IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 99 OF 2016

In the Matter of an Intended Appeal

BETWEEN

JOSEPH KIPLANGAT NGENO……..…. 1ST APPLICANT

WILLIAM LOKORIO…….....…… 2ND APPLICANT

JOSEPH BETT…… 3RD APPLICANT

JOSEPH CHUMO ……...……... 4TH APPLICANT

ROBERT KADASIA……...……....……. 5TH APPLICANT

DAVID ONYANGO ……...…...……. 6TH APPLICANT

WALTER JUMA ……. 7TH APPLICANT

IBRAHIM LUKHONI …….....……..... 8TH APPLICANT

JOSEPH KIRUI …….. 9TH APPLICANT

JACINTA KOECH ……...……...…..10TH APPLICANT

NANCY BITTOK …….....……...11TH APPLICANT

CAMILITA WABWIRE……...…….12TH APPLICANT

ANN CHEPTANI SUGUT……....…...……..13TH APPLICANT

ROSALIND MURAGURI ……...……14TH APPLICANT

AND

KENYA INVESTMENT AUTHORITY.....RESPONDENT

(A*pplication for extension of time to file and serve the Notice of Appeal out of time in an intended appeal from Employment and Relations Court at Nairobi against the whole of the judgment and decree (Nduma Nderi, J.) dated 7th November, 2014*

in

Industrial Cause No. 1760 of 2011)

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RULING

The applicants by their motion dated 19th April 2016 and brought under ***Rule 4*** of the Court of Appeal Rules seek in the main an order that this Court be pleased to grant them leave to file and serve a notice of appeal and record of appeal out of time against the judgment of the Employment and Labour Relations Court (Nduma, J) dated 7th November 2014. On the face of the motion are a whole dozen grounds (which could well have been summarized into three) on which it is founded as follows;

(a) The subject matter of these proceedings being termination of employment of the applicants from the Kenya Investment Authority for which the applicants have suffered loss and damages.

(b) Time for filing the record of appeal having lapsed, the continuous passage of time militates against the applicants' chances of filing the appeal and having heard on its merits.

(c) Having been grieved by the judgment of Honourable Mr. Justice Mathew Nduma Nderi dated 7th November 2014 the applicants through their advocates Messrs Maingi Musyimi & Associates, advocates filed a notice of appeal on 19th November 2014 and in the intervening period applied for certified copies of the proceedings and judgment.

(d) The certified copies of judgment and the proceedings were duly prepared and collected by the applicants advocates on 21st July 2015 wherefore a certificate of delay was duly prepared and certified on 21st August 2015 to affirm the said position.

(e) A record of appeal together with all necessary documents which was ready for filing on 21st October 2015.

(f) The said advocates were informed by the Registry, after assessment of Court charges, to pay a sum of Kshs. 100,800 to enable them file the record of appeal which money was not available to the applicants.

(g) It was not until 9th February 2016 that the applicants deposited a sum of Kshs. 99,000 into the Bank Account of the advocates to enable them proceed with the intended appeal.

(h) In view of the fact the applicants failed to timely lodge the record of appeal, it has become absolutely necessary for the applicants to filethe present application for extension of time within which to lodge its notice of appeal and record of appeal respectively.

(i) If the subject application is not allowed, the applicants will have completely been shut out on its right to lodge its appeal in this honourable court.

(j) The applicants' intended appeal has overwhelming prospects of success as evidenced by the draft memorandum of appeal.

(k) The said non – compliance with the Rules was as a result of financial constraints as the applicants could not afford the appeal's filing fees as assessed by the registry and such should not be a to bar to them from accessing justice.

The applicant is interested in pursuing the appeal and has not in any abandoned or waived his right thereof.

The application is supported by the affidavit of Joseph Bett one of the applicants, presumably on behalf of them all. In it he avers that he and the other applicants were in the employment of the defunct Invest Promotion Centre of which the respondent is the legal successor "in different job descriptions and from various dates of the late 1990's until their service were unfairly, illegally and unprocedurally terminated by the respondent on 30th September 2008 when they were all placed on compulsory early retirement." Aggrieved, they moved to the High Court seeking judicial review remedies which eventually led to the impugned judgment which further aggrieved them. Their advocates accordingly filed a notice of appeal on 19th November 2014, which was within time. They had also written to the Deputy Registrar of that court on 10th November 2016 bespeaking a certified copy of the judgment and proceedings. The proceedings were received on 21st July 2015, it is sworn, and in evidence thereof is attached a certificate of delay dated 21st August 2015.

The deponent swears that the applicants were required to pay a court fees deposit of Kshs. 100,800 in accordance with an assessment by the Court dated 21st October 2015 but they were unable to raise the money. It is only by 9th February 2016 that they had managed to raise some Kshs. 99,000 which they deposited in their advocate's account.

They blame financial constraints for their failure to file the record of appeal earlier and seek extension of time urging that they have a meritorious appeal, would otherwise be shut out of the appeal process completely and that the respondent will not suffer any prejudice if the application were granted.

The application stands opposed with the respondent's Manager, Human Resources and Administration, Stellah Naikara swearing a replying affidavit on 8th September 2016 in which the charges that the applicants have *violated* ***"the longstanding adage and equity maxim that equity aids the vigilant and not the indolent"*** and that they ***"have exercised blatant lethargy and dilatory"*** (sic!) and laxity. She assails the letter bespeaking proceedings as unworthy of consideration because it was not copied to the respondent as ***"specifically and mandatorily"*** required by the *proviso* to ***Rule 82*** of the Rules of this Court and the three-month delay in having the court fees assessed, which she terms ***"deplorable"*** and also unexplained. She sees further proof of "**apathy and inertia"** in the deposit of the Kshs. 99,000 after the fees had been assessed. She also questioned the applicant's failure to make use of the available facility for payment of a lesser or no amount conditional upon remittance of the balance upon conclusion of the appeal. The deponent swears that considering the applicants are fourteen in number, the sum required to be paid as court fees is a small one and the plea of financial constraints does not lie. She pleads that litigation must come to an end and it would therefore be prejudicial to the respondent were it to be condemned to live with the anxiety of its pendency. The respondent urges me to dismiss the application with costs.

Allowing an application for extension of time on the part of a single judge of this Court involves the exercise of discretion. The discretion is wide and unfettered designed to enable the judge to make a decision that conduces to the doing of justice in the particular circumstances of the case before him. That the discretion is wide and free is not to say that it is wild and foolhardy. It remains a judicial discretion to be exercised judiciously in accordance with settled principles of law, not on the basis of whim or caprice in accordance with a judge's personal predilictions. Among the matters a judge considers 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 the respondent may suffer by the grant of the application.

(See **SILA MUNYAO vs. MWANGI** [1999]2EA 231; **MWANGI vs. KENYA AIRWAYS** [2003] KLR 486).

Both counsel appearing before me namely Mr. Musyimi for the applicants and Miss Lwila for the respondent agreed that these are the indicative parameters within which a ***Rule 4*** application is considered. Mr. Musyimi urged me not to allow the last of these considerations, the likely prejudice that the respondent may suffer, to trump the requirement for substantive justice. On her part Miss Lwila took issue with the applicant's seeming lethargy in initiating necessary applications. She also pointed out that the explanation given for the delay, namely financial difficulties, did not lie as they could have invoked ***Rule 115*** of the Court of Appeal Rules for financial accommodation but they did not do so. She reiterated that the litigation must come to an end especially for the applicants who do not have a good appeal as their dilatoriness demonstrates. She cited this Court's decision (incidentally also cited by Mr. Musyimi for the opposite proposition) of ***NICHOLAS KIPTOO ARAP KORIR SALAT vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS*** [2013] eKLR as well as ***DANIEL WAIGANJO GITHINJI vs. KENPIPE CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD*** [2016] eKLR.

Mr. Githinji in his reply insisted that the delay herein is not inordinate and urged me to uphold substantive justice and not to deny the applicants access to the courts.

Having given this application careful consideration, I have come to the conclusion that it must fail. It was brought nearly a year and a half after the decision intended to be appealed against was rendered, although the notice of appeal itself was filed within time. As far as the record goes, the rules require that it should have been filed within 60 days after the notice of appeal was filed. This did not happen. The applicants would have benefited from a non-reckoning of the time it took to prepare a certified copy of the proceedings had they copied their letter bespeaking the same to counsel for the respondent. They did not do so. Even after the said proceedings were ready for collection, on 21st July 2015, the certificate of delay states it was prepared and ready for collection on 21st August 2016, which is a full month later with no attempt to explain the delay. There is also no explanation why the applicants sought assessment of court fees a full two months later on 21st October 2015. Even after that assessment, payment was not made. Instead, what is exhibited before me is a deposit slip for Kshs. 99,000 made by the applicants into their advocate's account nearly 100 days later.

It was not the full amount assessed and the payment was not into court. Now, had the applicants been genuinely unable to raise the court fees, it was open to them to make an application to the Registrar of this Court for appropriate relief. This was not done and when I asked Mr. Musyimi about this seeming anomaly, his answer, which I found rather specious and unilluminating, was that ***"they could not raise the amount but they are not paupers."*** This litany of omissions, defaults and delays is compounded by the fact that, even after the deposit of money was made into the advocates' account, it took about 70 days more to bring this application.

With respect to the applicants, I do not for a moment accept that the need for substantive justice to be done should ever be taken to be a licence for lethargy. Justice is a two-way street and I fear it would be sending the wrong signal and unfairly burdening, inconveniencing and prejudicing the parties who try their best to comply with the rules, were we to excuse every default on the basis only that we should not drive a party from the seat of justice. I think that much as the courts are open and free, inviting all who seek justice to draw nigh and be heard, there are instances when parties literally so drag their feet, or seem to be so indolent that they literally turn their backs on the doors of justice. When they do, their belated change of heart and plea for admission, unless well-explained, cannot be granted without seeming to abuse discretion.

Given the view I have taken, I think that the delay herein is too long. It is inordinate even though the

applicants would not admit it. The attempted explanations proffered are hollow and unconvincing. Litigation sure must come to an end and for these applicants, by their own delays the end is now. The application is dismissed with costs.

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

P. O. KIAGE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR