



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI 232 OF 2012**

**BETWEEN**

**DELIGHT SECURITY SERVICES LIMITED.....APPELLANT**

**AND**

**CHARLES OUMA OYUGI.....RESPONDENT**

*(An application for extension of time to file and serve notice of appeal and record of appeal out of time from the judgment of the High Court of Kenya at Nairobi (Rika, J.) dated 3<sup>rd</sup> August, 2012*

*in*

*Industrial Court Cause No. 765 of 2011)*

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**RULING OF THE COURT**

This is an application under **Rule 4** of the Court of Appeal Rules from the judgment of the Industrial Court at Nairobi (Rika, J.) dated and delivered on 3<sup>rd</sup> August, 2012. The application is supported by an affidavit sworn by Patricia Khisa, learned counsel for the applicant.

The award was delivered on 3<sup>rd</sup> August, 2012. The counsel for the respondent alleges she received instructions to appeal against the judgment and award on 21<sup>st</sup> August, 2012 after the lapse of the statutory 14 days period provided under **section 75 (2)** of the Court of Appeal Rules, 2010. She further alleged that after receipt of the instructions, she wrote to the Registrar of the Industrial Court on 21<sup>st</sup> August, 2012 to be furnished with certified copies of the proceedings, resulting in further delay in filing this application.

Relying on her supporting affidavit dated 13<sup>th</sup> September, 2012 Ms. Khisa, learned counsel for the applicant, submitted that she received instructions to file the appeal on 21<sup>st</sup> August, 2012, seven (7) days after the lapse of the statutory period. Thereafter, she applied for proceedings, and eventually filed this application on 14<sup>th</sup> September, 2012, a delay of 32 days. She argued that the delay was not inordinate, and that the applicant had an arguable appeal. She relied on two authorities; **Kenya Commercial Bank**

**Limited vs. Kenya Planters Cooperative Union (2010) eKLR and Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 3 Others (2010) eKLR.**

On the other hand, Mr. Ochiel, learned counsel for the respondent, opposed the application. Relying on the replying affidavit dated 21<sup>st</sup> January, 2013, he submitted that despite the fact that **section 3A** and **3B** of the Appellate Jurisdiction Act and **Article 159** of the Constitution allows exercise of discretion based on well established Rules, the same ought to be exercised judicially on the basis of evidence and upon sound principles and should not be exercised arbitrarily. Mr. Ochiel referred to the case of **Beatrice Wambui Kigundu & 4 Others vs. Beatrice Muthoni Thumbi [2007] eKLR.** He submitted that the delay in the present case was four weeks and that there is nothing in the affidavit explaining the reasons for the delay. Mr. Ochiel highlighted paragraph eleven of the supporting affidavit which states;

***“That there has not been any inordinate delay in pursuing the appeal and the lapse of the statutory period of filing the notice of appeal is inadvertent, having received the instructions after the lapse of the statutory period.”***

He relied on the case of **Mansoor Jiwani t/a Computer City vs. Ovidian Advertising and Design Ltd [2006] eKLR** and submitted that the applicant had not discharged its burden by providing a cogent reason why discretion should be exercised in its favour. He added that the appeal was not arguable since all the three grounds highlighted by the applicant are not on points of law. On the issue of prejudice, Mr. Ochiel told the court that the respondent would actually be prejudiced if the case is re-opened and that the applicant had a habit of delaying the matter. Lastly he submitted that **Rules 3A** and **3B** were meant to facilitate just, expeditious disposal of cases.

Ms. Khisa responded to the above submission and reiterated the case of ***Mansoor (supra)*** which states that only one reason is enough to allow the application. She added that the appeal is arguable and has high chances of success.

**Rule 4** of the Rules of this Court gives me unfettered discretion whether or not to extend time. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where 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.”***

I have taken into account all the factors as submitted above. I agree with the learned counsel for the respondent that the delay herein is not sufficiently explained. The applicant itself should have sworn an affidavit to explain the delay in instructing counsel late. Even after its counsel received instructions to file the appeal on 21<sup>st</sup> August, 2012, it did not do so until 14<sup>th</sup> September, 2012, a delay of another 21 days. Counsel’s explanation for this delay is that she had to apply for proceedings to the Industrial Court. Clearly, that reason is unacceptable as the aggrieved party does not require the proceedings in order to file the notice of appeal. Indeed, this application was filed eventually without the benefit of the “proceedings”.

The applicant has not filed a draft memorandum of appeal, and in the circumstances, it is difficult to ascertain whether this is an arguable appeal.

Finally, it is my view that this application also subverts the aim of the overriding objective as expressed in **section 3A** and **3B** of the Appellate Jurisdiction Act in that it will give rise to further delay. I therefore decline to exercise my unfettered discretion in favour of the applicant and hereby dismiss the application with costs to the respondent.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of March, 2013.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**