IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: NYAMU, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO NAI. 162 OF 2010 (UR 120/2010)

BETWEEN

THE SENIOR BEST E.P.Z. LIMITED …….APPLICANT
AND

THE TAILORS AND TEXTILE WORKERS' UNION ……..RESPONDENT

(An application for extension of time to file and serve a notice of appeal from the ruling and order of the Industrial Court of Kenya at Mombasa (Chemmuttut, J. & J. M. Kilonzo and A. O. Wafula, Members) dated 24th February, 2010

in

Trade Dispute Cause No. 178 of 2008)
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RULING

This is an application for extension of time and it is expressed to be grounded on ***Rule 4*** of the Court of Appeal Rules. It is however not a routine application in that it springs from proceedings filed and finalized in the Industrial Court in Mombasa. It does not spring from High Court proceedings as is the practice. It seeks to extend time within which the applicant may file and serve a notice of appeal and also the time within which an appeal may be filed against a three judge decision of the Industrial Court *(Chemmuttut, Kilonzo and Wafula, JJ)* delivered on 24th February, 2010.

I must at the outset observe that the application does raise a jurisdictional point in that ***section 64(1)*** of the retired Constitution empowered the Court of Appeal to deal with appeals emanating from the High Court and not the Industrial Court. The section states:
"There shall be a Court of Appeal which shall be a superior court of record and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law."

The law contemplated by ***section 64(1)*** of the Constitution is the Appellate Jurisdiction Act. ***Section 3(1)*** of the Act provides:
"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."

There is no mention of appeal from the Industrial Court or any other court or tribunal. As often stated jurisdiction is everything and for this reason I would at this point have been expected to down by

tools. However on 27th August, 2010 a new Constitution was promulgated and I am required to give a determination on 20th July, 2011. The new Constitution has widened the jurisdiction of the Court of Appeal to include appeals from other courts and tribunals as prescribed by an Act of Parliament. Thus ***Article 164(3)*** states:
"The Court of Appeal has jurisdiction to hear appeals from among:

(a) the High Courts' and
(b) any other court or tribunal as prescribed by an Act of Parliament."

The subject matter of the intended appeal stems from the Labour Institutions Act (Act 12 of 2007) which came into operation on 2nd June, 2008 pursuant to L.N. 2/2008.

Section 27 of the Act confers the Court of Appeal with the jurisdiction to hear appeals from the Industrial Court. The section stipulates:

"1. Any party to any proceeding before the Industrial Court may appeal to the Court of Appeal against any final judgment, award or order of the Industrial Court.

2. Appeals from a judgment, award, or decision of the Industrial Court shall only lie in matters of law."

It follows therefore that an Act of Parliament which was passed in the previous Constitutional dispensation did purport to confer jurisdiction on this Court in respect of matters of law emanating from the Industrial Court.

As a single Judge my mandate is restricted to ***Rule 4*** *(which in turn contemplates that an appeal does lie to the Court otherwise, the exercise of the power under the rule would all be in vain)*. I therefore consider it proper to determine the application with the above background in view and with the restrictions of a single Judge also in view. In this regard my inclination is to err on the side of caution so as to pave way for a competent bench to delve into the matter at an appropriate time. In addition, I believe what I have alluded to above does have a bearing on the merits of the application before me.

When the matter came before me the applicant was represented by ***Mr. Justus Munyithia,*** advocate but the respondent was unrepresented although service of a hearing notice was effected on 28th June, 2011.

The principal ground raised by Mr. Munyithia, learned counsel for the applicant is that although at the conclusion of hearing in the Industrial Court indications had been given that counsel for the parties would be notified of the date of the handing down of the award, this was never done and the award was read in the absence of both the applicant and its counsel. On this point I have considered the contents of the affidavit in reply and on balance my inclination in the circumstances, is to accept the applicant's counsel version that no notice was served and the averments in the affidavits in support of the application attest to this. The applicant became aware of the ruling on 4th March, 2010 when the respondent wrote concerning the award whereupon the applicant's counsel promptly applied for a certified copy of the award and the proceedings. The applicants were subsequently furnished with a certified copy of the award but have to date not been furnished with the proceedings. The Labour Institutions Act which gives the right of appeal is silent on the procedure for appeals hence the applicant's invocation of the Civil Procedure Rules and Court of Appeal Rules. For obvious reasons, I cannot go into the propriety of the procedure at this stage. Failure to notify a party of the date of the reading of the award or failure to serve an appropriate notice is in my view a good reason to extend time because it is just that an applicant be not shut out of the seat of justice due to the fault of the Industrial Court.

Having accepted that the applicant was never served with any notice concerning the reading of the award and conscious of the fact that this is a critical consideration, it is my view that I should not venture

any further. See ***Kenya Ports Authority vs Gitura Kahongo C.A. 105 of 2007, Dickson Ndegwa Mbugua vs City Council of Nairobi & 5 Others C.A. Nai. 112 0f 2009, Lucy Wambui Maina & 2 Others vs Peter Sudra Maina C.A. Nai 330 of 2004, Gapco Kenya Limited vs Salim Osman Talab & 2 Others C.A. Nai. 333 of 2004.*** I have also considered the draft memorandum and I am of the view that the grounds are not frivolous. For these reasons there is no reason why I should not exercise my unfettered discretion in favour of the applicant after keeping in focus essential factors such as the length of delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent.

In my view, all these factors are in the circumstances of this matter overshadowed by the right of being notified when an award would be read. The absence of the notice is clearly the main reason for the subsequent delay and I am also aware that the list of factors under ***Rule 4*** is not yet closed. What is contemplated to be filed by the applicant, is certainly not an ordinary appeal, it is an appeal which raises an important jurisdictional issue for determination by a full bench. It is an appeal which involves a matter of great national importance on the issue of the competency of appeals from the Industrial Court to this Court within the framework of the old Constitution. In such a situation, my inclination notwithstanding what I might consider to be the law concerning jurisdiction, is to grant the application. In the result, I grant the application on the terms that the applicant files and serves a notice of appeal within 7 days and files and serves record of appeal within 14 days using the available documents.

In the circumstances, I order that the costs of the application abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Mombasa this 7th day of October 2011

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR