



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS) CIVIL APPLICATION NO. NAI. 105 OF 2016

BETWEEN

ATTORNEY GENERALAPPLICANT

AND

ESTATE OF CPT. KARIUKI KINGARU

MUREBU (DCD). SVC. NO.020788.....)

WOI GEORGE NGUGI GITAU SVC NO. 020725/101825... ..)

WOI PHILIP NGUI KABUTHI SVC NO. 020750.....)

SSGT. GEORGE MUOKI (THRO? ALICE MUOKI))

SVC. NO. 020733.....)

SGT. JORAM GATHU BORO SVC NO. 020989/101853.....) RESPONDENTS

SGT. LEONARD REPHO NGURE SVC NO. 021555/101889..)

CPL. FRANCIS MBERERE NJIHIA SVC NO. 021233..... ..)

CPL. JOHNSON MAKUNGU MUVEA SVC NO. 022271.....)

ESTATE OF SSGT. GEORGE MBURU SVC NO. 020739.....)

(An application for extension of time to serve the notice of appeal out of time in an intended appeal from the judgment of the Industrial Court of Kenya at Nairobi (L. Ndolo, J.) dated 22nd October, 2014 In IND. COURT PET. NO. 49 OF 2012)

RULING

By the motion dated 18th August 2015, the Attorney General seeks the following orders;

- 1. THAT this honourable court do deem that the notice of appeal filed on 17th August, 2015 at the Employment and Labour Relations Court in Nairobi being an appeal against the**

judgment of Lady Justice Linnet Ndolo delivered on 22nd October, 2014 be deemed to be properly on record and/or in the alternative the time for lodging and serving the notice of appeal be extended.

2. THAT costs of this application be provided for.

The application is founded on the grounds appearing on the face of the motion as follows;

i. THAT the delay in serving the notice of appeal within the stipulated period was occasioned by inadvertent lack of participation by the applicant in the trial before the Industrial Court and the applicant was therefore not aware of the judgment date.

ii. THAT the delay and failure to file and serve the notice of appeal is excusable and will not in any manner prejudice the respondents.

iii. THAT the intended appeal is meritorious and raises serious issues of law which require proper determination by this honourable court.

iv. That it is in the interest of justice that this application be allowed.

It is evidentially supported by the affidavit of Erick Obura, a state counsel in the office of the applicant and which was relied on by Miss Odhiambo, learned counsel for the applicant. The deponent gives an account of the genesis and history of the dispute between the parties. The respondents, who are ex-service one of the defunct Kenya Air

Force filed suit on the High Court's Constitutional and Human Rights Division seeking damages "for their alleged arrest, detention and torture after the 1982 attempted coup".

The matter was ordered transferred to the Industrial Court on 8th November 2012 and it is sworn that the applicant did not participate in proceedings before the latter court as no mention and/or hearing notices were ever served on the Attorney General. The matter therefore proceeded ex-parte and on 22nd October 2014, Ndolo, J. delivered judgment awarding each of the respondents a total sum of Kshs. 8 million as general damages and costs. It is further averred that it was only on 8th July 2015, upon being served with a letter for the respondents' advocates demanding of the Solicitor-General the sum of Kshs. 72,820,668, that the Attorney-General became aware of the judgment intended to be appealed against. Upon perusal, several facts were noted including, as sworn at paragraph 10, that most of the documents required to be served upon the applicant that were in the court file had in fact been stamped as having been received by the applicant. He also swears at paragraph 11 as follows;

11. THAT is clear that although the aforementioned documents might have been served upon the applicant it is very possible that the registry staff at the applicant's office inadvertently failed to bring the documents to the attention of the counsel handling the matter.

It is averred that the applicant has a meritorious appeal with high chances of success in demonstration of which a draft memorandum of appeal is attached complaining, in the main, that the awards made were excessive. It is sworn further at paragraph 14 and 15 thus;

14. THAT the inadvertent human errors by the applicant's registry staff is what made the applicant fail to participate in the proceedings in the Industrial Court and the same should not be visited on the hapless Kenyan taxpayers who will bear the huge financial burden of compensating the petitioners herein.

15. THAT the delay in filing the notice of appeal is excusable and the respondents will not suffer any harm that cannot be compensated by an award of damages if time to appeal is extended.

The applicant therefore pleads that it would be in the interests of justice for this Court to exercise its discretion in favour of extension of time for filing and serving the notice of appeal.

The respondents opposed the application and filed a replying affidavit sworn by Anne Wanjiru Kingaru the personal representative of the estate of Captain Kariuki Kingaru (deceased). She swore that the applicant's counsel had failed in his duty to keep abreast of developments in the suit in the court below and that the bare statement blaming the registry staff at the applicant's chambers was inadequate in the absence of an affidavit from the counsel called Paul Ojwang who is said to have been more conversant with the suit. It is charged that the applicant is short of candour it being unbelievable that the applicant's counsel could have failed to make any effort to find out the status of the suit for six years whether by correspondence or by visits to the court registry. It is also averred that on 12th February 2015, one Miss Chesila appeared in the court below on behalf of the applicant on a taxation of costs meaning that the applicant was aware of the position of the suit so that there is no excuse for not filing the notice of appeal and that, moreover, the delay in filing the application some six months later on 17th August 2015 is inordinate. The deponent then swears to the **“great prejudice”** the respondents stand to suffer as follows;

“(a) That their names and reputation continue being tarnished as

„rebels?.

b. There must be an end to litigation.

c. That some of the litigants are aged and some have died pending the determination hence necessitated substitution of parties.

d. That no interest was charged on the general damages hence the amount depreciates with time.”

The respondents were represented before me by learned counsel Miss Mburu holding brief for Mrs. Madahane. She urged that the application be dismissed for being brought in bad faith and lacking in merit given the inordinate and inexcusable delay on the part of the applicant.

In her brief reply Miss Odhiambo submitted that the damages awarded were inordinately high and urged me to allow the application.

I have given due consideration to this application, the rival affidavits and submissions made before me. The application appeals to my discretion. The discretion I have is wide and unfettered to the end that justice may be served on a case by case basis. The discretion is not absolute, however, nor is it to be exercised in a whimsical or capricious manner. Rather, it is a judicial one and there are principles and considerations, all of them indicative, that have over time been developed by this Court. This gives a measure of certainty and rationality on the exercise of the discretion. Among the matters to be considered are;

a. The length of the delay

b. The explanation for the delay

c. Possibly, the chances of the intended appeal succeeding

d. The degree of prejudice likely to be suffered by the respondent (See **MWANGI vs. KENYA AIRWAYS LTD** [2003] KLR 486.

To that non-exhaustive list may always be added the general conduct of the applicant and in particular the degree of candour exhibited as well as the fairness of the applicant's conduct, for he who seeks equity must do equity.

In the case before me, the delay is by no means insignificant: the impugned judgment was rendered on 22nd October 2014. A notice of appeal dated 16th June 2015 was filed a month later on 17th August 2015. This was nearly ten months after the judgment. I have previously expressed the view that in this Court it is permissible to file such notice though out of time and then move the Court under **Rule 4** to regularize the filing should one succeed since the rule permits an application for extension of time for the doing of an act whether before or after the doing of the act. (See **MICHAEL MURIUKI NGIBUINI vs. EAST AFRICAN BUILDING SOCIETY** [2016] eKLR cited by the applicant).

Delay *per se* does not disentitle an applicant to a favourable exercise of discretion, for what is acquired is some plausible explanation for the delay be it long or brief. In this case, the proffered explanation is that the applicant essentially lost track of the case once it was transferred from the High Court’s Constitutional and Human Rights Division on 8th November 2012 and that it proceeded ex-parte before the Industrial Court of Kenya. As to why the applicant’s office should have been in the dark, what is placed before me is a set of conflicting explanations. In paragraph 5 of the supporting affidavit it is sworn that one Mr. Paul Ojwang, counsel for the applicant stated that he did not receive any mention and/or hearing notices from the respondent’s counsel to enable him to attend court. This is then contradicted in the paragraph 10(d) quoted earlier in this ruling which concedes that the said documents were in fact received in the applicant’s offices and duly stamped as received. At paragraph 11 an attempt is made to marry the two versions by the averment that **“it is very possible that the registry staff at the applicants office inadvertently failed to bring the documents to the attention of counsel handling the matter”**.

The documents served on the applicant by the applicant’s own showing are many and varied. They must have been served on diverse dates over an extended period of time. Indeed, it was contended by the respondents, without contest or controvert by the applicant, that counsel from the applicant’s chambers did in fact attend for taxation of costs way back on 12th February 2015. That must mean that the applicant was aware on that date, at the latest, of the existence of the judgment. There is no explanation given why it took the applicant over five months to prepare and sign the notice of appeal and then a further one month to file it in Court. Even then, it took another two months before this application was made. The picture that emerges from the material placed before me is one of lethargy and indifference. I do not see in the applicant a litigant concerned about timelines and the consequences of failure to comply therewith. There instead appears to have been a leisurely indifference which, to my mind, cannot be deserving of favourable discretion.

I note also that it has been contended by the respondents, which the applicant has not challenged, that the cause of action arose more than thirty years ago, thirty-four to be precise, and any further prolongation of it will be prejudicial to the respondents who are now much advanced in age and some have even died and been substituted. This I think is a case which exemplifies the need for litigation to come to an end.

The application is devoid of merit and I dismiss it with costs.

Dated and delivered at Nairobi this 25th day of November, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR