IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, JA)

CIVIL APPLICATION NAI 187 OF 2013 (133/2013)

BETWEEN

KENYA PLANTATION AND AGR. WORKERS UNION … APPLICANT

AND

KILIFI PLANTATION LTD. …………………………….. RESPONDENT

(An application for enlargement of time within which to file and serve the Notice of Appeal and the Record of Appeal against the Ruling and/or orders of the Industrial Court (Radido, J) dated 26th October 2012

in

INDUSTRIAL CASE NO. 125 (N) OF 2009)

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RULING

It is now well established that the decision whether or not to extend time within which to file and serve the notice of appeal is essentially discretionary.To enable the Court exercise its discretion in favour of an applicant for enlargement of time, the applicant must adequately explain the cause of the delay, whether short or long and give cogent reasons why notice of appeal or the appeal was not filed within the time prescribed by the law.

Secondly, an indulgence will be extended to an applicant seeking enlargement of time only on settled principles which have been articulated in the past decision, chief among them being **Leo Sila Mutiso v. Rose Helen Wangari** Civil Application No. Nai 251 of 1997 that:-

> **"……. in general the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay, secondly, the reasons for the delay, thirdly (possibly), the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the**

application is granted."

The present motion for enlargement of time pursuant to **Rules 4** and **75** of the Court of Appeal Rules is predicated on the grounds that:-

i. The applicant being aggrieved by the award given by the Industrial Court on 4th March, 2010 applied to have it reviewed, but the application was dismissed.

ii. On 12th December 2012 the advocates for the applicant, M/S JA Guserwa and Co. Advocates received instructions to peruse the relevant file.

iii. Upon perusal of Industrial Cause No. 125 (N) of 2009, the advocates discovered that the ruling in question had been delivered on 26th October 2012, by which time the time allowed to appeal had lapsed.

iv. The delay in filing the notice of appeal was occasioned by the applicant's advocates obtaining adequate instructions from the applicant's members,

v. Due to the transition of the former Industrial Court to the present one.

vi. The certified copy of the proceedings took long to deliver, and

vii. The intended appeal is arguable.

The application has been opposed by the respondent for the following reasons:-

i. That the applicant has not explained the delay of over 10 months or failure to file notice of appeal within the prescribed time.

ii. That the issue of the applicant's advocates obtaining instructions is irrelevant in an application for enlargement of time.

iii. That the application is frivolous, an abuse of the court process and a waste of the court's time as no evidence has been produced to show that the applicants have applied for the proceedings.

iv. That the intended appeal lacks merit and has no chance of appeal, and

v. That should the application be allowed the respondent will suffer irreparable prejudice.

Applying the principles outlined at the beginning of this ruling to the grounds relied upon by the applicant, can it be said that the delay of 9 months was inordinate in the circumstances of this case; that the applicant has discharged the burden of explaining the reason for the delay; that the appeal has chances of succeeding; and that the respondents are not likely to suffer prejudice.

The delay, according to the applicant was caused by two principal reasons, the taking of instructions by the applicant's advocates and the delayed delivery of the copies of the proceedings and the ruling. Starting with the latter reason, there is no evidence, as required by **Rule 81 (2)** that the applicant wrote to the Registrar of Industrial Court requesting for a copy of the proceedings as indeed there is also no certificate of delay by that court. There is no merit on that ground.

Regarding the time taken by the applicant's advocates in getting instructions, it is noted that the advocates were instructed and upon perusing the relevant record on 12th December, 2012 found that the decision had been rendered on 26th October 2012. But even before the 12th December 2012 when the advocate discovered that the ruling had been delivered, it is apparent from the record that the applicant was represented by Mr. Meshak Khisa when the ruling was delivered on 26th October 2012.

Assuming that the applicant's advocate was instructed on 30th January, 2013 as submitted and evidenced by a letter of that date, the burden still remains upon the applicant to explain the delay between 30th January, 2013 and 26th July, 2013 when this application was brought, a period of six months. I reiterate the words of Lord Guest in **Ratnam v. Cumarasamy** [1965] 1 WLR 8:-

> **"The rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material upon which the court can exercise its discretion."**

On the likelihood of success of the intended appeal, it is noted, that the only ground of challenge is that the learned Judge erred in not finding that the applicant's members were not given a hearing.Without expressing definitive position, the learned Judge found that ground to be outside the consideration of **Section 16** of the Industrial Court Act and Rule 32 of the Industrial Court (Procedure) Rules, 2010. He also was of the view that the question that was brought in the form of a review was a matter for appeal. I cannot say that there is no merit in those findings.

It is therefore, in my view doubtful if the intended appeal has any chances of success. The court cannot lose sight of the fact that, when the time fixed for appeal has run out without the would-be appellant providing any justification for the delay the respondent has a certain accrued rights.

In the circumstances, it will be prejudicial for the respondent to be dragged back to Court to relitigate matters thought to have been accepted by the applicant.

For these reasons, the application fails and is dismissed with costs.

Dated at Nairobi this 14th day of March 2014.

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

REGISTRAR