



IN THE COURT OF APPEAL

AT NAIROBI

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

Civil Application No. Nai 249 Of 2013 (Ur 179/2013)

BETWEEN

JANET NYANDIKO

APPLICAN
T

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(An application for extension of time within which to file & serve Notice and Record of Appeal from the judgment of the Industrial Court of Kenya (Nzioki wa Makau, J) dated 8th February, 2011

in

INDUSTRIAL CAUSE NO. 165 OF 2011)

RULING

This is an application by way of Notice of Motion dated 12th August, 2013 expressed to be brought under *Rules 4, 41, 42 and 49* of the *Court of Appeal*

Rules (the Rules). The applicant seeks the following orders:

1. *That this Honourable Court be pleased to grant the applicant leave to file her Notice of Appeal and Record of Appeal out of time against the Judgment/Award of the Industrial Court delivered on 8th February, 2013 by the Honourable Mr. Justice Nzioki Wa Makau in Industrial Court Cause No. 165 of 2011.*
2. *That the Honourable Court be pleased to grant the Applicant herein time to file Notice of appeal and appeal after the grant of such leave.*
3. *Costs for the application be in the intended appeal.*

The grounds upon which the applicant relies on in support of her application are that firstly, being aggrieved with the judgment she is desirous of appealing against it; secondly, that the clerk in charge of

the file left the firm having not lodged the notice of appeal within 14 days despite the fact that he had been issued with instructions within the prescribed period; thirdly, that the applicant has good grounds of appeal and if this application is not granted she will suffer prejudice; and fourthly, that she has filed this current application without undue delay.

The genesis of this application is that the applicant was employed by the respondent as a clerk/typist and later promoted to the position of a teller. The applicant was terminated from duty on 12th February, 2010 by the respondent.

The applicant filed a claim in the Industrial Court claiming that her termination was unlawful and therefore sought reinstatement, salary arrears for the period of 10 months she was on suspension, damages for wrongful/unlawful termination of employment and or terminal dues or compensation for wrongful dismissal.

The Industrial Court in a judgment dated 8th February, 2013 held *inter alia*:

“The Claimant’s employment was terminated in a manner that was unfair as the Employer did not in all the circumstances of the case act in accordance with justice and equity in terminating the employment of the employee. Granted she was asked to give explanations which were considered, granted she was aware of the cash balance issues and the absenteeism, she was of necessity to be accorded some degree of natural justice commensurate with the dictates of the law. She should have been called in and advised of the reasons for her termination. To that extent, the Claimant’s termination was unfair. It was lawful but unfair.”

The applicant was awarded one month pay in lieu of notice amounting to KShs.100,662/=, leave travelling allowance of KShs.5,393/=, costs and interest on the above from the date of judgment until payment in full. The learned judge also held that the other portions of the applicant's claim were not proved and were therefore, dismissed. It is that decision that the applicant intends to appeal against.

At the hearing of the application, Miss Guserwa, learned counsel for the applicant, submitted that the application before this court is dated 18th

August, 2013 and is supported by the applicant's affidavit dated the same day.

She submitted that she wished to rely on the applicant's affidavit. Counsel reiterated the grounds set out in the application and supporting affidavit and argued that the main reason for the delay in filing the Notice of Appeal was because the clerk who had been given instructions to file the notice of appeal failed to do so and had since left the firm. Counsel regretted the mistake and urged that the same should not be visited on the applicant. Counsel submitted that the applicant has also filed a supplementary affidavit dated 17th February, 2014 attaching a draft memorandum of appeal and a draft Notice of Appeal pursuant to the orders of Githinji, J.A dated 5th February, 2014.

On the issue of arguability, counsel submitted that from the judgment of the Industrial Court there was no justification for the applicant being awarded one (1) month compensation and not 12 months. In counsel’s view, therefore, on that ground alone, the intended appeal has high chances of success. She urged me to allow the application.

Learned counsel, Ms Oyombe appeared for the respondent. She strongly opposed the application and relied on the replying affidavit sworn by Laban Sogomo dated 7th November, 2013 and filed on 12th November, 2013. She also relied on the list of authorities filed herein. Counsel admitted that this court has powers to extend time to file documents, however, the discretion should be exercised judiciously as per various principles laid down by this Court.

On delay, Ms Oyombe submitted that the award was delivered on 8th February, 2013, yet this application

was brought to this court in September, 2013, a delay of 7 months. In counsel's view, this is an inordinate delay and cannot be justified. She argued that although there is no explanation given why since June to September, 2013 no steps were taken to lodge the Notice of Appeal. Counsel added that this Court's discretion should not be exercised to aid a person who is not diligent in pursuing her rights.

On the issue of one month's salary as compensation, counsel submitted that it was discretionary and is not mandatory for a successful litigant to be awarded maximum compensation. Counsel urged me to dismiss the application.

In response to the submissions made by counsel for the respondent, Miss Guserwa submitted that an appeal is a procedural and constitutional right. She urged that the applicant should not be shut out from her right to appeal on grounds of technicalities.

I have carefully considered the application, the affidavits on record, list of authorities, submissions by counsel and the law.

The discretion that I am called upon to exercise in this application is under **Rule 4** of the Rules which 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 doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The principles guiding the court on an application for extension of time premised upon **rule 4 of the Rules** are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is upon an applicant under this rule to explain to the satisfaction of the Court that she is entitled to the discretion being exercised in her favour.

The parameters for the exercise of such discretion are clear. See

MUTISO V MWANGI, CIVIL APPLICATION NO. NAI 255 OF 1997 (UR),

MWANGI V KENYA AIRWAYS LTD, [2003] KLR 486, MAJOR JOSEPH

MWERERI IGWETA V MURIKA M'ETHARE & ATTORNEY GENERAL, CIVIL

APPLICATION NO. NAI 8 OF 2000 (UR) AND MURAI V WAINAINA, (NO. 4)

[1982] KLR 38. See also **FAKIR MOHAMMED V JOSEPH MUGAMBI & ANOTHER, CIVIL APPLICATION NO. NAI 332/04 (Unreported)** where this Court rendered itself thus:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” as removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider too 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 on 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.”

The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In **MWANGI V KENYA AIRWAYS LTD, [2003] KLR 48**, the Court having set out matters which a single Judge should take into account when exercising the discretion under

Rule 4, went on to hold:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the

Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

The important point being made in the above passage is that apart from the length of the delay, the reason for the delay, the possible consideration of the appeal succeeding and the degree of prejudice to the respondent if time is extended, a single Judge would be perfectly entitled to consider any other factor outside these four, as long as that factor is relevant to the matter at hand.

I am, of the view that errors or faults of counsel should not be visited upon the applicant as was held in the case of **SHABIR DIN V RAM PARKASH**

ANAND, [1955] EACA Briggs JA said at page 51 thus:

“In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.” See also Lee .G. Muthoga -vs- Habib Zurich Finance (K) Ltd. & Another-Civil Application No. Nai. 236 of 2009.

Further, this Court in the case of **TRUST BANK LTD V AMALO**

COMPANY LTD, C.A. No. 215 of 2000 held:

“1. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigate (sic) from the pursuit of his rights.

2. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

Consequently, I find in the circumstances of this application, that the reason given by the applicant for the delay in filing the Notice of Appeal is excusable.

The applicant also contends that she has an arguable appeal as it raises an issue for determination as to whether the learned judge erred in awarding the applicant one month salary as compensation and in dismissing the applicant's other claims. An arguable appeal does not necessarily mean that which will succeed.

The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.

The respondents are justified in claiming that further delay in the matter will cause them prejudice. The justice of the matter nevertheless demands that an opportunity be given to the applicant to argue her appeal in the Court of Appeal.

Having taken all of the above into consideration including the length of the delay, the reasons for the delay, the *prima facie* arguability of some of the issues intended to be raised on appeal and the lack of substantial prejudice to the respondents in allowing the intended appeal to proceed, I have come to the conclusion that this is a proper case for me to exercise my discretion by granting the application for extension of time.

Accordingly, I make the following orders:

1. ***That time be and is hereby extended to file and serve a notice of appeal against the judgment of the Hon Mr Justice Nzioki wa Makau made on 8th February, 2011.***
2. ***The notice of appeal shall be filed and served on or before 5pm on 7th November, 2014.***
3. ***That time be and is hereby extended for filing the record of appeal against the judgment of the Hon Mr Justice Nzioki wa Makau made on 8th February, 2011.***
4. ***The record of appeal shall be filed and served on or before 5pm on 7th November, 2014.***
5. ***The costs of this application shall abide by the outcome of the intended appeal.***

It is so ordered.

Dated and delivered at Nairobi this 24th day of October, 2014.

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR