



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME) (IN CHAMBERS)

CIVIL APPLICATION NO. NYR. 25 OF 2013 (UR 9/2013)

ELIZABETH WAKANYI KIBE.....APPLICANT

versus

TELKOM KENYA LIMITED.....RESPONDENT

(An application for extension of time to file and serve a Record of Appeal in an intended appeal from the judgment delivered by the Industrial Court of Kenya at Nyeri(Abuodha, J.) and the consequential orders issued pursuant thereto on 4th June, 2013,

in

Industrial Court Case No. 2 of 2012

(Nairobi Cause Number 923 of 2010)

RULING

The Notice of Motion before me is brought under the provisions of **Rule 4** of this Court's Rules. It seeks for extension of time to file and serve a record of appeal in an intended appeal from the judgment of Abuodha, J. delivered on 4th June, 2013 in Industrial Court Case Number 2 of 2012. It transpired during the hearing that the applicant filed the record of appeal on the 20th day of August 2013, and the relevant prayer is the extension of time to the date when the record of appeal was filed or the same record be deemed as properly filed.

The applicant who was the plaintiff in the above suit states that she was dissatisfied with the said judgment and she instructed her counsel to file an appeal. Her counsel filed the requisite notice of appeal on 10th June, 2012 and also applied for the proceedings on the same date. On 18th June, 2013, the Deputy Registrar notified them that the proceedings were ready for collection. Counsel for the appellant prepared the record of appeal but they could not file the same as the applicant was late to furnish them with the court filing fees. The applicant contends that she had some financial constraints and was unable to remit the filing fees by the 11th August, 2013, which was the last day the appeal could be filed. The applicant was ultimately able to pay for the filing fees and the appeal was filed on 21st August, 2013 albeit a few days late. The applicant now seeks for the extension of time from 11th August, 2013 to the date when the appeal was filed and the said record of appeal be deemed to have been filed on time.

According to Mr. Onindo, learned counsel for the applicant, his client's appeal is arguable and the

annexed copy of the memorandum of appeal raises serious issues of law for consideration by the Court of Appeal. Secondly, he argued that the delay of 10 or so days is not inordinate and this court should exercise its discretion in favor of extending the time in line with the principles set out in the case of; **Rev. Silas Njeru & Catholic Diocese v Andrew Kiruga, CA No. 312/04.**

Mr. Melly, learned counsel for the respondent opposed this application by stating that the applicant was indolent and not deserving of the exercise of this court's discretion. He made reference to **Rule 82** of the **Court of Appeal Rules** which provides that an appeal be filed within 60 days after the notice of appeal was filed on 10th June, 2013. Secondly, if the applicant lacked filing fees, she should have moved the court under rule 115 seeking for waiver of the filing fees. Counsel submitted that lack of filing fees is not a plausible or reasonable explanation as contemplated by the rules.: counsel also dismissed the arguments that the applicant has an arguable appeal and submitted that the claim for 34 Million was merely speculative and not based on any law or evidence: finally, counsel submitted that his client will be prejudiced as the award made by the Industrial Court was subject to computation by the Deputy Registrar and the respondent was ready to allocate funds to settle it.

This court's exercise of discretion under **Rule 4** although unfettered must be exercised judiciously not on whims, sympathy or caprice. The guidelines for the exercise of this discretion are now clearly stated in cases of:- **MUTISO v MWANGI, Civil Application No. Nai. 255 of 1997 (UR)** and **Mwangi v Kenya Airways Ltd. [2003] KLR 486:**

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure 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 or 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.”

The first test is whether the reason offered by the applicant for the delay in filing the record of appeal out of time is reasonable? The record of appeal was filed on 21st August, 2013. The only problem is that it was filed 10 or so days late. The explanation offered is that the applicant did not have money to remit to meet the filing fees. Eventually, she was able to pay and the record of appeal was filed. Mr. Melly was of the view that the applicant should have applied to be exempted from paying the fees.

In my view, although lack of money cannot generally be taken as a good reason or excuse for parties to fail to observe the period provided in the rules, in this case, the applicant seems to have faced a temporary challenge of meeting the filing fees and that is the reason why she failed to meet the deadline set out in the rules. She, nonetheless, managed to raise the fees and the appeal was filed 10 days late. In the circumstances of this case, I do not agree with **Mr. Melly** that the applicant should have applied for exemption of court fees: this is because she was not a pauper but her money was not readily available. The delay of 10 days is not inordinate, and the reasons for the delay have been offered. The reasons are further reinforced by the fact that the applicant has already filed the appeal; accordingly, the inconvenience that has been caused to the respondent due to the delay and in defending this application can easily be compensated with costs.

On the second limb of whether the applicant satisfied me that the intended appeal is not frivolous; in evaluating the material before the High Court, I am conscious that the pronouncements that I make, at this stage should not deeply delve into the merits of the appeal, which is province of the three Judges. On the face of it, there are issues of law that appear arguable although not every arguable issue may succeed. See the case of **Geoffrey Makana Asanyo v National Bank of Kenya Ltd. Civil Application No. NAI. 132/99 (UR)**. It was held that:

“..... it is clear to us that a learned single Judge has no power to reject an application on the basis that it lacks merit or substance.”

This Court also stated in the case of: *AFRICAN AIRLINE INTERNATIONAL LTD. V EASTERN SOUTHERN AFRICA TRADE & DEVELOPMENT BANK (PTA BANK) 2003 KLR 140, the Court stated thus:*

“We wish to emphasize that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to facts of a particular case. No doubt in some cases, it may be material to have regard to the merits of the appeal: because it may be wrong and indeed an unkindness to the appellant himself, to extend his time for appealing, after he has allowed the time to lapse, to enable him to pursue a hopeless appeal this is why a single Judge is entitled to examine whether there was any material on record which may be Judicially considered. The process of analysis of such material, however, and the pronouncement with finality that the intended appeal has no substance, lacked merit or was frivolous, remains within the province of the full court....”

Bearing the above principles in mind and as I have noted above, this application meets the threshold of the two tests, I am inclined to allow it and extend the period within which the record of appeal should have been filed by 30 days. The respondent shall have the costs of this application.

Dated and delivered at Nyeri this 25th day of September, 2013.

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR