IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NYR. 13 OF 2014

MAGUNA ANDU SELF SELECTION STORES LTD……..…..APPLICANT

VERSUS

ALBERT OUMA AKEYO……..RESPONDENT

(An application to extend time to file and serve the record of appeal against the judgment of the Industrial Court of Kenya at Nyeri (Abuodha, J.) dated 4th October 2013

in

Industrial Case No. 30 of 2013)

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R U L I N G

The Notice of Motion dated 30th May, 2014, is brought by Maguna Andu Self Selection Stores *(applicant),* seeking for extension of time within which to file an appeal against the judgment of Abuodha, J., dated the 4th October, 2013. The application is brought under the provisions of ***Rule 4*** of the ***Court of Appeal Rules***.

The application is supported by affidavits of Simon Wachira Muriuki and Jeremiah Mbuthia Advocate for the applicant which were both sworn on 30th May, 2014. The said affidavits give the background information as thus; judgment in the matter was delivered on 4th October, 2013, being aggrieved; the applicant filed a notice of appeal and applied for the proceedings. The proceedings were supplied to the applicant's advocates on the 9th January, 2014. However, the appeal which ought to have been filed within 60 days which expired around the 9th of March, 2014, was not filed within time.

The reasons advanced for the delay were attributed to a mistake by Mr. Mbuthia, learned counsel for the applicant. He states in his supporting affidavit that after the proceedings were received in his office, he misplaced his office file and the matter escaped his attention. He deposed in the aforesaid affidavit that the mistake by counsel should not be visited on an innocent client. Submitting on the issue of whether the appeal is arguable, counsel contended that the award of salary for the month of July, 2012, to the respondent was without basis as the respondent had already tendered his resignation for the said month, also the damages for unlawful termination was not supported by any evidence. Lastly, counsel submitted that if leave was granted to file the appeal, no prejudice would be occasioned to the respondent and the inconveniences caused by the present application can be compensated with costs.

On the other hand, this application was opposed by the respondent who was acting in person. He contended that the intended appeal lacked merit because his employment was unlawfully terminated. Since the termination, he has no means of livelihood; he claimed that loss of employment has rendered him destitute; he claimed that he had to walk all the way from Murang'a to Nyeri to attend the hearing of this application. Further, although he had served the appellant with a notice of termination, but the appellant terminated his employment before the notice expired.

The prayers sought herein 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 whimsically or capriciously. The parameters that guide the Court are well set out in a long line of authorities. See the case of; - ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur)***:

> ***"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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 above list is of course not exhaustive as held in the case of;- ***Mongira & Another v Mukaria & Another, 2005 2 KLR 103 at page 106-10***7, where the Court again cited ***Leo Sila Mutiso,*** (supra), and went on to state:

> ***"Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general" Rule 4 gives the Judge unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. So ……. factor is relevant to the issue being considered. To limit such issues only to the far set out in paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way".***

With the above principles in mind, I now approach the application before me. The applicant is late in filing the appeal for a period of three months. The applicant has explained that the delay was caused by its counsel who received the proceedings within time, but misplaced his office file and the matter escaped his attention. The respondent vehemently opposed this application and rightly so, because the applicant chose his own lawyers and, therefore, it should bear the consequences of his advocates' mistakes and should not visit it upon the respondent who would wish to leap the fruits of his litigation. Ordinarily a mistake by counsel is usually excusable if it is genuine does not cause prejudice to the other side. See the case of;- ***Belinda Murai & others vs Amoi Wainaina, [1978] LLR 2782 (CALL) Madan, J.A.*** *(as he then was)* was at his best legal wit 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...".***

Even if I were to overlook the delay attributed to the advocate, this is nonetheless not the only handle the applicant has to overcome; the applicant has to demonstrate it has an arguable appeal, and the

application will not prejudice the respondent. On these two issues, this application fails. The applicant did not annex a draft memorandum of appeal from which I could discern whether it raises an arguable appeal, of course this is not to say that an arguable appeal will of necessity be successful but the least the applicant should have done is to avail me that opportunity. The respondent contended that he will be prejudiced, so far he is unemployed and he claimed he has been rendered destitute after the termination of employment. This contention is not farfetched and for the very reason that this appeal involves a delicate issue that touches on the respondent's livelihood, the applicant should have been diligent to ensure the appeal was filed on time.

For the foregoing reasons, I find no merit in this application which is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JULY 2014.

MARTHA KOOME

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JUDGE OF APPEAL