



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OUKO & KIAGE, JJ.A.

CIVIL APPLICATION NO. NAI 241 OF 2013 (UR 175/2013)

BETWEEN

BUNSON TRAVEL LIMITED.....APPLICANT

AND

KIZITO INJILA MWENESI.....RESPONDENT

(An Application for the extension and enlargement of the time within which to file a notice of appeal against the Judgment and Decree of Industrial Court of Kenya at Nairobi (Maureen Onyango, J) delivered on the 29th April, 2013

in

Industrial Cause No. 1083 of 2011)

RULING OF THE COURT

By an omnibus Notice of Motion dated 10th September 2013, the applicant sought a raft of orders from this Court; among them an order for enlargement of time within which to file the notice of appeal. This is the prayer that concerns us at this point in time.

The same is premised on Rule 4 of this Court's Rules and should have been asked for separately as it is a single Judge application while the prayers for stay of execution and injunction are motions for a full bench.

The prayer for extension of time was heard by Warsame, JA who dismissed the same vide his ruling rendered on 22nd November 2013. Being dissatisfied with that dismissal, the applicant wrote to the Registrar of this Court on 26th November 2013, pursuant to **Rule 55 of this Court's Rules** seeking a reference to a full court. We heard the application on 2nd March, 2015 on a date when the firm of Namada & Co. Advocates, on record for the respondent, though duly served with the hearing notice, did not attend court. The application, therefore, proceeded for hearing in their absence as provided for under **Rule 56(2) of this Court's Rules**.

A brief recapitulation of the facts surrounding this motion is necessary.

The matter arises from an industrial dispute which was heard and determined in the Industrial Court (now Employment and Labour Court), in which the respondent herein who was the claimant, was awarded a sum of Kshs. 484,643.30/=. That judgment was rendered on 29th April 2013. The applicant, though aggrieved by that judgment, did not file the notice of appeal within 14 days as stipulated under **Rule 75 of this Court's**

Rules.

It moved this Court by way of this notice of motion about five months later, seeking to be allowed to file the notice of appeal out of time. The main reason given for this delay was that the applicant's Board of Directors took time to convene and deliberate on the judgment and decide of whether an appeal was viable or not.

Even after getting the instructions the applicant still filed the application before the wrong court, thus wasting more time. That application was dismissed on 3rd June, 2013 – yet this application was not filed until three months later. According to the applicant, the delay was not inordinate, and the intended appeal has a 'high probability of success'.

Warsame JA, sitting as a single Judge heard the arguments proffered by the applicant, but was not convinced that the order sought was merited. The learned Judge found the delay of six months to be inordinate in the circumstances of the case, and further that the same had not been sufficiently explained. The applicant faults the learned Judge for not considering factors other than the delay before exercising his discretion to dismiss the application. Incidentally, other than propounding the issue of delay, and the fact that the respondent will not be prejudiced, learned counsel for the applicant did not bring forth any other grounds in support of his application.

We have considered the application, along with the submissions of learned counsel. It is trite law that a single Judge of this Court in dealing with an application such as the one before us exercises unfettered discretion, with a caveat that such discretion has to be exercised judicially, and upon the now settled principles of law. In exercising that discretion, a single Judge does so on behalf of the whole court.

Before this Court can interfere with the decision of the single Judge, certain parameters have to be met. These were clearly set out in **Gitetu vs Kenya Commercial Bank Limited [2009] KLR 545** as follows:-

It must be shown that the Judge,

- i. Took into account an irrelevant matter which he/she ought not to have taken into account;*
- ii. Failed to take into account a relevant matter; or*
- iii. Misapprehended some aspects of the applicable law; or*
- iv. Was plainly wrong in his/her decision such that a reasonable tribunal properly directing itself to the applicable law and evidence could not have arrived at such a decision.*

A reference to the full court is not an appeal and it is not enough to show that the full court could have arrived at a different result if it had been sitting in place of the single Judge. What we need to consider here is whether considering the facts of this case, the learned Judge departed from the laid down principles that guide a court before arriving at the said decision.

As stated earlier on, the only grounds proffered in support of the application was that the delay was not inordinate, and that the respondent would not be prejudiced if the application was to be allowed. Whether the delay was inordinate or not depends on the peculiar circumstances of each case. While 12 months may not be deemed to be inordinate in some cases, even four months would be considered inordinate in

another, depending on the reasons given and the peculiar circumstances of the case.

In this case, learned counsel concedes that they received the judgment on time. They sought instructions from the applicant who nonetheless took its sweet time to give the said instructions. We note that, as stated by Waki, JA in **Bi-machi Engineers Limited vs James Kahoro Mwangi [2011] eKLR Civil Application No. 15 of 2011**, and endorsed by Warsame, JA in his ruling:-

“The filing of a notice of appeal is a simple and mechanical task and could even have been done soon after the applicant became aware of the judgment.”

There was nothing to stop counsel for the applicant from filing the notice of appeal within time while awaiting other instructions from the members of the applicant’s Board. Indeed, to make matters worse, after the application for extension of time was dismissed before the Industrial Court, the applicant still took three months to move to this Court.

No plausible reason was given for that delay.

We hold the view that the learned Judge was right in finding that the said delay was inordinate and inexplicable. It cannot also be said that the respondent will suffer no prejudice if the application is allowed. Having to defend the appeal and the inevitable issue of the expense and anxiety involved is of itself prejudicial to the respondent. In view of the foregoing, we are satisfied that the learned Judge exercised his discretion judicially having considered all the relevant matters placed before him and the applicable law. We find no basis for interfering with his findings.

In the result, we find this application lacking in merit and dismiss it accordingly. We make no orders as to costs as we note that there was no replying affidavit and the respondent’s counsel was absent on the hearing date.

Dated and delivered at Nairobi this 24th day of April, 2015.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR