be agreed or assessed.

Dated and delivered at Nakuru this 16th day of June, 2016.

R. N. NAMBUYE

JUDGE OF APPEAL