



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 251 OF 2014**

**BETWEEN**

**JOHN MWANGI KURIA & 163 OTHERS .....APPLICANTS**

**AND**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**NATIONAL IRRIGATION BOARD.....2ND RESPONDENT**

(Being an application for leave to file Notice and Record of Appeal out of time against the award by Hon. Lady Justice Linnet Ndolo dated 30<sup>th</sup> July, 2014

**in**

**Industrial Cause No. 28 of 2012)**

**RULING**

The Notice of Motion before me is by 164 applicants who are seeking for leave to appeal against the decision by Ndolo dated 30<sup>th</sup> July, 2014. The applicants were retrenched from employment by the 2<sup>nd</sup> respondent on various dates from the year 2002. Being dissatisfied with the process and the payment of the retirement dues, the applicants filed suit before the High Court which was subsequently transferred to the Industrial Court for hearing and determination. The matter was heard and the following award was made in favour of the applicants;

**(a) One month's salary payable to all the claimants as compensation for an irregular retrenchment exercise to be based on each claimant's last salary;**

**(b) Severance pay at 15 days salary for each completed year of service payable to all the non unionisable claimants;**

**(c) The amounts payable under (a) and (b) above shall be tabulated jointly by counsel for the parties and paid to the claimants within the next 60 days from the date of this award;**

**(d)The respondent shall pay the costs of this case;**

**(e)The award amounts shall attract interest at court rates from the date of the award until payment in full.**

The reasons advanced by the applicants for the delay in filing the appeal were that after the judgment was delivered, it took them some time to convene a meeting of all the applicants who were located in various counties; they were able to meet on the 14<sup>th</sup> August 2014, when the majority of the applicants expressed their dissatisfaction with the award; they sought legal advice from their counsel on record, Mrs. Ligunya and instructed counsel to lodge an appeal on 10<sup>th</sup> September, 2014. They annexed a copy of the letter signed by majority of the applicants. Counsel however advised them that time had lapsed for filing an appeal and consequently they were required to seek leave to extend time for filing. The applicants convened another meeting to collect money for filing the application which took them more time. Mrs. Ligunya submitted that the delay was well explained and the appeal as demonstrated by the draft memorandum of appeal raised arguable grounds.

This application was opposed; Mrs. Kimani, learned counsel for the respondents, relied on her replying affidavit sworn on 24<sup>th</sup> October, 2014. Counsel contended that the delay of 45 days was inordinate and the reasons were not plausible. The reasons given in the supporting affidavit clearly show the applicants filed this application as an afterthought. On the appeal being arguable, Mrs. Kimani submitted that the applicants failed to demonstrate any grounds that are capable of determination by the Court.

The instant application was filed on 26<sup>th</sup> September 2014, thus it comes about 45 days late. Nevertheless, the discretion I have to exercise under **Rule 4** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. The guidelines for the exercise of such discretion are now clear and I may remind myself, thus:-

**"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider as 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: See MUTISO V MWANGI, Civil Application No. Nai. 255 Of 1997 (Ur), MWANGI VS KENYA AIRWAYS LTD [2003] KLR 486, MAJOR JOSEPH MWERERI IGWETA VS MURIKA M'ETHARE & ATTORNEY GENERAL, Civil Application No. Nai. 8 of 2000 (UR) and MURAI VS. WAINAINA (NO. 4) [1982] KLR 38"**

See **Fakir Mohammed vs. JOSEPH MUGAMBI & ANOTHER Civil .App. Nai. 332 of 2004 (unreported).**

With the above principles in mind, I now approach the application before me. The applicants were late in filing the Notice of Appeal by a period of about 45 days. The applicants are many and they state that it took them time to consult and issue instructions to appeal. They have attached a copy of a signed document by a majority of the applicants. It is more plausible than not that it took time to gather the applicants and to obtain the written instructions. That is not the only handle the applicants have to overcome for filing the application late. I have also to look at the merit of the appeal and that is not to say an arguable appeal will of necessity be successful. These are the grounds raised in the proposed memorandum of appeal:

**1. The learned Judge erred in law and fact in awarding the senior employees 15 days severance pay for each year worked as opposed to 25 days as paid out to junior employees or 2 V2 months' salary for each year worked as prayed for.**

**2. That the learned Judge erred in law in and fact whilst declaring the employees pensionable within the meaning of the Retirement Benefits Act despite proof that the scheme operated by the respondent was not registered scheme under the Retirement Benefits Authority Act as at the time of their retirement and or employment.**

**3. That the learned Judge erred in law and fact by failing to address her mind on the issues of breach of fundamental rights as espoused by the applicants.**

It is trite that an arguable appeal is not necessarily one that will succeed. The determination of the appeal is a matter for a full Bench but a cursory look at those grounds I may say at this point is that the grounds of appeal appear arguable.

In view of the foregoing, I am satisfied that this is a proper matter for me to exercise my discretion in favour of the applicants and to grant them leave to appeal. Accordingly the applicants are given 7 days to file and serve the Notice of Appeal and the Record of Appeal should be filed within the next 30 days from today.

Due to the nature of this matter that involves so many applicants I order that costs of this application should abide the outcome of the appeal.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of November, 2014.**

**MARTHA .K. KOOME**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original**

**DEPUTY REGISTRAR**