IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 250 OF 2014

BETWEEN

KENYA UNION OF DOMESTIC HOTELS' EDUCATIONAL INSTITUTIONS, HOSPITALS &

ALLIED WORKERS, GEORGE CHESIRE & 84 OTHERS..... APPLICANTS

AND

NAIROBI CLUB..... RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal & Record of Appeal out of time from the ruling and orders of the Industrial Court of Kenya at Nairobi given by the Honourable Lady Justice Monica Mbaru on the 10th

of May, 2013)

in

Trade Dispute no 77 (N) of 2008)

RULING

1. Before me is an application by way of a Notice of Motion brought by George Chesire and 84 others. The application is principally brought under the provisions of Rule 4 among other Rules of this Court. The applicant is seeking for extension of time, within which to serve a Notice and Record of Appeal out of time against the ruling and order of the Industrial Court of Kenya at Nairobi issued on the 10th May, 2013 by Mbaru, J.
2. The brief background of the facts giving rise to the instant application is; sometimes in January 2009, some 85 employees of Nairobi Club were dismissed from employment. They lodged a trade dispute suit before the Industrial Court of Kenya. After hearing the matter, Chemmuttut J.,delivered a judgment on the 24th September, 2009. The Judge ordered reinstatement of the applicants and payment of back pay. The respondent unsuccessfully filed several matters in the High Court in its attempt to set aside the aforesaid orders. Finally an application for review which I gather was dated 25th March, 2013, was filed before the Industrial Court.
3. That application was determined by Mbaru, J., on the 10th May, 2013, the orders of Chemmuttut, J., were reviewed or clarified in the following terms;-"As noted above, to arrive at back wages due, is not a m echanical process that would involve a standard arithmetic. I therefore direct that the respondent/ applicant herein to use the reviewed formula to table a re-worked schedule of back

wages due to the claimants calculated from the 20th of January 2009 to 24th September 2009, both dates inclusive (Net back wage = gross back wage- (interim earnings- expenses) within 14 days from today and serve upon the claimants upon which the claimants will have an opportunity to give their reviewed schedule using the same criteria noting in arriving at the interim earnings will require their cooperation and reasonable application. This is to be done within 7 days of service. The matter will be mentioned in the next 30 days for the court to confirm compliance and direct on payment dues"

4. The applicants were dissatisfied with the aforesaid orders and they contend that they instructed their former Advocates to file an appeal which was not done. After much persistence by the applicants, the said law firm eventually but belatedly filed a Notice of Appeal on the 6th June 2013, at the Industrial Court without first obtaining the leave of the court. The application for leave to file the Notice of Appeal was dismissed as the applicants Advocates failed to give sufficient reasons. Sometimes on 7th April 2014, the said firm of Advocates wrote to the applicants indicating that they were not in a position to continue acting for them. It took the applicant's time to consult due to their large numbers, scarcity of funds and to agree to instruct M/S Arwa and Associates (the present Advocates) to act for them in this matter. According to Mr. Change, learned counsel for the applicants, the delay in filing the Notice of Appeal was not deliberate, it is also excusable in the circumstances of this matter.On the issue of the Appeal being arguable, counsel submitted, it raises substantial issues of law that are novel concerning the payment of back pay and the interest payable. He referred to the memorandum of appeal and the judgment and urged leave be granted as the respondent will not suffer any prejudice.
5. Mr. Murugara, learned counsel for the respondent, opposed this application on several grounds. Firstly, he submitted that a similar application seeking for extension of time to file an appeal out of time was unsuccessfully argued before the Industrial Court. That application was dismissed on 17th March, 2013, because the trial Judge found that the applicants Advocates were not candid. They kept attending the Industrial Courtfor the computation of the dues and failed to indicate to the Judge that their clients intended to lodge an appeal. According to counsel, the applicants cannot rely on the same grounds to urge for leave before the Court of Appeal. Even after that application was dismissed, the applicants went back into deep slumber and it was not until after six months that the instant application was filed on the 26th September, 2014. The first delay is merely explained by the applicants passing the back to their Advocates, despite the fact that the same law firm continued participating in the proceedings. The second explanation given is that the applicants had to look for money which is also a mere sweeping statement as there is no evidence placed before the Court to support that allegation.
6. On the appeal being arguable, counsel was of the view that there are several decisions on the calculation on back salaries based on contracts of employment. Once a contract of employment is terminated, damages are payable. The argument that back salaries are calculated from the date of dismissal to the date of order of reinstatement is without basis as intervening circumstances, such as alternative employment must be taken into account. Such are the circumstances of this case because out of the original 85 claimants, 5 have since died and 49 were reinstated. Thus the intended appeal cannot be said to raise novel issues. Counsel also referred to several authorities by this Court where the principles on when an order for extension of time can be granted.
7. I have considered all the submissions, the matters stated in the application and the cited authorities. It is settled that an application such as the instant one call for the exercise of the court's discretion which is generally unfettered. However, where the court has to exercise its discretion, there must be some reasonable basis of fact or law to warrant the orders being made in favor of the applicant. 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 SilaMutiso v Rose HellenWangariMwangi, C. A. Appl. No. Nai. 251/97 (ur):
8. "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."
9. 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 106-107, where the Court again cited Leo SilaMutiso (supra),

and went on to state:

10. "These, 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 and so long as the 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 long as the 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."
11. It is also settled that the above factors are not exhaustive but a mere guideline. The applicant is late in filing the appeal from the original order of Mbaru, J., dated 10th May, 2013, and the delay to the time the instant application was filed on 26th September, 2014, should be explained. The explanation offered by the applicants isthat the delay was caused by the firm of Advocates; M/s Ahmednasir, Abdikadir and Co. Advocates who represented them before the Industrial Court. The said firm failed to file an appeal, but after what the applicants call "much coercion and visits made by the applicants upon their previous advocates they decided to file a Notice of Appeal on the 6th day of June, 2013 at the Industrial Court; albeit belatedly and without seeking leave of the Court" I do not think the above explanation is cogent and warrants the exercise of my discretion in favour of the applicants. This is for the simple reason that from 10th May, 2013, the applicants state that they were dissatisfied with the judgment and they kept reminding their legal counsel to appeal, which did not happen until 17th September, 2013. However, after that application was dismissed on the 17th March, 2014, the applicants went into another lull for six months. It took them another almost six months from the 17th March, 2014to 26th September, 2014 to file the present application. The reasons advanced for this delay are equally not plausible. The applicants contend that they are many in number, thus it took them time to consult and raise money to instruct another counsel once their previous counsel wrote to them and indicated his inability to continue acting for them.
12. It is only logical to expect that every single applicant who filed a claim before court maintained his or their interest in the suit before the court. It therefore defeats common sense that with the modern means of communication, it would have taken the applicants so much time to consult and agree on the way forward. In this regard if the applicants had lost contact with their counsel, they have only themselves and their own counsel to blame, they should bear the consequences of their own lapses which should not be visited upon the respondent.
13. 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 .From the submissions of counsel for the appellant and also the draft memorandum of appeal, it seems there are two issues that stand out; most poignantly is the period when the back pay should be calculated and whether the Industrial Court Judge had jurisdiction to review the matter when there was a Notice of Appeal on record. It is not my province as a single Judge to comment substantively on the merit of the appeal, which is for the three Judge Bench to decide. What I can say at this point is that in my humble view the two issues are sufficiently addressed in the rulings of the trial court.
14. The inordinate delay occasioned by the applicants is not excusable, and for the same reasons it cannot be said the respondent will not be caused any prejudice as the consequences for delay cross cut both sides. The applicants have slept on their rights, while the respondents have moved on after there was no appeal filed within the period set by the law. There is no justification for the applicants to suddenly wake up and wish to drag the respondents on with litigation.
15. In view of the foregoing, I am not satisfied that this is a proper case in which to grant leave to appeal. This application is dismissed, but bearing in mind the nature of this litigation, I make no order as to costs.

Dated and delivered at Nairobi this 14th day of November, 2014.

MARTHA K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR