



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 61 OF 2014

BETWEEN

ABYSSINIA IRON & STEEL LTDAPPLICANT

AND

KENYA ENGINEERING WORKERS UNION.....RESPONDENT

(An application for extension of time to file Notice and Records of Appeal out of time from a judgment and Decree of the High Court of Kenya at Kisumu (Hon. Lady Justice Hellen Wasilwa)

in

KISUMU HCCC No. 74 OF 2013)

RULING

By the Motion on Notice dated 22nd August, 2014 under Section 3 (1) of the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya, Rules 4, 41, 42 and 49 of this Courts' Rules, 2010 the Applicant, Abyssinia Iron & Steel Limited prays that I grant the applicant leave to file and serve its Notice of Appeal and Record of Appeal out of time against the judgement of the Industrial Court delivered on 25th February, 2014 by Hellen Wasilwa, J, in Industrial Court Cause No. 74 of 2013 between Kenya Engineering Workers Union (the respondent) and the applicant. There are grounds set out in the Motion and there is also an affidavit of Peter Kaguamba sworn on 22nd August, 2014 with annexures. Although there was an affidavit in support of urgency sworn on 22nd August, 2014 by Judith Abrahams Guserwa, an advocate, the applicant found it necessary to file another affidavit in support of urgency sworn on 24th September, 2014 by Prestone Ndombi Wawire, also an advocate, to which there are many annexures. The brief facts are that the respondent filed the said cause at the Industrial Court against the applicant and by the judgement delivered on 25th February 2014 it was ordered inter alia that the applicant recognize the respondent union. The next day 26th February, 2014 the applicant through its General Manager wrote to the Industrial Court requesting copies of proceedings and judgement for purposes of an appeal. This letter was copied to the respondent. No Notice of Appeal was filed within the stipulated time or at all. The applicant thereafter on 24th March, 2014 appointed the firm of J. A. Guserwa & Company Advocates to represent it in the intended appeal. By then time for filing Notice of Appeal had expired. It appears that the said law firm was not made aware that Notice of Appeal had not been filed. They obtained

proceedings and judgement on 15th August, 2014 and it was then that they realized that an appeal could not be filed because necessary steps had not been taken after judgement of the Industrial Court. The applicant later appointed the firm of Wamae & Allen , Advocates, to act in place of the previous advocates. This are the advocates who urged the Motion before me.

Mr. Wawire, the learned counsel for the applicant, in his submissions, requested me to extend time giving as reasons for delay the facts enumerated in this Ruling. Counsel submitted further that the recognition agreement ordered by the Industrial Court would place undue financial and other hardships on the applicant because it would have to recognize people who are not its employees as they are outsourced from another company. This, submitted counsel, would see an astronomical rise in the applicants wage bill and industrial action which could cripple its operations. He saw these as arguable points. Counsel also believed that the respondent would not be prejudiced by a grant of the orders prayed.

The respondents counsel although served with a hearing notice did not attend court when the Motion came for hearing.

It is now settled that in an application under Rule 4 of this Court's Rules, the Court is being called upon to exercise its unfettered discretion. The matters which are to be considered whether to grant an extension of time are first the length of the delay, the reason for that delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In **Patel V Waweru & 2 Others (2003) KLR 361 at pp. 362 - 3** this Court had the following to say in respect of rule 4 of this Court's Rules:-

“ this is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the rules of this Court. All that the applicant was required to do was to place sufficient material before the Learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI - Civil Application No. NAI 251 of 1997 (unreported) this court stated:

"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."

And in **Pothiwalla V Kidogo Basi Housing Co-Operative Society Ltd & 31 Others [2003] KLR 74** the single judge had the following to say on rule 4:-

"I think it is now settled that an application of this nature (under rule 4 of this Court's Rules) the Court is being asked to exercise its unfettered discretion and that for an applicant to succeed he must satisfy the Court that the delay was not inordinate and that the delay has been sufficiently explained. The other issue to be considered is whether the intended appeal is arguable. Lastly, the applicant has to show that no prejudice would be caused to the respondent if the application to extend time is allowed. This discretion, like any other judicial discretion must be exercised judicially."

In **Muchugi Kiragu V James Muchugi Kiragu & Another - Civil App. NO. NAI 356 of 1996** the Court had the following to say as regards this Court's discretion under the said Rule:

"Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis

that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.

I have considered the application, the documents in support and the submissions by learned counsel for the applicant. I am satisfied that the applicant is entitled to my exercise of discretion in its favour. The applicant applied for proceedings the day after the judgement of the Industrial Court. Thus the applicant was vigilant in its efforts to pursue an appeal and failure to file a Notice of Appeal appears to me to be an excusable mistake on the part of the applicant. The draft Memorandum of Appeal appears to raise arguable points. In the premises, I grant the application as prayed and order that the applicant files and serves a Notice of Appeal within seven (7) days of today and thereafter file and serve Record of Appeal within fourteen (14) days. Costs of the Motion shall abide the hearing and determination of the intended appeal.

Dated and delivered at Kisumu this 8th day of November, 2014

S. ole Kantai

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR