



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: D. MUSINGA, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 32 OF 2016 (UR 22/2016)**

**BETWEEN**

**AMATSI WATER SERVICES COMPANY LIMITED.....APPLICANT**

**AND**

**FRANCIS SHIRE CHACHI.....RESPONDENT**

**(Being an application for stay of an Award of the decree from the Industrial Court at Nairobi  
(Rika, J.) dated 26<sup>th</sup> day of September, 2012**

**in**

**Industrial Court Cause No. 1548 of 2010)**

**\*\*\*\*\***

**RULING**

1. The application before me is dated 8<sup>th</sup> February 2016 and seeks extension of time for the applicant to file and serve a notice of appeal. The judgment sought to be appealed against was delivered on 26<sup>th</sup> September, 2012. The respondent had filed a suit against the applicant before the Industrial Court claiming, *inter alia*, that his contract of employment was terminated unfairly and was thus entitled to terminal benefits. The trial court awarded him a total of **Kshs. 2,219,878/=**.
2. In its application, the applicant stated that the aforesaid award was made on a date that it had no notice of. It got to learn about delivery of the award (judgment) on 4<sup>th</sup> October, 2012 when its advocates received a letter from the respondent's advocates, M/s Lumumba & Lumumba, demanding payment of the said sum.
3. Upon receipt of the said letter, the applicant's advocate notified their client accordingly. The applicant, being a public entity, had to constitute a meeting of its Board of Directors to deliberate on the judgment and decide the way forward. Having done so, it advised its advocates to appeal against the award.
4. On 23<sup>rd</sup> November, 2012 the applicant's former advocates filed an application seeking extension of time and for stay of execution of the decree pending hearing and determination of the intended appeal.
5. Before that application could be heard, the trial court granted conditional order of stay of execution of

the decree, requiring that the decretal sum be deposited in court, which was done.

6. On 15<sup>th</sup> July, 2015 the applicant's application filed on 23<sup>rd</sup> November, 2012 was listed for hearing before a full bench of this Court. The Court directed that the application be placed before a single judge since the only issue for determination was whether time for filing the notice of appeal was to be extended or not.

7. Inadvertently, the application was again listed before a full bench on 14<sup>th</sup> October, 2015. The court directed that a fresh application for extension of time, independent of the prayer for stay of execution be filed. As a result, the applicant withdrew its earlier application and filed the current one, dated 8<sup>th</sup> February, 2016.

8. **Mr. Masila**, learned counsel for the applicant, submitted that the delay in filing the initial application was not inordinate, considering that it was filed within a period of less than two (2) months from the date the applicant became aware of the award.

9. Counsel further submitted that the delay had been well explained, that the intended appeal has high chances of success; and that the respondent will not be prejudiced by grant of the orders sought since the decretal sum had already been deposited in court.

10. The respondent opposed the application and filed a replying affidavit. The salient points in the replying affidavit as summarized by **Mr. Wachira**, learned counsel for the respondent, were that prior to the delivery of the award, the applicant's advocates had been served with a mention notice dated 5<sup>th</sup> June, 2012 informing them that the matter would be mentioned on 7<sup>th</sup> August, 2012 for purposes of requesting for a judgment date, upon confirmation that both parties had put in their written submissions.

11. The applicant's advocates did not attend court on the aforesaid mention date. The court set the date for delivery of its award as 26<sup>th</sup> September, 2012. Upon delivery of the award on the said date the respondent's advocates were duly notified vide a letter dated 27<sup>th</sup> September, 2012. That letter was received on 4<sup>th</sup> October, 2012.

12. Mr. Wachira submitted that the delay in filing the application for extension of time is inordinate. Counsel added that the intended appeal has no chance of success.

13. I have considered the affidavits on record as well as submissions by counsel. It is trite law that in an application for extension of time to file an appeal a single judge of this Court exercises his unfettered discretion. The discretion should, however, be exercised upon reason and judiciously. See **CMC HOLDINGS LIMITED versus NZIOKI [2004] 1 KLR 173.**

14. The delay in filing the application for extension of time was 43 days.

There is no dispute that the applicant's advocates were not notified of the date of delivery of the award. The mention notice dated 6<sup>th</sup> June, 2012 that was served upon them by the respondent's advocates was not sufficient. The trial court, having indicated that the award would be delivered on notice, ought to have given due notice to the applicant's advocates who were not in court on 7<sup>th</sup> August, 2012 when the matter was mentioned. Alternatively, the respondent's advocates should have informed the applicant's advocate that the award was scheduled to be delivered on 26<sup>th</sup> September, 2012. That does not, however, mean that the applicant's advocate had no responsibility to find out what had transpired in court on 7<sup>th</sup> August, 2012.

15. When the applicant's advocates became aware of the award, they immediately notified the applicant. I accept Mr. Masila's submission that the applicant's Board of Directors had to meet to deliberate on the matter and thereafter give its advocates instructions to appeal.

16. In the circumstances, I find that the delay was not inordinate, but even if it was, the explanation for it is satisfactory.

17. Having looked at the intended grounds of appeal as summarized at paragraph 15 of the applicant's affidavit sworn by **Alice Kirambi**, the Chair of the Board of Directors, I am satisfied that the intended appeal is arguable.

18. Lastly, considering that the decretal sum has already been deposited in court, I think the respondent shall not suffer a great decree of prejudice if this application is allowed.

19. Consequently, I grant leave to the applicant to file and serve a notice of appeal out of time. That should be done within seven ( 7) days from the date of this ruling. Further, the applicant should file and serve the record of appeal within fourteen (14) days from the date of this ruling. The costs of the application are awarded to the respondent.

***Dated and delivered at Nairobi this 16<sup>th</sup> day of September, 2016.***

**D. MUSINGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**