



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 246 OF 2015

BETWEEN

KENYA HOTELS & ALLIED WORKERS UNIONAPPLICANTS

AND

NAIROBI SERENA HOTELRESPONDENT

(An application for extension of time within which to lodge and serve a record of appeal from the Ruling of the Employment and Labour Relations Court of Kenya at Nairobi (Nzioki Wa Makau, J.) dated 11th June, 2014

in

Industrial Court Cause No. 658(N) of 2009)

RULING

The applicant Kenya Hotel and Allied Workers Union by its application dated 15th September 2016 prays as follows;

- (a) The time fixed for lodging Record of Appeal and for service of the same on the intended respondent to be extended.**
- (b) The Record of Appeal be filed and served within the next 30 days after the expiry of the period granted in (a) above.**
- (c) That costs be in the cause.**

The application is erroneously expressed as brought under **Rule 5** of the Court of Appeal Rules but I will overlook the error as a mere irregularity as I understood perfectly that it is an application for extension of time under **Rule 4**. It is premised on the grounds appearing on the face of the motion as follows;

- 1. The certificate of delay in the High Court matter was issued on the 21st day of July 2015 after the lapse of the required time for filing of an appeal.**

2. Both the Decree and Certificate of delay were certified on the 2nd day of September 2015.

3. It is only fair and just that the application herein be allowed lest the applicant/appellant suffers irreparable damages.

It is also supported by the affidavit of the applicant's 2nd Deputy Secretary General John Simiyu sworn on 18th September 2016 which he relied on at the hearing. In it is stated that after judgment was delivered by the Employment and Labour Relations Court on 11th June 2014, the deponent filed a notice of appeal some 5 months later on 13th November 2014, on which date he also wrote to that court applying for typed proceedings. He swears further that on 11th May 2015 he was "*notified by an out dated (sic) letter dated 13th March 2015*" that the proceedings were ready for collection and he paid the requisite fees. He annexed a certificate of delay issued on 21st July 2015 indicating the length of days it took to prepare and deliver the certified copies of proceedings. The decree was certified on 2nd September 2015 although a cursory glance at it indicates that it was issued dated 11th June 2014 by the Registrar of that court. As I have pointed out at the start of the ruling, the motion was filed a year later on 15th September 2016.

Even though the respondent did not file any affidavit in reply to the application, its learned counsel **Ms. Lorraine Oyombe** did appear at the hearing of it. I rejected her application for adjournment to put in a replying affidavit but allowed her to respond on the basis of the record filed by the applicant and on points of law. Counsel submitted that the applicant was guilty of inordinate delay having filed its notice of appeal more than a year after the impugned judgment yet such notice ought to have been filed, by dint **Rule 75(2)** of the Court of Appeal Rules within **fourteen (14)** days. Moreover, the applicant did not serve said belated notice of appeal for the respondent as required by **Rule 82** of the Rules. She contended that no reason at all had been given for the delay and the fact of processing documents for the record cannot be a good enough reason. Counsel urged that litigation must come to an end and that to further prolong this matter by opening up the path of appeal would be prejudicial to the respondent. She urged me to dismiss the application with costs.

Making a brief reply, Mr. Simiyu attempted to explain from the bar that the delay in filing the notice of appeal was because the applicant first sought and lost a review of the judgment before the court below. He pleaded that if the application is not granted the grievant in the court below will suffer. He did not elaborate.

The extension of time as sought herein lies in the discretion of the single judge of this Court. It is a discretion that is wide and unfettered intended to ensure that the ends of justice are met. Being a judicial discretion, it is exercised on the basis of settled principles, not on sympathy, personal preference or other capricious basis. In determining such an application, I must consider, as part of a rational exercise, the length of the delay; the explanation for the delay; possibly, but not necessarily, the chances of the intended appeal succeeding and, lastly, the degree of prejudice that may be suffered by the respondent were the application to be granted. These principles have been applied and restated with regularity by judges of this Court in many cases including **MWANGI vs. KENYA AIRWAYS LTD.** [2003] KLR 486.

It seems clear to me that delay of over one year before the notice of appeal was filed is inordinate. It is a curiosity that the applicant asks for extension of time to file and serve a record of appeal yet there really is no valid or efficacious notice of appeal on record. To grant the application would be to act in futility. It comes down to this: whether for the unsought extension of time for filing of a notice of appeal or for the filing for the record of appeal, there is long and unexplained delay. Such unaccounted for delay, to my mind, disentitles an applicant to the favourable exercise of judicial discretion. Timelines serve an important function in the administration of justice. They are meant to ensure that the wheels of justice turn at a pace that can actualize the constitutional commend for justice to be administered without delay or in a timely fashion. When a party by delay, runs afoul the principle, the onus is on him to give an explanation to the Court so as to benefit from the discretion that would excuse the delay. When no or no plausible reason is offered the judge is handicapped in that he has no material, and therefore no basis, upon which he can enlarge time.

I think that the applicant is guilty of double defaults and it would not conduce to the doing of justice for me to extend time for the filing of the record of appeal. I find no merit in the application and accordingly dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 14th day of October, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR