REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA (IN CHAMBERS)

CIVIL APPLICATION NAI 130 OF 2014 (UR 106/2014)

BETWEEN

THE BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND.....APPLICANT

AND

JORIM WAHOME MARENYA…….…..... RESPONDENT

(An application for filing an appeal out of time from the Award of the Industrial Court of Kenya at Nairobi (Steward M. Madzayo, J.) delivered on 19th September, 2010

in

Industrial Court Cause No. 408 of 2010

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R U L I N G

The applicant seeks leave mainly under **Rule 4** of the **Court of Appeal Rules 2010, (Rules)** to file and serve a record of appeal out of time and a further order that the record of appeal lodged in Court on 13th May 2014 and served on 27th May 2014 being Civil Appeal No. 110 of 2014 be deemed to have been filed and served on time.

The applicant has already instituted Civil Appeal No. 110 of 2014 which was lodged on 13th May 2014 against the Award of the Industrial Court dated 13th July 2012. By the Award, the Industrial Court declared the dismissal of the respondent from the employment by applicant as unfair, unlawful and illegal and ordered the respondent's unconditional reinstatement without loss of benefits and payment of all his salaries and dues from the date of dismissal to the time of reinstatement. It is important to state at the outset that **Rule 12(1)** obligates the Registrar of this Court to accept any document lodged out of time. However the Registrar is required to mark the document "***lodged out of time***" and to inform the person lodging it thereof.

Rule 4 gives the Court unfettered discretion to extend time limited by the Rules or by any decision of the

Court or decision of the Superior Court on such terms as it think just.

By **Rule 82(1)**, an appeal to this Court should be instituted within 60 days of the date when the notice of appeal was lodged. However by proviso to the Rule as read with **Rule 82(2)** the period certified by the Registrar of the High Court as having been required for the preparation and delivery of a copy of the proceedings is excluded from computation of time where an applicant applied for a copy of proceedings in writing, within 30 days of the decision and has served a copy of the letter requesting for proceedings on the respondent.

In exercising discretion to extend time under Rule 4, the Court is required to exercise its discretion judicially by taking into account all the relevant circumstances of each case including the length of delay, reasons for the delay, the merits of the intended appeal or appeal, and the prejudice which may be occasioned to the respondent if the application is allowed. (See **Wasike v. Swala 1984 KLR 591, Sila Mutiso vs. Leo, Rose Hellen Wangari Mwangi (Civil Application No. Nai 251 of 1999) [unreported**].

The interest of the administration of justice is also an important factor. As I said in **Baobab Beach Resort & Spa Limited vs. Duncan Muriuki Kaguuru & Another, Nairobi Civil Application No. 12 of 2012** (unreported), the duty of the Court to administer substantive justice to the parties without undue regard to procedural technicalities as embodied in the overriding objective principle in **Section 3A** and **3B** of the Appellate Jurisdiction Act and **Article 159(2) (d)** of the Constitution is now a paramount consideration. No single factor is decisive on its own and the court should weigh and balance all the relevant factors which emerge from the material before it.

In this case, the applicant prepared a notice of appeal dated 24th September 2012 and lodged it in the Industrial Court within 7 days prescribed by the Rules. Although the applicant states that it applied for typed copy of proceedings on 24th September 2014, it did not annex the copy of the letter to the application. However the certificate of delay issued by the Industrial Court verifies that the applicant indeed applied for certified copies of proceedings by a letter lodged on 24th September and within the 30 days of the judgment.

In addition, the respondent has annexed to his replying affidavit a copy of the applicant's letter dated 24th September 2014 bespeaking the proceedings. The copy of the letter indicates that a copy was to be served on the respondent's advocates. However, the respondent states that he obtained a copy of the letter from the court file and that it was not served on his advocates. It is evident therefore that the applicant applied in writing for a copy of the proceedings within the prescribed time.

The applicant's advocate insists that the copy of the letter was served on the respondent's advocate but his clerk failed to obtain an acknowledgment of service. The replying affidavit is sworn by the respondent himself. The respondent's advocate has not denied on oath that the copy of the letter requesting for proceedings was not served on her firm. There is no explanation why the respondent went to the Industrial Court registry to obtain a copy of the letter which has endorsements of the registry officers. It is probable that the registry copy was obtained to bolster the respondent's case that the copy of the letter was never served. It is more probable than not that the copy of the letter was served on the respondent's advocates and I am satisfied that the condition for exclusion of time taken from preparation and delivery of proceedings has been fulfilled.

The certificate of delay dated 30th May 2014 certifies that the time for preparation and delivery of the proceedings was from 24th September 2012 until 11th November 2013. That period is excluded from computation of time by proviso to Rule 82(1). Thus, the applicant could have filed an appeal within 60 days from 11th November 2013 – that is on or before 12th January 2014.

It is trite law that the court's Christmas vacation starts on 21st December of every year and ends on 13th January of every year. If the period excluded by proviso to **Rule 82(1)** and by **Rule 3(e)** is taken into account, the applicant could have filed the appeal on time on the basis of the certificate of delay on or before 4th of February 2014. However, the certificate of delay indicates in paragraph 2 that although the

copy of proceedings was ready for collection on 11th November 2013, the applicant was not informed that they were ready for collection. Thus, the certificate of delay shows that the copy of proceedings was not delivered on 11th November 2013. The applicant's counsel states in the written submissions that Registrar of the Industrial Court never notified him that the proceedings were ready and had to rely on a copy of proceedings served upon him by the respondent's counsel in respect of other proceedings to institute the appeal. But according to the respondent's submissions, the applicant's counsel was indolent as he could have checked from the registry whether the proceedings were ready. Since the court's registry did not inform the applicant's advocates that proceedings were ready for collection, it is difficult to ascertain the period of delay attributable to the applicant's advocates. However, even assuming that the copy of the proceedings was delivered to the applicant's advocates by 11th November 2013 as the certificate of delay indicates, the period of delay from 5th February 2014 to 13th May 2014 when the record of appeal was lodged is about 3 months and 8 days.

There is another reason for delay given by the applicant apart from lack of proceedings – that the applicant put the appeal on hold at the request of the respondent in the hope of arriving at an out of court settlement.

It is clear from the supporting affidavit of **Mr. Austin Ouko**, the Legal Manager of the applicant, that the respondent by a letter dated 23rd May 2013 requested the applicant to consider an exit package and issue him with a certificate of service. As Mr. Ouko explains, the appeal was put on hold for exploring a possibility of settlement. He informed the applicant's advocates so by a letter dated 27th June 2013. The minutes of applicant's meeting of 31st may 2013 shows that the applicant decided that detailed proposals on settlement of the case be considered by the relevant committee.

Ultimately, Austin Ouko by a letter dated 6th March 2014 informed the applicant's advocates that the out of court negotiations that parties were engaged in did not materialise and instructed the advocates to proceed with the appeal.

It is evident at least, that, at the request of the respondent for an out of court settlement, the applicant instructed its advocates to keep the intended appeal on hold until 6th March 2014 when the applicant instructed its advocates to proceed with the appeal.

Although that does not exonerate the applicant from blame for delay, it is nevertheless a reasonable explanation for the delay. The delay of 3 months and 8 days is not an inordinate delay, having regard to the fact that an out of court settlement was being pursued and further, that, other proceedings were going on between the parties in the Industrial Court.

The applicant states that it has good grounds of appeal and has annexed a copy of the memorandum of appeal filed in Civil Appeal No. 110 of 2014. On the other hand, the respondent contends that the appeal is incompetent as he was not served with the notice of appeal within the stipulated 7 days. The respondent further contends that the appeal has no chances of success as the applicant had filed a review application against the same judgment, which review application was dismissed.

Dealing with the issue of the review application first, it is common ground that the applicant indeed filed an application to review the same judgment that he intends to appeal from. The ruling of **Makau, J.** dated 20th December 2012 dismissing the review application is annexed to the respondent's replying affidavit.

Section 16 and 17 of the Industrial Court Act provides for both review and appeal respectively. Similarly **Rules 27(4)** and **32(1)** of the **Industrial Court (Procedure) Rules 2010** provide for appeals and review respectively. However section 16 of the Industrial Court Act and Rule 32(1) of the Industrial Court (Procedure) Rules 2010 which relates to review do not provide, like section 80 of Civil Procedure Act and Order 45(1) (a) and (b) Civil Procedure Rules provide, that a review application can be made where an appeal is allowed but has not been preferred or where no appeal is allowed. Thus, both the Industrial Court Act and the Rules made there under do not expressly preclude a review application where an appeal has been preferred or where an appeal is allowed.

In this case an appeal had already been preferred by filing a notice of appeal before the review application was made. The issue raised relates to the competence of the appeal. It is an issue which can only be decided by a Court competent to hear the appeal and not by a single Judge.

Similarly, the issue regarding the service of the notice of appeal goes to the competence of the appeal.

By section 17(2) of the Industrial Court Act an appeal from the decision of the Industrial Court lies only on a matter of law.

The memorandum of appeal shows that the issues of law raised therein are not frivolous. They *inter alia* question the legality of the decision of the Industrial Court ordering reinstatement of an employee who was dismissed over 7 years ago and breach of the statutory principle that no order of specific performance in a contract of service should be made except in exceptional circumstances.

It is apparent that the issues of law raised in the appeal are not frivolous.

The respondent contends that he would suffer prejudice if the application is allowed as he would be denied the fruits of his judgment for a long time. On the other hand, the applicant seeks the leave of the Court to exercise its undoubted right of appeal. In the circumstances of this case, any prejudice that the respondent may suffer can be adequately compensated by an award of costs.

For the foregoing reasons, the application is allowed and orders in terms of prayer 1 and 2 of the notice of motion dated 11th June 2014 are granted. To give efficacy to this order, time for service of the notice of appeal which service is disputed is extended.

The costs of this application to the respondent.

Dated and Delivered at Nairobi **this 7th day of November, 2014.**

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR