IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO, JA. IN CHAMBERS)

CIVIL APPLICATION NO.30 OF 2015

BETWEEN

SAMUEL MWEMA MANZI ……..APPELLANT

AND

AGAKHAN SPORTS CENTRE ……...……RESPONDENT

(Being an appeal from the Judgment of the Industrial Court of Kenya at Mombasa (Mukau,J.) dated 14th February, 2014

In

Industrial Court No.97 of 2013)

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RULING

It is today firmly settled that the power to grant an order for enlargement of time to file the notice and record of appeal under **Rule 4** of the Court of Appeal Rules is essentially discretionary; that in general the matters which a single Judge of this Court takes into account in deciding whether to grant an extension of time include the length of the delay, the reason for the delay, the chances of the intended appeal or appeal succeeding if the application is granted and the degree of prejudice if the application is granted, among other considerations. See **Leo Sila Mutiso** v **Rose Hellen Wangari Mwangi**, Civil Application No.Nrb.251 of 1997.

Although the foregoing factors are not exhaustive, there is no requirement that all of them be present in every application for extension of time. Each case will be considered in the context of its peculiar circumstances. See **Margaret Muthuri Muchiga** v **Esther Kamori Gichobi**, Civil Application No.117 of 2009.

From the scanty information on record it appears that there was a labour dispute between the parties at the end of which the Employment and Labour Relations Court (**Makau, J**) gave judgment in favour of the applicant on 14th February, 2014. According to the decree Kshs.492,292/= was by consent awarded to the applicant, while Kshs.97,500/= representing accrued leave and arrears of salary increase was awarded

by the court in that judgment. Dissatisfied with the decision the applicant filed, on 13th March, 2014 a notice of his intention to appeal to this Court. The Judgment having been rendered on 14th February, 2014, the notice of appeal was clearly filed out of time by five days in strict computation of time. In addition the Deputy Registrar issued a certificate of delay to the effect that the applicant applied for copies of proceedings and judgment on 3rd March, 2014 and the same supplied on 2nd July, 2013 (should be 2014). The applicant has further deponed that since being supplied with copies of the proceedings and judgment he has now lodged the record of appeal. The applicant, acting in person brings the present application (citing irrelevant provisions of the law) and prays that the notice of appeal filed out of time be admitted and deemed as having been filed within time and further that time be enlarged for him to file the record of appeal.

His reasons for the delay are that he is a layman; that he did not know the time lines for filing the notice and record of appeal; that the court issued a certificate of delay, explaining the reasons for delay; that he was misadvised by his advocate then on record that he had thirty (30) days to lodge the notice and record of appeal and that the delay is not inordinate.

The respondent in opposing the application has argued that the applicant cannot hide behind the fact of being a layman as ignorance of the law has never been a defence; that no sufficient reasons has been given for the delay; that this application and the record of appeal were filed on 15th June 2015, 16 months after judgment, constituting another unexplained delay; that the appeal has no chance of success as the respondent had paid the applicant part of his claim before the case proceeded to the hearing; that the remaining claims were awarded by the court in the impugned judgment and paid; that the appeal challenges the judgment for failing to award general damages for unlawful termination of services yet the claim upon which the judgment was rendered was for redundancy benefits. The respondent, finally states that it will suffer prejudice if the application is granted as it will continue to incur costs in defending the appeal and wasting time.

Applying the principles enumerated at the beginning of this ruling, it is not in doubt that the notice of appeal was filed five (5) days after the prescribed fourteen (14) days. The record of appeal itself was filed on 15th June, 2015 while this application was brought on the same day, some sixteen (16) months.

The period covered by the certificate of delays is between 3rd March, 2014 and 2nd July, 2014 (erroneously given as 2013 but cannot be 2015 as the certificate itself was issued on 15th April 2015). The burden was on the applicant to explain, first the five days delay in lodging the notice of appeal and then the delay between 2nd July, 2014 and 15th June, 2015, nearly one year delay. It is not a plausible excuse that the applicant was misled by an advocate who ought to know the requirement for filing appeal to this Court. That perhaps explains why there is no affidavit from the advocate confirming that position. A delay of one year and in the absence of an explanation is clearly inordinate and the prejudice to the respondent is obvious, considering that it has made substantial payment to the applicant. Although in an application for extension of time, a single judge cannot purport to decide the merits of the appeal or intended appeal but on the authority of **Leo Sila** (*Supra*) the single judge can consider the "possibility" of the chances of success of the appeal based on the material before the judge. No purpose can possibly be served by granting an application for extension of time to lodge an appeal that will be dead on arrival. The memorandum of claim filed by the applicant states that;

"7….by a letter dated 1.3.2012 and issued on 24.4.2012 the respondent terminated the service of the claimant on account of redundancy and has not computed the rightful dues following the redundancy of the claimant ……

10. THAT the Claimant's demand is made up as follows:

March 2012	***Salary***	***50,000.00***
April 24th		***46,152.00***

Severance for 12 years ***346,140.00***

3 months payment in lieu of notice ***150,000.00***

2011/2012 leave due ***50,000.00***

Increment of salary May to Oct.11 ***60,000.00***

Total ***02,292.00"***

The appellant insists that Kshs.492,292/= paid by the respondent is less by 210,000/=. After hearing the parties **Makau, J** awarded kshs.37,500/= for accrued leave days and Kshs.60,000/= for arrears of salary increase, with the result that out of Kshs.702,292/= sought in the statement of claim, a total of Kshs.589,792/= has been settled, on all heads of the claim. The appeal challenges the decision of the learned Judge for having failed, after finding that the termination was unlawful, to award general damages for unlawful termination. The statement of claim, as I have noted was based on the redundancy benefits. That claim cannot be converted on appeal.

For this reason I find that the chances of success of the appeal are thin. The application, for all the other reasons, has no merit and is dismissed with costs.

Dated and delivered at Malindi this 30th day of October, 2015

W. OUKO

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR