



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 171 OF 2011**

**BETWEEN**

**KENYA LOCAL GOVERNMENT WORKERS UNION.....APPLICANT**

**AND**

**COUNTY COUNCIL OF MERU.....RESPONDENT**

*(Application for extension of time to file and serve the Record of Appeal out of time in an intended*

*appeal from the award of the Nairobi Industrial Court (Kosgei, J) dated 4<sup>th</sup> March, 2011*

**In**

**N.I.C. NO. 684 OF 2010)**

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**R U L I N G**

The applicant **KENYA LOCAL GOVERNMENT WORKERS UNION (Union)** has brought this application under **Rule 4** of the Court of Appeal Rules for orders that time for filing a notice of appeal and also time for filing the record of appeal in respect of the Award of the Industrial Court in Cause NO. 684 of 2010 be extended.

The Union being aggrieved by the Award of the Industrial Court delivered on 4<sup>th</sup> March, 2011 in **Industrial Court Cause NO. 684 of 2010** intends to appeal against the Award.

The application is made by the Union on behalf of 34 former employees of **COUNTY COUNCIL OF MERU** (Respondent). The respondent dismissed the 34 employees on grounds *inter alia* of misappropriation of Council funds and desertion of duty, but paid them their dues. Thereafter, the Union claimed that the employees were wrongly dismissed and referred the dispute to the Ministry of Labour. The Minister for Labour in turn referred the dispute to the Industrial Court. At the hearing of the dispute in the Industrial Court the 34 claimants were represented by *Mr. Munyao* who was described by *Mr. Ariithi* learned counsel for the respondent as “a seasoned trade unionist knowledgeable about labour law”. *Mr. Munyao* made submissions in the Industrial Court indicating why the dismissal was unlawful and asked the Industrial Court to set aside the dismissal of the claimants and order their reinstatement. He did not call any of the claimants to give evidence. On the other hand, the respondent called its clerk –

*Stephen Kuriti Muguna* as a witness after which the respondent's counsel made submissions.

The Industrial Court in its Award made findings *inter alia*, that the respondent had valid grounds for taking disciplinary action against the claimants and that the claimants were granted a fair hearing. The Industrial Court however made a finding that the dismissal was unlawful in that the highest form of punishment under the Collective Bargaining Agreement was termination of employment and thus reduced the dismissal to normal termination with a concomitant order that the claimants be paid their respective terminal dues provided in the Collective Bargaining Agreement. Regarding the claim for reinstatement the Industrial Court said:-

***“In view of our finding that the respondent had justifiable grounds to discipline grievants, the claim for reinstatement cannot be granted.”***

The principles upon which the Court exercises unfettered discretion to extend time are well known. The applicant in order to succeed is required to demonstrate, among other things, that, there were good reasons for the delay, that the delay is not inordinate, that the intended appeal or appeal is not frivolous and that no undue prejudice would be occasioned to the respondent if the application is allowed.

*Mr. Julius Mark Ole Apale* the Assistant National Secretary of the Union deposes in the supporting affidavit among other things, that the claimants had no advocate; that the claimants were not aware of the Award until 18<sup>th</sup> May, 2011 and that delay in filing the Notice of Appeal was due to the fact that the Union was not represented in court when the Award was read.

On the other hand, *Mr. Muguna* the respondent's Town Clerk deposes in the replying affidavit that the Union was represented by *Mr. Munyao* and *Mr. Apale* when the Award was read and that the allegation that the Union was unrepresented was untruthful.

The respondent has annexed a certified copy of the proceedings of the Industrial Court which shows that *Mr. Munyao* and *Mr. Ole Apale* were present when the Award was read. Indeed, the Industrial Court recorded thus:-

***“The award of the court was read out in open court in presence of parties' representatives”.***

*Mr. Ariithi* as officer of the Court confirmed that he attended the reading of the Award and that *Mr. Munyao* and *Mr. Ole Apale* were present.

The certified copy of the record of the Industrial Court discredits the explanation in the affidavit of *Julius Mark Ole Apale* that the Union was not represented on 4<sup>th</sup> March, 2011 when the Award was read and I reject that explanation.

Furthermore, the present application was filed on 4<sup>th</sup> July, 2011 over 50 days from 18<sup>th</sup> May, 2011 when the Union allegedly learnt that the Award had already been delivered. That delay which is relatively inordinate was not explained.

In the final analysis, I find that there was inordinate delay in bringing the application which delay has not been reasonably explained.

The Union has annexed a draft Memorandum of Appeal containing seven proposed grounds of appeal in support of the contention that the intended appeal is arguable. On the other hand, the respondent maintains that the intended appeal is not arguable.

The first proposed ground of appeal that the Union was denied an opportunity to call witnesses is *prima facie*, frivolous as the proceedings of the Industrial Court show that *Mr. Munyao* stated at the hearing that the Union would not call witnesses. Similarly, the second proposed ground of appeal that the finding of the Industrial Court that the claimants had engaged themselves in acts of misconduct is erroneous is also frivolous as the Town Clerk of the respondent gave oral evidence and produced documentary evidence

proving the acts of misconduct. The claimants did not give evidence. Thus there was no evidence to the contrary.

Regarding the other proposed grounds of appeal which relate to damages and terminal dues, there was evidence given in the Industrial Court by the Town Clerk of the respondent that upon dismissal of the claimants they were paid their dues. In addition, the Industrial Court varied the order of dismissal to one of the normal termination of service and decreed that the claimants be paid terminal dues under the Collective Bargaining Agreement which includes pay in lieu of notice, accrued leave pay and pension dues in accordance with the Pensions Act. The respondent claims that the claimants have been paid their dues and terminal benefits.

Regarding the claim for reinstatement, the Industrial Court made a finding that the claim was brought eight years after the dismissal of the claimants and gave reason why claimants could not be reinstated.

There was also evidence from the clerk of the respondent that some claimants were past retirement age, some were about 54 years old, and some about 61 years old. The Union did not indicate to the Industrial Court which of the 34 claimants sought reinstatement.

From the foregoing, the Union has not in my view, demonstrated that the intended appeal is arguable.

Lastly, the respondent would suffer undue prejudice if the application is allowed as it would be required to defend claims which arose over 8 years ago.

In the light of the foregoing I decline to exercise the Court discretion in favour of the applicant and dismiss the application with costs to the respondent.

***DATED and DELIVERED at NYERI this 24<sup>th</sup> day of MAY, 2012.***

***E.M. GITHINJI***

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**