



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GATEMBU, J.A. IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 216 OF 2014**

**BETWEEN**

**BANKING INSURANCE & FINANCE UNION.....APPELLANTS**

**AND**

**HARAMBEE CO-OPERATIVE SAVINGS & CREDIT SOCIETY....RESPONDENT**

***(Being an Application for Extension of time to lodge an Appeal against the whole of the Judgment and Orders delivered on 9<sup>th</sup> December, 2013 (Nzioki wa Makau, J.)***

***in***

***INDUSTRIAL COURT CAUSE NO. 555 OF 2010)***

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**RULING**

1. In its judgment delivered on 9<sup>th</sup> December 2013, the Industrial Court (Nzioki wa Makau J) dismissed the applicant's claim against the respondent for reliefs for alleged unlawful redundancy of 52 of its members. The court found that the redundancy of the 52 staff members was lawful and fair.
2. Intending to appeal that judgment the applicant Banking Insurance & Finance Union has by its Notice of Motion dated 15<sup>th</sup> August 2014 and presented to this Court on 19<sup>th</sup> August 2014 sought an extension of time to file and serve the notice of appeal and record of appeal. The application is made under rule 4 of the Court of Appeal Rules and sections 3A and 3B of the Appellate Jurisdiction Act.
3. In an application under rule 4 of the Rules, a single judge of this Court is called upon to exercise unfettered discretion which must however be exercised judicially. As this Court held in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997:**

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this***

***court takes into account in deciding whether to grant an extension of time are: first, the length of delay; secondly, the reason for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

4. As already indicated, the decision of the Industrial Court from which the applicant intends to appeal was made on 9<sup>th</sup> December 2013. Under rule 74(2) of the Court of Appeal rules, the applicant should have lodged a notice of appeal within fourteen days of that decision. It should therefore have been lodged on or before 16<sup>th</sup> January 2014<sup>[1]</sup>. Hellen Chrisensia Aoko Yaya, a member of the applicant Union, deposes in her affidavit sworn on 15<sup>th</sup> August 2014 in support of the application that the applicant’s former advocates did not, for reasons not within the appellant’s knowledge, file a notice of appeal.
5. The applicant’s former advocate Johnson Omboga Advocate in his affidavit sworn on 28<sup>th</sup> August 2014 also in support of the application deposes that the applicant instructed him to file an appeal; that he prepared a notice of appeal and a letter requesting for proceedings and gave both to his clerk for filing; that the clerk did not, inadvertently, file the notice of appeal. A copy of the notice of appeal that the advocate says he prepared and a copy of a letter dated 11<sup>th</sup> December 2013 to the Registrar requesting for proceedings are part of the record of the application.
6. The copy of the letter to the Registrar dated 11<sup>th</sup> December 2013 referred to above does not bear any stamp unlike a subsequent letter dated 11<sup>th</sup> February 2014 to the Registrar bespeaking proceedings. I note that the letter dated 11<sup>th</sup> February 2014, which in the circumstances I would have expected to be a follow up letter, makes no reference to the earlier letter of 11<sup>th</sup> December 2013. I also note that the letter dated 25<sup>th</sup> June 2014 from the Registrar of the High Court to the applicant’s former advocates, Ms Omboga & Co advocates informing those advocates that copies of proceedings are ready for collection makes reference to the advocates letter dated 11<sup>th</sup> February 2014 but does not refer to the earlier letter of 11<sup>th</sup> December 2013. There is therefore no evidence that the letter dated 11<sup>th</sup> December 2013 bespeaking proceedings from the Registrar of the Industrial Court was delivered to that court.
7. That as it may the present application was not presented to this Court until 19<sup>th</sup> August 2014. The period between 16<sup>th</sup> January 2014 when the notice of appeal should have been filed, and 19<sup>th</sup> August 2014 when the present application was filed is a delay of just over eight months. How is that delay explained?
8. Having instructed its former advocates to appeal the decision of the Industrial Court given on 9<sup>th</sup> December 2013 the applicant does not say or demonstrate that it followed up with its former advocates either in writing or otherwise to ascertain the status or progress of the appeal. Indeed, there is no mention by the applicant when it discovered that its former advocates had not filed a notice of appeal.
9. Hellen Chrisensia Aoko Yaya deposes in her supporting affidavit that the typed proceedings were availed to the appellant on 25<sup>th</sup> June 2014. Assuming, absent an indication by the applicant as to when the previous advocates omission to file a notice of appeal was discovered, that the discovery was made on receipt of the typed proceedings, it is not explained why the applicant waited another one and half months to present this application on 19<sup>th</sup> August 2014.
10. Learned counsel for the applicant Mr. Koceyo Titus who appeared for the applicant submitted that the intended appeal is arguable; that amongst other grounds the applicant will demonstrate on appeal that the judgment delivered on 9<sup>th</sup> December 2013 contradicts another award of the Industrial Court given on 5<sup>th</sup> December 2008; that the former advocates for the applicant have acknowledged the mistake made in not filing the notice of appeal and that the applicant should not

be penalized for the mistakes of its advocates. Though served, there was no appearance for the respondent at the hearing of the application.

11. The proposition put forward by learned counsel for the applicant that a party should not be punished for the mistakes of counsel has support in judicial pronouncements. The former Chief Justice Kwasi Apaloo in **Philip Chemowolo & another v Augustine Kubede, (1982-88) KAR 103 at 1040** stated that:

*“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”*

12. C.B Madan JA **Belinda Murai & 9 others –vs- Amos Wainaina, CA NO. NAI. 9 of 1978** on his part stated:

*“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip.... The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”*

13. Each case must however be considered on its own peculiar circumstances. It is not enough for a party seeking the exercise of discretion in its favour to say that it should not be penalized for the mistakes and omissions of their advocate. It is incumbent on that party to furnish reasons for the delay and to also demonstrate what remedial action it has, without inordinate delay, taken on discovering the mistake by its lawyers. For the reasons I have already given, I am not satisfied that the applicant has done so. Being of that view, I need not go on to consider the chances of the appeal succeeding or the question of prejudice.

14. The result is that I am not persuaded that I should exercise my discretion in favour of the applicant. I accordingly dismiss the applicant’s application dated 15<sup>th</sup> August 2014 and filed in Court on 19<sup>th</sup> August 2014. As the respondent did not appear during the hearing of the application, though served with notice of hearing, I make no orders as to costs.

**Dated and delivered at Nairobi this 20th day of February, 2015.**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

/ewm

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[\[1\]](#) In arriving at this date, regard is had to rule 3 of the Rules of the Court on computation of time and the exclusion of the Christmas vacation that commenced on 21<sup>st</sup> December 2013 and terminated on 13<sup>th</sup> January 2014