



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 281 OF 2014

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION APPLICANT

AND

KENYATTA UNIVERSITY..... 1ST RESPONDENT

THE INDUSTRIAL COURT OF KENYA 2ND RESPONDENT

(Application for extension of time to file and serve Notice of Record of an appeal against the whole Judgment of the High Court of Kenya (Ngugi, J.)

delivered on 3rd October, 2012

in

MISC. CIVIL APPLICATION NO. 430 OF 2007)

RULING

[1] This is an application under Rule 4 of this Court Rules by University Academic Staff Union (applicant) in which they are seeking an extension of time to regularize three steps which they missed in their bid to mount an appeal. The Notice of Appeal that they seek to regularize was filed on 19th October 2012, instead of 17th October 2012; the record of appeal was filed on the 3rd October 2014, instead of 25th August 2014; and the time within which to serve the record of appeal also needs to be regularized as it was served upon the 1st respondent to 16th October 2014.

[2] The application is supported by the grounds stated in the body thereto and the supporting affidavit of Enonda A. M Dickson Advocate who has explained in further details the reasons for the delay. It is the applicant's case that being dissatisfied with the judgment of Mumbi Ngugi J., delivered on the 3rd October, 2012. On the 17th October 2012 the applicants instructed the firm of Enonda, Makoloo & Co. Advocates to file an appeal and the Notice of appeal was filed on the 19th October 2012, which was a delay of only 2 days.

[3] On 4th September 2012, the applicants' advocates applied for certified copies of proceedings and judgment, and it was not until the 6th March 2014, that they were notified that the proceedings were ready for collection upon payment of the requisite court fees. The court fees were paid on the 24th June 2014, according to the certificate of delay issued by the Deputy Registrar. Thereafter counsel for the applicant's instructed his clerk to file the record of appeal and he proceeded on his annual leave for the months of August, only to return in late September to realize the appeal was never filed. The appeal was finally filed on 3rd October 2014, despite the fact that it ought to have been filed 60 days after the applicant's counsel was notified the proceedings were ready and that was on or about 6th March 2014.

0. Counsel for the applicant apologizes for what he terms as inadvertent mistake on his part which he pleads should not be visited upon his innocent client. Mr. Enonda leaned counsel for the applicant urged that the application be allowed as it will not prejudice the respondents in any significant manner. He submitted that the appeal raises weighty matters and it has a good chance of success. Moreover the respondents have not filed any sworn deposition in opposition to this application and they have also not filed an application to strike the appeal which they could have done within 30 days of service of the record of appeal if indeed they were serious with the objection of the appeal. Lastly counsel reminded me that this court has unfettered discretion to ensure ends of justice are met for the litigants who come to court.

0. This application was opposed Mr. Waigi leaned counsel for the respondent. He submitted that the instant application did not meet the set threshold to warrant the

exercise of this court's discretion. This is because the applicants were late in filling everything. They were informed the proceedings were ready in March and it took them up to June to collect them. The record of appeal was filed 5 months late which delay is inordinate and does not deserve the exercise of this court's discretion.

[6] The prayers sought in the instant application call for the exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court have been established in a long line of authorities. See the cases of: **MUTISO v MWANGI, Civil Application No. Nai. 255 of 1997 (UR)** and **MWANGI V KENYA AIRWAYS LTD. [2003] KLR 486:**

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of 'sufficient reason' was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider as long as they are relevant. The period of delay, the reason for the delay, (possibly), the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay or public administration, the importance of compliance with time limits, the resources of the parties whether the matter raises issues of public importance are all relevant but not exhaustive factors.”

[7] With the above principles in mind, I now approach the application before me.

It is evident that the applicant's counsel filed the record of appeal late by about 4 months. The Notice of Appeal was also filed late by only 2 days and the appeal was served upon the respondent late by about 10 days. The reasons given by the applicant are what has become a practice now for advocates to blame themselves for mistakes when they fail to take a mandatory step as instructed by their clients and then ask court not to visit the blame on an innocent client. See the case of;-

Belinda Murai & others vs Amoi Wainaina [1978] LLR 2782 (CALL) Madan JA (as he then was) was at his best legal wits when he explained what constitutes a mistake in the following words:

“A mistakable is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

[8] At this day and age of digital technology and liberalized open market, I would myself decline to excuse the mistakes by the lawyer and ask the client who chose his or her counsel to take responsibility for the mistakes of his own counsel as it is oft’ said choices have consequences.

[9] However the above principle is not the only consideration to make for this kind of an application. I have to examine whether the appeal is arguable. One unique feature I find in this appeal is that the applicant’s counsel filed the record of appeal on the 3rd October 2014, despite not having complied with the Rules. This is commendable because most applicants come to court to seek leave before they have filled an appeal. I have looked through the record of appeal and in my view it raises arguable points especially one poignant point of law stands out on whether the High Court has jurisdiction to quash a decision of the Industrial Court.

[10] Besides the aforesaid, and although the respondent opposed the application for extension of time, the respondent did not file an application under Rule 84 of the Court of Appeal Rules seeking to strike out the appeal. In the event, it is my considered view the substantive matters of law raised in this appeal may as well proceed to a hearing. The respondent will also not suffer any prejudice except for the inconvenience of having to defend this application for which he did not even file a replying affidavit. This is what Rule 84 of this Court Rules provides;-

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on

the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be”

[11] The above being my findings, the Notice of Motion is hereby allowed as prayed. As the applicant had taken all the necessary steps to regularize the appeal, the order that commends itself is to deem the notice of appeal and the appeal as properly filed and served.

The respondent shall have the cost of this application in any event.

Dated and delivered at Nairobi this 16th day of October 2015.

M.K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR