



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 38 OF 2015 (UR 34/2015)

BETWEEN

KRYSTALLINE SALT LIMITED.....APPLICANT

AND

KWEKWE MWAKELA & 67 OTHERS.....RESPONDENTS

(An application for extension of time to appeal out of time from the judgment and decree of the Employment & Labour Relations Court of Kenya at Mombasa, (Makau, J.) dated 19th December 2014

in

E&LRCC. Nos. 116 to 162 and 175 to 195 of 2014)

RULING

By the Notice of Motion dated 20th July 2015 the applicant craves leave of the Court to file an appeal out of time against the judgment and decree of the ***Employment and Labour Relations Court, (Makau, J.)***, dated 19th December 2014. By that judgment, the court awarded 68 former employees of the applicant a total of Kshs **2,219,191.77** being salary in lieu of notice and leave pay. Aggrieved by the judgment, the appellant filed a Notice of Appeal on 15th January 2015.

Although ***Rule 75(2)*** of the ***Court of Appeal Rules (the Rules)*** requires the Notice of Appeal to be filed with 14 days of the of the date of the judgment, it is evident that in this case the Notice of Appeal was filed within time in light of the provisions of ***Rule 3(e)*** of the Rules which excludes the period of Christmas vacation in reckoning the time prescribed by the Rules. Ordinarily that vacation commences on 21st December and terminates on 13th January of the succeeding year.

By a letter that is erroneously dated 13th January 2014 instead of 2015, the applicant applied for certified copies of the proceedings and judgment as required by the proviso to **rule 82**. There is nothing on record to suggest that the letter was not served upon counsel for the respondent as required by the above rule.

From a copy of the certificate of delay dated 23rd April 2015, which forms part of the application, the applicant received the proceedings on 2nd April 2015. By dint of the provisions of rule 82, the applicant

was obliged to file the appeal within 60 days from the date the proceedings were ready, namely by 1st June 2015. The appeal was not filed within that time or at all and on 22nd July 2015 the applicant filed the application now before me for extension of time.

The reasons for the applicant's failure to file the appeal within the prescribed time are set out in the affidavit in support of the Motion, sworn by **Ms. Emma Ochieng**, Advocate, on 20th July 2015. Essentially counsel explains that there was confusion in their chambers arising from the fact that on 15th February 2015, the applicant filed an application in the Employment and Labour Court for stay of execution. The ruling on the application was delivered on 10th July 2015, which date counsel had marked as the bring-up date for the file. In the process, the deadline for filing the appeal was missed, the error only being discovered upon the delivery of the ruling.

The respondents were duly served with the application for extension of time on 24th July 2015 and a hearing notice for 28th September 2015. They did not file any affidavit to oppose the application and neither the respondents nor their advocate attended court for the hearing of the application on the scheduled date. In these circumstances there is no material before me to controvert the averments in support of the application, which I will treat as unchallenged.

The discretion of this Court to extend time under **rule 4** is wide and unfettered, subject of course to the fact that it must be exercised judicially. (See **FAKIR MOHAMED V. JOSEPH MUGAMBI & 2 OTHERS C.A. No. NAI 332 of 2004**, and **LEO SILA MUTISO V. ROSE, C.A. NAI 255 of 1997**). Among the factors to be considered in determining whether or not to exercise discretion in favour of an applicant include the period of delay, the reason for the delay, the degree of prejudice that the respondent stands to suffer, and possibly the chances of success of the appeal.

In the instant case the application for extension of time was filed slightly more than a month after the date prescribed for filing of the appeal. I would not describe that delay as inordinate. As to the reason for the delay, I am satisfied that counsel has been candid and owned up to their mistake, which, in the absence of contestation by the respondents I am willing to excuse. Again, without any response from the respondents, I have no material before me to conclude that they will suffer any prejudice in the event time is extended as prayed by the applicant. Lastly, the applicant has annexed to its application a draft Memorandum of Appeal from which I cannot conclude that the intended appeal is idle, taking into account the fact that by dint of the amendments introduced by the ***Statute Law (Miscellaneous Amendment) Act, 2014***, decisions of the Employment and Labour Relations Court are now appealable to this Court on both facts and law.

Taking into account all the foregoing, I am satisfied that this is an application deserving an order for extension of time. Accordingly I allow the Motion dated 20th July 2015 and direct that the appeal shall be filed within 21 days from the date of this ruling. Costs of the application shall be in the intended appeal.

Dated and delivered at Mombasa this 16th day of October, 2015

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR