



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 10 OF 2011

BETWEEN

MOI TEACHING AND REFERRAL HOSPITALAPPLICANT

AND

**KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS, HOSPITALS
& ALLIED WORKERSRESPONDENT**

*(An application for extension of time to appeal from the award of the Industrial Court of Kenya at
Nairobi (Chemettut, J.) dated 23rd November, 2010
in*

IND. CAUSE NO. 570 (N) OF 2009)

RULING

The applicant seeks an order under **rule 4** of the rules of this Court as follows: -

“a) The applicant be granted an order extending the time within which to lodge a notice of appeal from the award of the Industrial Court made and delivered on the 23rd of November, 2010 and the Notice of Appeal lodged in the Registry of the Industrial Court on the 9th day of December, 2010 be deemed to have been properly lodged.”

The award referred to was made in a dispute filed by the respondent on behalf of one of its members who was an employee of the applicant. The employee had complained that the applicant had dismissed her summarily, allegedly for using abusive language and ejecting other members of staff from their work stations in an effort to force them into an illegal procession, as well as other gross misconduct. The dismissal was communicated to the employee by the Acting Director of the applicant. Her appeal to the Board of Management of the applicant was rejected, hence her appeal to the respondent Union which took over the matter but made no headway in settling it, before resulting to court action.

It was contended for the employee that she was not given a reasonable opportunity to be heard in her defence since she never misconducted herself as alleged. It was also contended that the employee was dismissed by an officer who had no authority to do so under the law governing the applicant. The applicant on its part contended that it had fully complied with the law and procedure in dismissing its

employee.

The Industrial Court was persuaded after hearing the parties that the applicant did not accord the employee the right to a fair hearing and was in breach of substantive as well as procedural law, and further that the Acting Director had no authority to discipline the employee. It quashed the dismissal of the employee and ordered her reinstatement and payment of her salary and other emoluments within 21 days of the award. The award was made on 23rd November, 2010.

The applicant was aggrieved by that order and proceeded to instruct its advocates on record to file a Notice of Appeal, which was drawn up on 7th December, 2010. It would have been timeous if the notice of appeal was filed and served on the same day but it was not. It was filed two days later on 9th December, 2010 and was served on the same day.

The applicant takes responsibility for the delay in failing to instruct counsel on time, citing the need to summon the Board of Management to take a decision. Learned counsel for them, Mr. Shivaji, contended that the delay was not inordinate since it caused no prejudice to the respondent who became aware, at an early stage, that there was an intention to appeal. He also submitted that the intended appeal will raise weighty issues of law and referred to a draft memorandum raising seven of such grounds.

On the other hand the motion was opposed by learned counsel for the respondent, Ms. Guserwa, who submitted that the filing of the notice of appeal did not have to wait for a Board meeting as it was a formality which counsel for the applicant, who was present when the award was made, could have discharged forthwith. She cited the prejudice being caused on the employee who has not been reinstated for the last five years despite orders to do so and submitted that the applicant ought not to be heard in this matter as it was in contempt of court. As for the merits of the intended appeal, she found no ground which can dislodge the sound reasoning of the Industrial Court.

The issues raised by both counsel are indeed the selfsame factors which a single Judge of this court would consider in exercise of his unfettered discretion. It has been said before that they are not exhaustive factors and there may well be other relevant factors which will serve the ends of justice in the matter. The court is also under a statutory duty to consider and apply the overriding objective of the Appellate Jurisdiction Act spelt out in **Sections 3A** and **3B** to facilitate the just expeditious, proportionate and affordable resolution of applications and appeals before it.

I have given consideration to the application and have formed the following view of it. The submission by Ms. Guserwa that the notice of appeal was a formal document which could have been filed by counsel on record without awaiting further instructions has substance. However, the explanation that the instructing client was an institution which needed to make a corporate decision on the matter and took time to do so, may well be plausible, though not excusable. It is not the length of delay that determines whether it is or is not inordinate but the circumstances surrounding the delay. A delay of one day without any explanation at all may well be inordinate while a ten-year delay can be explained satisfactorily. If I was not of the view that the intended appeal raises fairly weighty issues of law, I may well have found the delay inordinate. I do not place much premium on the claim that the employee will be prejudiced. That is because there has been no stay of the order of the Industrial Court and yet the employee has taken no action to resume her duties or enforce the payments ordered by the Industrial Court. There are legal avenues to address any prejudice. At all events, the respondent has always been aware, after service of the notice of appeal, that the applicant intended to appeal and there is no averment that there is deliberate delay in filing the intended appeal itself.

For those reasons, I am inclined to grant the order as prayed. The applicant shall bear the costs of the motion in any event.

Dated and delivered at Nairobi this 3rd day of February, 2012.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR