



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 233 OF 2014

BETWEEN

JOAN JELAGAT BIWOTT

JAMES KAMAU GAITHUMA

SIMON MAINA MACHARIA.....APPLICANTS

AND

REGIONAL REACH LIMITED.....1ST RESPONDENT

MEDIAMAX WORKS LIMITED.....2ND RESPONDENT

(Being an application for extension of time to file and serve notice of appeal out of time against the Judgment of the Industrial Court of Kenya at Nairobi (Njagi Marete, J.) dated 16th July, 2014

in

Industrial Court Cause No. 1228 of 2010)

RULING

1. The applicants were the claimants in **Cause No. 1228 of 2010** that was before the Industrial Court of Kenya, as it was then known. They were being represented by the firm of **Macharia Nderitu & Company Advocates**. Judgment in the aforesaid matter was delivered on 16th July, 2014. The applicants' case seeking, *inter alia*, damages for unlawful termination of employment was dismissed. However, the said advocates did not inform the applicants about the outcome of the case until 21st August, 2014.
2. On the following day, that is, 22nd August, 2014, the applicants personally went to the trial court's registry and applied for a copy of the judgment and made the appropriate payment for it.
3. On 1st September, 2014, the applicants instructed **M/s Mugo Kamau & Company Advocates** to institute an appeal on their behalf. The said firm prepared a notice of appeal on the same day and filed it on the following day. The notice was served upon the respondent's representative, Federation of Kenya Employers, on 8th September, 2014.

4. On 10th September, 2014, the applicants' advocates filed an application seeking leave to file a notice of appeal out of time and for the notice of appeal on record to be deemed as having been filed and served in time. The applicants blamed their former advocates for failing to notify them in time about delivery of the trial court's judgment.

5. **Mr. Kamau**, learned counsel for the applicants, urged this Court not to punish the applicants for their former advocates' mistake. Counsel submitted that the delay in filing the notice of appeal was not inordinate, in the circumstances as summarized above.

6. Although the respondents' representatives were served with a hearing notice in respect of the applicants' application that was heard on 13th September, 2016, they did not attend court. The 2nd respondent had, however, filed a replying affidavit to the applicants' affidavit. The main issue raised in that replying affidavit is that the application for extension of time was made "*almost a year down the line without disclosing the reason for the delay*".

7. Mr. Kamau challenged that objection. He pointed out that the application was filed within less than two months after delivery of the impugned judgment and eight days after filing of the belated notice of appeal. Counsel further submitted that the reason for the delay had been well explained.

8. I have considered the affidavits on record as well as Mr. Kamau's submissions. It is trite law that in considering an application for extension of time such as this one, the Court exercises its unfettered discretion. That discretion must, however, be exercised judicially and not capriciously.

9. The factors that this Court has to take into account include, the length of the delay; the reason for the delay; the likelihood of success of the intended appeal; and the degree of prejudice that is likely to be occasioned to the respondents if the application for extension of time is granted. See **SHAH v SOUTHERN CREDIT BANKING CORPORATION LTD [2008] KLR 173**.

10. The delay in filing the notice of appeal was about one month, considering that under **rule 75(2)** of this **Court's Rules** the notice of appeal ought to have been filed within fourteen days from 16th July, 2014 when the judgment sought to be appealed from was delivered. The applicants' former advocate did not notify the applicants about the judgment until 21st August, 2014 when he sent them a text message. Thereafter, the applicants moved with speed and did the needful. In the circumstances, I find that the delay was not inordinate and even if it was, the delay has been well explained.

11. I have perused the draft memorandum of appeal. I cannot say that the intended appeal is frivolous. I am also not satisfied that the respondents shall suffer great prejudice if the application for extension of time is granted.

12. In view of the foregoing, the application for extension of time to file a notice of appeal as well as the record of appeal out of time is granted. The notice of appeal that has already been filed and served is hereby deemed as having been filed and served in time. The applicants should file and serve the memorandum and record of appeal within thirty (30) days from the date of this ruling.

Each party shall bear their own costs of the application.

Dated and delivered at Nairobi this 16th day September, of 2016.

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR