



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 226 OF 2011 (UR.145/2011)**

**BETWEEN**

**NEW KENYA CO-OPERATIVE CREAMERIES LTD ..... APPLICANT**

**AND**

**PETER MWANTHI MWAU ..... RESPONDENT**

***(An application for leave to file and serve a notice of appeal and record of appeal out of time from the Ruling and Order of the Industrial Court of Kenya at Nairobi (P. K. Kosgei, J) dated 21<sup>st</sup> July, 2011***

***in***

***Cause No. 1267 of 2010)***

***\*\*\*\*\****

**RULING**

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file a notice of appeal, and record of appeal, from the ruling and order of the Industrial Court (P. K. Kosgei, J.) dated 21<sup>st</sup> July, 2011. The application is supported by two affidavits, one sworn by Milcah Mugo on 21<sup>st</sup> September, 2011, and another sworn by Marion Karanja, learned counsel for the applicant, also sworn on 21<sup>st</sup> September, 2011.

The ruling in the case before the Industrial Court was delivered on 21<sup>st</sup> July, 2011. However, the applicant and her counsel say in their depositions, that neither of them were informed of the date the ruling of the Industrial Court would be delivered, and that the same was delivered in their absence, and without their knowledge. They found out about the delivery of the ruling on 5<sup>th</sup> September, 2011 and filed this application on 22<sup>nd</sup> September, 2011.

These facts are not controverted as there is no replying affidavit filed. Ms. Marion Karanja, learned counsel for the applicant, urged that the prayers be granted, as the application was timeously made, and deserving of this Court's discretion. However, Ms. Betty Rashid, learned counsel for the respondent, opposed the application arguing that the application was made after an inordinate delay, and that the appeal was not meritorious and had no chances of success.

Having considered the application and the depositions in support of the same, and having heard counsel, I am of the view that the delay in bringing this application, is not inordinate, and is well

explained. **Rule 4** of the Rules of this Court gives me unfettered discretion whether to extend time or not. 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 indicated above, and am of the view that this application has merit, and I allow the same.

In the draft memorandum of appeal annexed to the application, the applicant has raised issues about the Industrial Court’s jurisdiction, and breach of statutory provisions. The appeal is arguable, and, indeed, deserving of this Court’s discretion.

Accordingly, I hereby allow the application, and order that the notice of appeal shall be filed and served within the next seven days, and the record shall be filed and served within the next 14 days, failing either of which, this appeal shall stand dismissed. The costs of this application shall be in the appeal.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of February, 2012.**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**