IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & AZANGALALA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 152 OF 2014

JAMES OMWOYO NYANG'AU.....APPELLANT

AND

THE HERITAGE INSURANCE COMPANY LIMITED.....RESPONDENT

(Being an application for extension of time to enable and allow record of appeal field on 20 th June, 2014 deemed as properly filed same arising from the award and order of the Industrial Court of Kenya at Milimani (Nairobi), (Rika, J.) dated 7th February, 2013 in Industrial Cause No. 299 of 2012)

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RULING OF THE COURT

[1] On 7th February, 2014, ***Rika, J.,*** in ***Industrial Court Cause No. 299 of 2012***, awarded ***James Omwoyo Nyang'au***, *(the applicant),* Kshs. 700,000/- as general damages for breach of contract of employment against the ***Heritage Insurance Company Limited***, *(the respondent).* The applicant had claimed Kshs. 27,607,000/= among other reliefs. The applicant was aggrieved with that award and he timeously lodged a notice of appeal on 20th February, 2014, through his advocates, ***Nyagito and Company***. He lodged ***Civil Appeal No. 132 of 2014,*** on 20th June, 2014 through the same advocates. The appeal was lodged two months outside the time stipulated in ***Rule 82 (1)*** of this ***Court's Rules***.

[2] On 24th June, 2014, the applicant through the same advocates, then lodged an application under ***rule 4*** of this ***Court's Rules*** seeking that the record of appeal lodged on 20th June, 2014 be deemed to have been lodged and served within the stipulated time. That application was dismissed by ***Githinji, J.A***., prompting the present reference before us in which the applicant, through his advocate Mr. Nyagito, has asked us to interfere with the discretion of the learned single Judge.

[3] Learned counsel urged that ***Githinji, J.A.***, improperly exercised his discretion and failed to take into

account ***Article 159*** of the ***Constitution*** and the overriding objective of the ***Appellate Jurisdiction Act***. In learned counsel's view, contrary to the position taken by ***Githinji, J.A.***, the appeal has overwhelming chances of success as besides quantum of damages, the applicant made other claims before the court below which ***Githinji, J.A.***, failed to appreciate.

[4] ***Rule 4*** of the ***Court of Appeal Rules*** gives a single Judge unfettered discretion to extend time, but such discretion must be exercised judiciously. In ***Mwangi –v- Kenya Airways Limited, [2003] KLR 486*** at page 487, this Court stated of this discretion and the manner it ought to be exercised as follows: -

> ***"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in, Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997 (unreported), the court expressed itself thus: -***
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> ***'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'.***
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> ***These in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words "in general". Rule 4 gives the single Judge an 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 in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way".***

[5] It is plain therefore, that if the single Judge exercises his discretion improperly, then a reference to the full Court, against that decision of the single Judge may be set aside. (See this Court's decision in ***Peninnah Mongina & Another –v- Walter Masese Makori & Another, [2005] eKLR (Civil Application No. 20 of 2004),*** where it was held:

> ***"…under rule 4 of this Court's Rules, the learned single Judge exercises unfettered discretion. In a reference to the full court before we can interfere with that discretion, we must be satisfied that the learned single Judge misdirected himself in some matter and as a result, arrived at a wrong decision or, that the learned Judge misapprehended the law or failed to take into account some relevant matter".***

[6] And in ***Transnational Bank of Kenya –v- Hassan Said Amdun, [2006] eKLR (Civil Application No. Nai. 133 of 2005)***, we reiterated:

> ***"In exercising the discretion under Rule 4, a single member of the Court is doing so on behalf of the whole Court… the Court has now settled the circumstances under which it will interfere with the exercise of the discretion by a single Judge. The full Court will only interfere where it is shown that in coming to his decision, a single Judge has taken into account a matter which he ought not to have taken into account or that he has failed to take into account a matter which he ought to have taken into account or that he has misunderstood some law or principle of law and thus misapplied the law, or that there was no evidence at all before him to support a particular conclusion, or that he failed to appreciate the weight or bearing of circumstances, admitted or proved or that everything taken into account, the decision is plainly wrong".***

[7] Those are the principles which we will apply to the reference before us. The applicant stated in his Notice of Motion and in his affidavit in support thereof that he failed to further instruct his advocate to

file the record of appeal in time because he was indisposed. In paragraph 7, he averred as follows: -

> ***"7. THAT I became so indisposed and bedridden that I had to attend to hospital and medication from a period ranging from April, 2014 to 10 th June, 2014 (annexed hereto and marked "JON 2" are copies of medical records)".***

[8] We have carefully considered the impugned ruling of ***Githinji, J.A***. In it the learned Judge in summary set out the applicant's claim before the court below and the proceedings leading to the application before him. After considering what was before him, the learned single Judge remarked as follows:

> ***"The delay of 2 months is relatively long in the circumstances of this case. The applicant does not claim that he was prevented from filing the appeal in time by the lack of proceedings. He does not rely on proviso to Rule 82 (1) of the Court of Appeal Rules. The hospital documents he relies on to show that he was sick do not show that he was ever admitted in hospital or that he was bedridden throughout. The genuinesses of the documents is even doubtful. The handwritten letter shows that it was written for purposes of this application.***
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> ***It is not written on the letter head of the hospital. The other two documents are not printed in the name of the hospital. Further, the documents show that the applicant was an outpatient. He could, therefore, have seen his advocates to give him instructions. There is no reasonable explanation for the delay.***
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> ***The applicant does not state that the appeal is arguable and his advocate has not demonstrated on prima facie basis that the appeal is indeed arguable".***
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> **…….**
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> **…….**
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> ***The statement that the respondent will not suffer any prejudice if the application is allowed cannot be true. It will suffer prejudice by being dragged in court again after paying the decretal amount".***

[9] In a reference such as this, the Court is not sitting on appeal from the decision of the single Judge. In ***Attorney General –v- James Alfred Korosso, [2010] eKLR (Civil Application No. 114 of 2008)***, we stated:

> ***"The full court is not concerned with the merits of the decision as it is not sitting on appeal against the decision of a single Judge. Rather, the full Court is only required to investigate whether or not the single Judge has misdirected himself on matters of fact or law in exercising his unfettered discretion".***

[10] A reading of the ruling of ***Githinji, J.A***., shows that the learned Judge considered all the reasons advanced by the applicant in support of the application for extension of time. Having considered those reasons, the learned single Judge was not satisfied he could exercise his discretion in favour of the applicant. The learned Judge considered the medical evidence put forward to support the applicant's allegation that he was prevented from lodging his appeal in time because he was indisposed. The documents relied upon were indeed not on the letter head of the medical facility the applicant allegedly attended. More importantly however, the documents clearly showed that the applicant was attended to as an outpatient and could therefore, not have been bedridden as he had sworn in his affidavit in support of the application. As the applicant was not bedridden, he could have instructed his advocate to lodge the appeal as stipulated in our Rules.

[11] We find no basis to fault the learned Judge on his conclusion regarding the documents exhibited to support the allegation of illness. It is clear that the applicant was not candid regarding the reason for

failing to further instruct counsel. The authenticity of those documents was also doubted by the learned Judge but that was not the principal reason why the applicant's allegation of illness was not accepted by the learned Judge.

[12] The learned Judge further considered the arguability of the appeal and doubted the same. The applicant contends that the observation was incorrect as the learned Judge only considered one aspect of the appeal.

[13] In ***Leo Sila Munyao -v- Rose Hellen Wangari Mwangi,*** *(supra)* this Court was not certain that the chances of the appeal succeeding is an essential matter to be taken into account when considering an application for extension of time under ***rule 4*** of this ***Court's Rules***.

[14] See also the case of ***Fakir Mohamed -v- Joseph Mugambi & 2 Others, Civil Application No. Nai. 332 of 2004*** and ***Mwangi -v- Kenya Airways Limited, [2003] KLR 486***.

[15] In ***Hezekiah Muchoki -v- Elizaphan Onyancha Ombogi, (Civil Application No. 212 of 2008) [2016] eKLR***, this Court found that the single Judge having found that inordinate delay was unexplained, should not have subsequently considered the application on the basis that the intended appeal was arguable. Citing with approval, the case of ***Ramesh Shah -v- Kenbox Industries Ltd., [2007] eKLR***, we stated:

> ***"It is clear to us, ... that the only ground upon which the application under rule 4 was granted was because the intended appeal was arguable. The issue therefore, arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think that, except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed, it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore, to be allowed to appeal despite the delay".***

[16] It is plain therefore, that arguability of an appeal is a factor to be taken into account while considering an application under ***rule 4*** of our ***Rules***. It is however, not the sole determinant factor. The learned Judge, in the application before us, considered arguability of the applicant's appeal but found against the applicant. We cannot fault him on his observation as we are not considering the merits of his decision. The fact remains that the learned Judge considered arguability of the appeal a relevant factor and determined it against the applicant.

[17] The learned Judge also considered the prejudice, if any, which the respondent would suffer if the application would be allowed. He determined that the respondent, even though had not responded to the application, would suffer prejudice as it would be "*dragged in court again, after paying the decretal amount*".

[18] It was not disputed that the applicant was awarded Kshs. 700,000/=, as general damages for breach of contract. It was also common ground that the applicant had previously been paid "*Kshs. 566,810/= as service pay, notice and pension*".

Also not in contention was the fact that the said award of Kshs. 700,000/= was paid to the applicant. It was on the basis of those facts that the learned single Judge concluded that the respondent would suffer prejudice if it was to face further litigation after a delay which had not been satisfactorily explained.

[19] Having considered the learned Judge's ruling we do not find that he exercised his discretion injudiciously.

[20] The authorities relied upon by counsel for the applicant properly enunciated and applied the law to the circumstances obtaining in those cases but are clearly distinguishable from the facts herein. In

Kamlesh M. D. Pattni -v- Director of Public Prosecutions & 3 Others*, *[Civil Appeal (Application) No. 120 of 2013 (2015)] (UR), the Court dismissed an application to strike out the record of appeal on account of a one day delay which is not the position herein. In ***Maureen Waithera Mwenje & Another -v- David Kinyanjui Njenga & 2 Others, [Civil Appeal (Application) No. 104 of 2011] (UR)***, the applicant sought to strike out the appellant's record of appeal on the principal ground that the same had been filed out of time. At the hearing however, there was disagreement on whether the appellants had sent a copy of their letter bespeaking proceedings to the respondent's advocates. Resolution of the disagreement depended on the word of one party against that of another. Following the decision in ***Ali Ahmed Naji -v- Lutherian Word Federation, (Civil Appeal No. 18 of 2003) (UR)***, the Court gave the benefit of doubt to the appellant in order to afford him the opportunity to exercise his right of appeal thereby giving effect to the overriding objective of the Appellate Jurisdiction Act. The issue of failing to serve a copy of a letter bespeaking proceedings has not arisen herein.

Lastly, in ***Richard Ncharpi Leiyagu -v- IEBC & 2 Others, [Civil Appeal No. 18 of 2013 (2013)] eKLR***, an election petition had been dismissed when the petitioner failed to attend the court on the first day of hearing even though the petition had been allocated four (4) consecutive hearing dates. The petitioner and his counsel attended the court on the second day of hearing and unsuccessfully attempted to explain the failure to attend on the first day of hearing. He then lodged an application to set aside the dismissal of the petition but the learned Judge of the High Court dismissed that application because he believed he had to comply with strict timelines under the ***Elections Act*** and that he had no jurisdiction to review or set aside his order under the ***Elections Act***.

On appeal, we found that the learned Judge of the High Court had misapprehended the law and the purport of the overriding objective of the ***Civil Procedure Act***. We accordingly set aside the order dismissing the petition and ordered the hearing of the petition before a different Judge. Here, ***Githinji, J.A.***, did not misapprehend the law or the oxygen principle.

[21] We are in no doubt therefore, that these authorities, as summarized above, dealt with vastly different circumstances from the circumstances obtaining in the matter before us and are therefore, clearly distinguishable.

[22] In this application, the learned Judge considered all the relevant factors: the length of delay; the reasons for the delay; the chances of the appeal succeeding and the likely prejudice the respondent would suffer if the application were to be allowed. As observed, we do not detect any improper exercise of discretion nor was ***Article 159*** of the ***Constitution*** offended. We agree with the learned Judge that in the peculiar circumstances of the entire matter, it would have been improper for him to exercise his discretion in favour of the applicant.

[23] Accordingly, we decline the applicant's plea to interfere with the decision of the learned single Judge. We find that the reference has no merit and order that it be and is hereby dismissed.

[24] Given the parties' previous relationship as employee/employer, respectively, we order that each party shall bear its own costs.

Dated and Delivered at Nairobi this 29th day of July, 2016.

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR