



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AZANGALALA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 98 OF 2014

BETWEEN

NEXT GENERATION COMMUNICATION LTD.....APPLICANT

AND

GEORGE M. KIRUNGARU.....RESPONDENT

(An application for leave to appeal out of time the Award of the Industrial Court at Nairobi delivered by Mr. Justice James Rika on 12th March 2014

in

INDUSTRIAL CAUSE NO. 1632 OF 2012)

RULING

This is an application for extension of time brought under Rule 4 of this Court's Rules. The applicant, **Next Generation Communication Ltd.**, seeks that this Court do extend time within which to lodge an appeal out of time by which I presume it means to lodge and serve the record of appeal out of time. It also seeks a further order that the Notice of Appeal dated 4th March, 2014 and filed on 7th March, 2014 be deemed duly filed within time. The application is supported by the grounds set out in the body of the application. It is also supported by an affidavit sworn by one, **Richard Kimani Karanja**, its Managing Director.

In his submissions before me, **Mr. Kiprono**, the learned counsel for the applicant, contended that the delay involved in filing the Notice of Appeal was only seven (7) days and was explained in the supporting affidavit. In learned counsel's view, that delay is not inordinate. To buttress his contention, he invoked the decisions of this Court in **Solomon Murathe Gitau & 787 Others -v- Nguni Group Ranch [2014] eKLR** and **Keziah Stella Ryman & 2 Others -v- Paul Mutevu & 8 Others [2013] eLKR**. In the former, a delay of fourteen months was attributed to counsel and was not held against the applicant and in the latter the delay involved was of nine (9) days and was not explained yet time was extended.

Learned counsel further submitted that the appeal has high chances of success as shown in the draft Memorandum of Appeal exhibited by the applicant. It was also his contention that the respondent stands to suffer no prejudice if time is enlarged.

Mr. Munoko, the learned counsel for the respondent, has opposed the application mainly on the ground that the delay has not been explained. Learned counsel also complained that even the Notice of Appeal sought to be

duly filed was not served upon his firm nor was the letter bespeaking proceedings.

On the likely prejudice the respondent stands to suffer if time is extended, learned counsel submitted that execution had commenced and will be impeded by the grant of an order extending time to lodge the Notice of Appeal and the Record of Appeal. In Mr. Munoko's view the rules of this Court must be complied with.

The conditions to be satisfied in order to grant extension of time were stated in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi [Civil Application No. Nai 251 of 1997] (UR)** as follows:-

“.....first the length of delay, secondly the reason for the 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

Bearing the above in mind, it is to be noted that there was a delay of nine (9) days in lodging the Notice of Appeal. This is certainly not inordinate delay by any standards. In the supporting affidavit, it is deponed that there was a delay in obtaining copies of proceedings and judgment and further that the applicant itself did not formally instruct counsel with dispatch with the result that the Notice of Appeal was filed a few days outside the prescribed time.

The applicant is a limited liability company and I take judicial notice of the fact that such an entity has a process of making decisions unlike a normal person who requires no consultation or meetings before determining the cause of action to take. I therefore accept the explanation given in the supporting affidavit that the applicant's management had to go through the judgment before making a decision on whether or not to appeal against the same.

In my view the delay involved is not inordinate and has been adequately explained.

On whether the intended appeal has chances of success, I have looked at the draft Memorandum of Appeal exhibited by the applicant and observed that the interpretation by the lower court of certain provisions of the Employment Act is intended to be challenged. There is therefore an issue of law which this court has an opportunity to settle in the intended appeal and I would not let that opportunity pass.

On the issue of whether the respondent stands to suffer prejudice if the extension is granted, it was contended for the respondent that execution had

commenced and will be impeded if the application is allowed. I am unable to appreciate how an order extending time to lodge a Notice of Appeal and a record of appeal would impede execution. In my view, even if that were the case it would not be such prejudice as would make me decline the extension sought as the right to execute is not lost by a pending appeal.

In view of the foregoing, I am satisfied that this is a proper case in which to exercise my discretion in favour of the applicant. This application is therefore allowed and the Notice of Appeal filed on 7th March, 2014 is deemed duly filed with the leave of this court. The applicant should serve a copy of the same upon the respondent within seven (7) days of today. The applicant should also lodge the record of appeal within thirty (30) days from the date hereof and serve the same upon the respondent within seven (7) days of lodgment. The applicant shall pay the respondent the costs of the motion.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2015.

F. AZANGALALA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR