



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 153 OF 2015 (UR 125/2015)

BETWEEN

MISS NDUTA MBILE..... APPLICANT

VERSUS

JOHN GACHAU GITONGARESPONDENT

(An Application for extension of time within which to file and serve the Appeal against the Judgment/Award of the Employment and Labour Relations Court at Nairobi (Bryam Ongaya, J.) dated 28th August, 2012 in

Industrial Cause No. 19 OF 2011)

RULING

This is an application under **Rule 4** of the **Court of Appeal Rules 2010** for extension of time for filing an appeal from the judgment of the Employment and Labour Relations Court at Nairobi (**Bryam Ongaya, J.**) dated 28th August, 2012 in Industrial Cause No. 19 of 2011.

The application is supported by the affidavit of **Miss Nduta Mbile**, the applicant herein and various documents. The respondent did not file a replying affidavit nor attend the hearing of the application.¹

The statement of claim and the response of the applicant to the claim are omitted from the record of the application. However, it is clear from the oral evidence given in the trial court and the extracted decree that the respondent claimed that he was employed by the applicant as a night watchman through oral contract for a period of 4 years, and that his employment was terminated without notice. The respondent also claimed that he was being paid a salary of Kshs. 4,000/- per month which was below the agreed salary of Kshs.5,175/- or the minimum wage increased by the minister responsible for labour in 2006 to Kshs. 6,796/- per month. He claimed a total of Kshs. 498,228/35 under various heads.

The applicant claimed that the respondent was a casual worker employed at a daily wage of Kshs. 300/-; that the respondent did not work for two years – 2006 and 2007; and that she had paid the applicant all his dues before he left employment.

The trial court in an extempore judgment allowed the respondent's entire claim on 28th August, 2012. The

applicant filed a notice of appeal dated 5th September, 2012 and applied on the same day for a copy of the proceedings and the award.

The applicant also filed an application for stay of execution of the decree dated 25th September, 2012 and also an application for review of the award dated 3rd October 2012. The application for review was dismissed on 9th October, 2012. The application for stay of execution pending appeal was allowed by consent on 9th November, 2012 on condition that the applicant pays Kshs. 16,350/- as costs and deposits land title for Ngong/Ngong/38852 as security, which condition the applicant complied with.

By an application dated 22nd January, 2013 the respondent applied that the order staying execution be set aside on the ground that the applicant had not lodged an appeal. The record does not show whether or not the application was heard. However, the applicant's application in the trial court dated 28th May 2013 sought to set aside the ruling of 29th May, 2013 indicating that the trial court allowed the respondent to execute the decree.

In an application of this kind, the applicant is required to demonstrate, amongst other things, that the intended appeal is arguable; that there has not been inordinate delay in filing the application; and that the respondent would not suffer undue prejudice if the application is allowed. The power of the court to extend time is however discretionary.

As regards the first requirement, the applicant has filed a draft memorandum of appeal containing twelve grounds of appeal. They broadly relate to lack of proof of existence and terms of the oral contract of employment; the inadequacy of the evidence to substantiate the existence of the contract and the claim; and the failure to refer the labour dispute to the statutory conciliation process.

The Labour Relations Act provides for a dispute resolution mechanism between employer and employee in sections 62 to 72. According to these provisions, a trade dispute is first reported to the Minister responsible for labour matters, who in turn appoints a conciliator to resolve the dispute and if the dispute is not resolved through that process, then by section 73(1) a party to the dispute can refer the dispute to the Industrial Court.

In this case, it is evident that the dispute was not reported to the Minister and hence no conciliator was appointed to resolve the dispute before the respondent filed the claim in the Industrial Court. Having perused the evidence, the impugned judgment and the draft memorandum of appeal, I am satisfied that the intended appeal is arguable.

On the question of delay, the present application was filed on 5th June, 2015 nearly three years since the date of the delivery of judgment. The applicant avers that she relied on professional advice of her former two advocates to proceed and file the appeal but her former advocates failed to do so. The record shows that the applicant was at first represented by the firm of **Mitey & Associates** who filed the notice of appeal within the time stipulated by the rules and indeed drafted and signed a memorandum of appeal dated 15th August, 2013. In March 2015 she instructed another advocate, **R. H. Wanga** and in May 2015, instructed her current advocates who filed the present application.

The record also shows that the file was not always available at the registry and that the proceedings were not supplied in time. Indeed, by a letter dated 18th September 2012, the firm of Mitey & Associates complained to the Deputy Registrar of the court that the registry had not provided the proceedings despite several visits to the registry to collect them. Coupled with the delay in obtaining the proceedings, there were other subsequent proceedings in the court which caused further delay.

This is a case where the applicant evinced a desire to appeal the decision of the trial court from inception, filed a notice of appeal and applied for a copy of the proceedings in time and actively pursued the delivery of a copy of proceedings and actively participated in the subsequent proceedings to have the award reviewed and to forestall execution before the intended appeal is filed, but her former advocates

failed to institute the appeal. I am satisfied that the delay is excusable in the circumstances.

The respondent has partly executed the decree and will not suffer any undue prejudice if the application is allowed.

Accordingly, I allow the application and extend time as prayed. The applicant shall file the appeal within fourteen (14) days from the date hereof.

The costs of the application shall be costs in the appeal.

Dated and Delivered at Nairobi this 20th day of November, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR