



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE J.A (IN CHAMBER’S))

CIVIL APPLICATION NO. NAI 261 OF 2013 (UR 189/2013)

BETWEEN

UNIVERSITIES NON-TEACHING

STAFF UNION (UNTESU).....APPLICANT

AND

MOI UNIVERSITY .....RESPONDENT

*(Application for extention of time within which to file and serve the Notice of Appeal and the Record of Appeal against the Ruling of the Industrial Court (Makau J) Dated 18<sup>th</sup> October, 2012*

in

*Industrial Cause No. 1649 of 2011*

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RULING

1. The applicants **Universities Non-teaching Staff Union (Untesu)** moved to the Industrial Court and presented cause No. 1649 of 2011, against the Respondent **Moi University**. The claim centered on an alleged breach of the provisions of Section 49 of the Labour Regulations Act 2007 where by the Respondent was alleged to have failed to deduct Agency fees from the Respondents’ employees, who had allegedly benefited from a Collective Bargain Agreement (CBA) on behalf of the applicant as indicated vide gazette notice No. 5607 of 27<sup>th</sup> April, 2011. Parties were heard on their merits resulting in a ruling delivered by **Nzioki Wa Makau J** on the 18<sup>th</sup> day of October, 2012, in which the applicants lost.
2. The applicants were aggrieved by that ruling and desired to appeal against that decision. They retained the services of M/S J.A. Guserwa & Company Advocates for this purpose. M/S Guserwa allegedly signed the notice of appeal and a letter asking for the supply of a typed copy of proceedings for purposes of readiness of the intended appeal but an unnamed clerk in her office inadvertently failed to lodge these documents in time hence the presentation of the notice of motion dated the 20<sup>th</sup> day of September, 2013 and lodged on the 25<sup>th</sup> day of September, 2013

- which seeks to regularize that position, the subject of this ruling.
3. The application is predicated under Rules 4 and 42 of the Court of Appeal Rules and Sections 3A and 3B of the Appellate jurisdiction Act. Two substantive reliefs are sought namely:-
    1. ***That the Honourable Court be pleased to grant the applicant leave to file and serve its notice of appeal and record of appeal out of time against the ruling of the Industrial Court delivered on 18<sup>th</sup> October, 2012 by the Hon. Justice Nzioki wa Makau in Industrial Court Case No. 1649 of 2011 between Universities Non-teaching Staff Union (UNTESU) versus Moi University.***
    2. ***That this Honourable Court be pleased to find that the Notice of appeal lodged in Court on the 11<sup>th</sup> day of February, 2013 and served on the respondent counsel on the 12<sup>th</sup> February, 2013 be deemed to have been filed and served within time.***
  4. In her oral submission in Court, M/S Guserwa reiterated the content of the grounds in the body of the application as well as those in the supporting and supplementary affidavits of **Charles G. Mukhwaya**. She conceded that the notice of appeal was not filed in time as it was filed four (4) months out of time; that she signed both the notice and the letter requesting for proceedings within time but an unnamed clerk in her office failed to lodge and serve these documents in time. **M/S Guserwa** went on to add that they are ready and willing to move diligently given a chance to do so as the record of appeal is ready for filing; that they have an arguable appeal which should be given a chance to be ventilated; and that they have sufficiently explained the delay and for this reason this Court should exercise its discretion in their favour.
  5. The application has been opposed by the Respondent vide the replying affidavit of **Wikister Muyoka Simiyu** dated 31<sup>st</sup> day of October, 2013 and lodged in this Court on the 1<sup>st</sup> November, 2013. In summary **Mr. Martin Njiru Ileri** learned counsel holding brief for **Harrison Okeche** for the Respondent, relying on the content of the replying affidavit urged me to disallow the application. **Mr. Njiru** argued that as at the time the application under review was served on the respondent, the applicant had not demonstrated seriousness in their intention to pursue the intended appeal as they had failed to explain sufficiently the discrepancy in their deponements as regards the date of first November, 2012 when the notice was dated and when counsel allegedly obtained instructions to appeal on 6<sup>th</sup> November, 2012. The applicant had not also applied for a copy of typed proceedings in writing with a copy to the respondent nor exhibited a copy of the draft memorandum of appeal showing what issues the applicant intended to take up on appeal. It is only after the respondent had raised these concerns in their replying affidavit that the applicant exhibited these documents in their supplementary affidavit. To **Mr. Njiru** this was not a show of diligence on the part of the learned counsel. Lastly that the delay of four months has not been sufficiently explained. **Mr. Njiru** has also urged me not to allow learned counsel for the applicant to take refuge under the alleged inadvertence on the part of an unnamed clerk in her office as it was her obligation to ensure that preliminaries for the presentation of the intended appeal were complied with within reasonable time.
  6. In response to **Mr. Njiru's** submission, **M/S Guserwa** still maintained that she did what was expected of her as counsel within time but it was the clerk in her office who let her down; that this should not be visited on their client who should be given an opportunity to ventilate on appeal their well founded grievances as demonstrated in the draft memo of appeal. Considering that their appeal is not frivolous but one that is arguable. Also the delay of four months
  7. The respondent relied on the decision in the case of **Muhuyu Wandabwa Khamala versus the Attorney General and 2 others [2005] eKLR** for the proposition that even a delay of only six weeks if not sufficiently explained will disentitle a litigant to the relief of leave to appeal out of time; the decision in the case of **Attorney General versus Hon. Prof. George Saitoti [2010] eKLR** for the proposition that Rules of Court must be obeyed.
  8. My jurisdiction has been invoked under both the substantive and procedural provisions of law. The substantive provisions of law are Sections 3A (1) and 3B (1) of the Appellate Jurisdiction Act. These enshrine the overriding objective principle.

***“3A The overriding objective of this Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.***

**3B. For the purposes of furthering the overriding objective specified in Section 3A, the Court shall handle all matters presented before it for the purposes of attaining the following aims:-**

- a. **The just determination of the proceedings.**
  - b. **The efficient use of the available judicial and administrative resources.**
  - c. **The timely disposal of the proceedings as well as all other proceedings in the Court at a cost affordable by the respective parties; and**
  - d. **The use of suitable technology”**
9. The parameters for the applicability of this principle have been demarcated by a wealth of case law. There is the case of **City Chemist (NBI) Mohammed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)** for the proposition that the principle confers on the Court considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder; the case of **Kariuki Network Limited & another versus Daily & Figgis Advocates Civil Application No. Nai 293 of 2009** for the proposition that the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate time and costs saving disposal of cases before it; (ii) that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the Court to be guided by a broad sense of justice and fairness; the case of **Hunter Trading Company Limited versus ECF/OIL Kenya Limited Civil Application No. Nai 6 of 2010 (UR 3[2010]** for the proposition that the overriding objective principle is intended to re-energize the process of the Court, and encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the Rules made thereunder are “<sup>0</sup>2” compliant.
10. The procedural provision of law is enshrined in Rule 4 of this Court’s Rules. It provides:-

**“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and or reference in these Rules to any such time shall be construed as a reference to that time as extended”**

11. On interpretation of this Rule, I wish to draw inspiration from the decision in the case of **Kariuki Net Work Limited & another versus Daily & Figgis (Supra)** the case of **Deepak Manlal Kamami and another versus Kenya Anti-corruption and 3 others Civil Application No. 152 of 2009** for the proposition that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just expeditious, proportionate and affordable resolution of Appeals. See also the case of **Grindlays Banks International (K) Limited versus George Borbour Civil Application No. Nai 257 of 1995;** for the proposition that rules of Court must be obeyed and in order to justify a Court in extending the time frame within which to comply with procedural steps required to be taken in any litigation, there must be sufficient material placed before a Court of law to enable it extend such a time limit, ruling otherwise would defeat the very purpose for which time lines were put in the rules.
12. On the applicability of Rule 4, I wish to adopt the parameters set by the decision in the Case of **Leo Sila Mutiso versus Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997** for the proposition that the decision whether or not to extend time for appealing is essentially discretionary; that the matters which this Court takes into account in deciding whether to give an extension of time or not are **first**, the length of the delay; **second** the reason for the delay; **third** (possibly) the chances of the appeal succeeding if the application is granted; and **fourth** the degree of prejudice to the respondent if the application were to be granted. The case of **African Airlines International Limited versus Eastern and Southern African Trade & Development Bank (PTA) Bank [2003] KLR 140** for the proposition that the discretion to extend time is unfettered and should be exercised flexibly with regard to the particular case and that all the relevant factors pertaining to each particular case should be taken into consideration. The case of **Githiaka versus Nduriri [2004] 2KLR 67** for the proposition that under Rule 4, the Court is vested with an unfettered discretion to extend time with the only fetter being that it be exercised judiciously that

is to say on sound reasoning free from whim, caprice or sympathy and in the interest of justice in the case.

The case of **Delphis Bank Limited versus Recco Builders Limited and another [2005] 346** for the proposition that a defaulting party is not precluded from seeking leave to regularize the notice of appeal and where there is demonstration that despite the delay, the applicant had been diligent, that the intended appeal has merit and the extension of time sought would not prejudice the respondent, the Court can still exercise its discretion in favour of such an applicant.

13. Applying the above principles to the rival arguments herein, it is undisputed that the applicant's notice of appeal and the letter requesting for a typed copy of the proceedings were dated the 1<sup>st</sup> day of November, 2012. The notice was nonetheless lodged and served onto the respondent four (4) months later. Whereas the letter requesting for a typed copy of the proceedings for purposes of appeal was only brought to the attention of the Respondent through the applicants supplementary affidavit after the respondent had faulted the applicant on their default regarding this procedural step in the respondents replying affidavit. It is evident from the content of the record that there was discrepancy in the date of receipt of the instruction to appeal and the date when the notice of appeal was dated and signed. Learned counsel **M/S Guserwa** explained that the dating and signing of the notice of appeal ahead of instructions to appeal and the letter requesting for a typed copy of the proceedings were simply for purposes of preparedness; and that had the unnamed clerk in her office moved diligently, the appeal could have been filed within time.
14. Issues of procedural lapses on the part of advocates to the detriment of their clients are not a rare phenomena in litigation. These do arise from time to time and their effect on the clients cause, usually depends on the underlying circumstances surrounding the litigation. In **Lee G. Muthoga versus Habib Zuruch Finance (K) Limited Nairobi Civil Application No. Nai 236 of 2009 (UR) 165 OF 2009** faced with a similar scenario, the Court made the following observation:-

***"... Mr. Owang states that although their Court clerk was served with the hearing notice, the clerk forgot to record and /or diarize the hearing date with the result that all advocates in the firm were not aware that the matter was due for hearing on 9<sup>th</sup> July, 2009. Mr. Kirundi who appeared before us on behalf of the applicant readily admitted that his firm occasioned the omission which he termed an inadvertent and a pure mistake which should not be revisited upon an innocent applicant who had no control over the circumstances leading to his counsels' failure to attend court on the due date"***

As against the respondents arguments that the above was not a good explanation, the Court in the above cited case had this to say:-

***"It is plain from the circumstances presented before us that mistakes or careless or inadvertence on the part of the clerk of the firm of Messers Kirundi & Co. Advocates who act for the applicant occasioned counsels' failure to attend Court and thus leading to the application being dismissed for want of appearance. It is obvious as we have already said that the applicant is totally blameless. In our view, the omission constitute a sufficient cause within the meaning of rule 55(3) of the Rules of this Court. In the result, we allow the application"***

In the case of **Joseph Njuguna Muniu versus Medicino Glovani [1998] eKLR** faced with a similar scenario, the Court had this to observe:-

***"But herein an officer of the Court with an implicable record as an advocate of standing in Ms. Jan Mohamed. She applied to set aside the exparte judgment within two weeks of it having been pronounced. She has admitted that a hearing notice for 15<sup>th</sup> November, 1995 was received in her office. She has said that she had every intention to appear at the hearing of the suit but through a mistake in her office the hearing date was not noted in her diary. We know that administrative mistakes of this kind do occur in the offices of busy practicing advocates and yet they have to depend upon their clerical staff for every routine or secretariat matter.***

*The learned judge was not impressed with her explanation because in her view, the person who failed to enter the date in Miss Jan Mohamed's, diary should have given his or her affidavit to say how and why he or she had failed to enter it in their diary. Once the Judge had accepted that somebody had forgotten or overlooked to do so as he did, in my view, it is not material to know who that person was and how or why he or she had forgotten. In our view, the explanation given by Miss Jan Mohamed was good enough to show why she failed to attend at the hearing of the suit. There was no evidence that Miss Jan Mohamed was reckless or indifferent or that whatever she had said in her affidavit was not true. There was therefore no basis on which the learned judge had held that no justifiable and excusable reason had been offered."*

15. Applying the above reasoning to the rival arguments herein, I am of the opinion that no penal consequences flow from the applicants' advocates failure to name the clerk who allegedly failed to take the procedural steps in time, nor for failure to furnish an affidavit explaining why and how the default occurred. It was sufficient for *M/S Guserwa* to lay the blame on the clerk. I do take judicial notice as the Judges in the cited case, did that routine chores in an advocate's office are usually executed either by a clerk or a secretary. There is nothing to counter *M/S Guserwas'* assertion that this was the position. Further her assertion on readiness to proceed has been borne out by demonstration that both the notice of appeal and the letter requesting for proceedings were dated and signed on 1<sup>st</sup> November, 2012 and in fact had these been lodged in time, these proceedings would have been rendered unnecessary. In the premises, I find the explanation given by *Ms Guserwa* reasonable. No reckless or indifferent conduct on the part of counsel has been displayed.
16. As for prejudice to the respondent, I find that no immediate benefits were due to flow from the decision of the learned Judge to the Respondent as all that the learned trial Judge did was to decline an order for the deduction of agency fees in favour of the applicant. This is something that can be compensated for by way of costs.
17. As for the arguability of the intended appeal, this is not a mandatory requirement under Rule 4 procedures. However, where issue has been raised over it, there is no harm on it being interrogated along side others. I have looked at the three grounds of appeal intended to be raised on appeal by the applicant. They seek to fault the learned trial Judge in the exercise of his judicial discretion in denying the applicant the relief sought. I believe there is good ground for the applicant seeking to get a second opinion on the exercise of that discretion. Allowing the applicant such an opportunity will be in line with the call made to me vide the constitutional provisions in Article 159 (2) (d) thereof which enjoins me to lean towards the rendering of substantive justice to the litigants as opposed to denying the same on accounts of technicality. Denying the applicant the relief sought will be tantamount to denying justice on a point of technicality. Such a denial will also be an affront on the overriding objective principles, in that it will be portraying rules of procedures as yokes as opposed to them being vehicles of justice. Such a move will also defeat the overriding objective as it would not pave the way for a speedy disposal of the litigation between the parties herein. All that the applicant will be required to do consequent to any denial is to refer the matter to a full bench. This will result in further delays.

The upshot of the foregoing assessment is that, I find merit in the application dated 20<sup>th</sup> September, 2013. The same is allowed with costs to the Respondent. Since the proceedings were necessitated by the negligence on the part of the applicant's advocates office, that office will meet the costs of the application to the Respondent. The applicant has seven (7) days of the reading of this ruling within which to lodge and serve the notice of Appeal. The record of Appeal which I have been told is ready for lodging is to be lodged within thirty (30) days of the lodging of the notice of appeal. In default, leave granted herein to lodge the above documents out of time to stand lapsed.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of June, 2014**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**