IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, J. MOHAMMED & OTIENO-ODEK, JJA)

CIVIL APPLICATION NO. 250 OF 2014

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS, HOSPITALS & ALLIED

WORKERS GEORGE CHESIRE & 84 OTHERS …….....……..…..
APPLICANTS

AND

NAIROBI CLUB …….…….....……..……..….
RESPONDENT

(Being a reference to full bench in the ruling by single judge in an application for extension of time to file and serve Notice & Record of Appeal out of time from the ruling and orders of the Industrial Court at Nairobi (Lady Justice M. Mbaru) delivered on 10th May 2013

in

Trade Dispute No. 77 (N) of 2009)

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RULING OF THE COURT

1. This is a Reference before a full bench from a ruling by a single judge of this Court (Hon. Koome, JA) delivered on 14th November 2014 declining leave to extension of time to file the Notice and Record of Appeal.

2. The facts relevant to the Reference are that the applicants filed before the Industrial Court a dispute against the respondent in **Trade Dispute No. 77 (N) of 2009**. An award was made by Chemmutut, J. on 24th September 2009. Dissatisfied with the award, the respondent applied for review. A ruling was delivered by Mbaru, J. on 10th May 2013. The applicant intends to appeal against the ruling but there is delay in filing the Notice and Record of Appeal. The length and reasons for the delay in filing the notice of appeal and record for appeal is as captured by the single judge. There is no much contest as to the length, reasons and steps taken to remedy the delay. We can do no more than quote the learned judge who expressed herself as follows:

> ***"The applicant is late in filing the appeal from the original order of Mbaru J. dated 10th May 2013 and the delay to the time the instant application was filed on 26th September***

2014, should be explained. The explanation offered by the applicant is that the delay was caused by the firm of M/s Ahmednassir Abdikadir & Co. Advocates who represented them before the Industrial Court. The said firm failed to file an appeal, but after what the applicants call "much coercion and visits made by the applicants upon their previous advocates" they decided to file a Notice of Appeal on the 6th day of June 2013 at the Industrial Court; albeit belatedly and without seeking leave of the Court. I do not think the above explanation is cogent and warrants the exercise of my discretion in favour of the applicants. This is for the simple reason that from 10th May 2013, the applicants state that they were dissatisfied with the judgment and they kept reminding their legal counsel to appeal, which did not happen until 17th September 2013. However, after that application was dismissed on 17th March 2014, the applicants went into another lull for six months. It took them another almost six months from 17th March 2014 to 26th September 2014 to file the present application. The reasons advanced for this delay are equally not plausible. The applicants contend that they are many in number and thus it took them time to consult and raise money to instruct another counsel once their previous counsel wrote to them and indicated his inability to continue acting for them….The inordinate delay occasioned by the applicants is not excusable….The applicants have slept on their rights while the respondents have moved on after there was no appeal filed within the period prescribed by the law. There is no justification for the applicants to suddenly wake up and wish to drag the respondents on with litigation…. I am not satisfied that this is a proper case in which to grant leave to appeal. This application is dismissed… I make no order as to costs."

The applicant has invoked ***Rule 55(b)*** of the Rules of this Court to have this

Reference before a full bench of the Court.

3. At the hearing of this Reference, learned counsel Mr. Rupia J.O. Change appeared for the applicants while learned counsel Mr. Gitonga Murugara appeared for the respondent. Both counsel submitted a list of authorities.

4. Counsel for the applicants reiterated the grounds in the Notice of Motion dated 24th September 2014 and the supporting affidavit thereof. The core of the applicants submission is that delay to lodge the Notice and Record of Appeal was due to inadvertence of their previous advocates; that the previous advocate did not take any step to file the Notice or Record of appeal within the stipulated time; that the applicants were constantly given empty promises and no Notice or Record of Appeal was lodged; that the inadvertence and delay should not be visited upon the applicants; that the applicants should not be denied an opportunity to advance their appeal before a court of justice; that the applicants have been desirous and are interested in pursuing the intended appeal; that the length of delay is reasonable and the delay has been explained. Counsel submitted that the intended appeal was arguable and raised novel and substantial issues of law on the question of back pay; that it is a matter of public interest that an opportunity to appeal should be given for this Court to resolve the moot legal issues involved; that the intended appeal has high chances of success and no prejudice will be suffered by the respondent if leave is granted.

5. The respondent in opposing the Reference submitted that the single judge correctly exercised her discretion in declining to grant extension of time. It was submitted that, before this Court was a Reference and not re-argument or re-hearing of the application for extension of time; that the applicants counsel has made a fundamental error in his failure to demonstrate how the single judge erred in exercising her discretion, the learned counsel re-argued the application for extension of time; that no attempt had been made to show that the single judge erred in re-evaluating the evidence or how the court erred in exercising its discretion. It was submitted that what is required in law is to demonstrate how the decision by the single judge was incorrect. Counsel emphasized that the record revealed a series of lapses by counsel for the applicants which are being termed as inadvertent; that the single judge considered these lapses and termed them negligent and the

court/judge was not satisfied that the lapses satisfactorily explained the delay. On arguability of the intended appeal and its chances of success, this Court was urged to find that both Mbaru, J. and Koome, JA were satisfied that the issue of back payment had been dealt with. This Court was urged not to interfere with the discretion that was perfectly exercised by the single judge in declining to grant extension of time.

6. We have considered the able submission by both counsel and remind ourselves that this is a Reference. In **Samaki Industries (Nairobi) Limited -v- Samaki Industries (K) Limited, Civil Application No. NAI 260 of 1996 (98/96 UR**), this Court stated that "because the single judge is exercising discretion, a full bench of three judges can only interfere with that exercise if it be shown that in the exercise of the discretion, the single judge failed to take into account a relevant matter or took into account an irrelevant matter or consideration which he ought to have taken into account." In **Attorney General -v- James Alfred Korosso, Civil Application No. NAI 114 of 2008,** this Court stated that in a Reference, "the Court is not concerned with the merits of the decision by the single judge, as it is not sitting on appeal against the decision of the single judge; rather, the full Court is only required to investigate whether or not the single judge has misdirected itself on matters of fact or law in exercising its unfettered discretion." In **Baldevkumar Mohindra -v- Mathuradevi Mohindra (`933) 1EACA 56,** the predecessor to this Court stated that this Court will not interfere with the exercise of a judge's discretion unless the learned judge did not see that justice would not result from the exercise of that discretion.

7. In this Reference, the applicants have urged that public interest require that leave be granted and extension of time allowed. In **Gitau -v- Muriuki (1986) KLR 211**, this Court held that a court ought to be inclined to exercise its discretion and enlarge time to appeal where the applicant has shown *prima facie* that it has an arguable appeal and the court is satisfied that no harm would result to the respondent. The applicants submitted that the intended appeal is arguable and raises a novel issue of back pay and no prejudice will be suffered by the respondent. The applicant cited the case of **Kiarie -v- Njoroge (1986) KLR 402** in support of the proposition that extension of time should be granted where the court is satisfied that the cause of delay does not lie with the applicant. The applicants submitted that the cause of delay was inadvertence on the part of their previous counsel. Citing the case of **Wasike -v- Khisa & Another (2004) 1KLR 13 to 21**; the applicants urged this Court to observe the principle that it would be a fetter on the wide discretion of the court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained. Counsel relied on the decision in **Gathiaka -v- Ndururi, Civil Application No. NAI 294 of 2003** where it is stated that mistake by counsel are not a reason for denying an otherwise deserving applicant a favourable exercise of discretion.

8. Our mandate as a Reference Court is to investigate whether the single judge misdirected herself on matters of fact or law in exercising her unfettered discretion. In her ruling, the judge considered the arguments advanced by the applicants explaining the delay and inadvertence on the part of their previous counsel. The judge also considered the submission that the applicants are too many and needed time to meet, consult and raise fees to engage a new advocate; the judge addressed the issue of arguability of the intended appeal and its chances of success. All pertinent facts and arguments in support of the application were evaluated, considered and determined by the learned judge.

9. In the case of **Nicholas Kiptoo arap Korir Salat -v- IEBC & 7 Others**,**Supreme Court Application No. 16 of 2014**, it was stated that extension of time being a creature of equity, one can only enjoy it if he acts equitably: *he who seeks equity must do equity.* There is a maxim in equity that delay defeats equity and equity aids the vigilant. This Court in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR**, stated that the discretion to extend time under ***Rule 4*** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice.

10. Before the Industrial Court the applicant was represented by counsel when ruling was delivered on 10th May 2013. As was stated by Tunoi, J.A. *(as he then was)* in **Njoka Muriu & another -vs- Evans Githinji Muriu & Another- Civil Appl. No. Nai. 356 of 2003,** a notice of appeal is a one

page formal piece of paper whose lodgment is a matter of course. In the case of **Silverbrand vs County of Los Angeles (2009) 46 Cal. 4th 106, 113** cited by the Kenya Supreme Court in **Nicholas Kiptoo arap Korir Salat -v- IEBC & 7 Others, Supreme Court Application No. 16 of 2014,** it was stated *inter alia*:

> **"...the filing of a timely notice of appeal is a jurisdictional prerequisite. Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal".** (sic)

11. The issue for our inquiry is whether the applicants have demonstrated that the single judge erred in exercising her unfettered discretion. The evidence on record shows indolence not only on the part of previous counsel for the applicant but also on the applicants. A Notice of Appeal is a simple document that a vigilant litigant must ensure that it is filed. If the applicants were vigilant, the Notice of Appeal ought to have been filed when it was dated. The fee required for filing a Notice of Appeal is insignificant to justify a delay of over six months for the applicants to meet and raise funds.

    It is also our view that every act, omission, mistake or error would receive an automatic relief or excuse from the court. Advocates are officers of this Court, hence they are required to satisfactorily explain their omissions and mistakes through cogent, clear explanations for the Court to exercise its discretion in their favours. We think all the parties read the application and their advocates' in this matter are not with blame or liability in the way the manner was handled from 10th May 2013 to the filing of the application for extension of time.

12. The single judge evaluated the merits of the explanation for delay as attributed to the previous counsel. The applicants have not demonstrated to our satisfaction how the single judge misdirected herself in considering and evaluating the explanation for delay and inadvertence. The applicants have not been able to satisfactorily demonstrate to us that the single judge either misdirected herself or acted on matters which she ought not have acted upon or failed to take into consideration matters which she ought to have taken into consideration and in doing so arrived at a wrong conclusion.

13. For the reasons stated above, this Reference has no merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 31st day of July, 2015

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR