



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: BOSIRE, J.A. (IN CHAMBERS))**  
**CIVIL APPLICATION NO. NAI. 53 OF 2011 (UR. 35/2011)**

**BETWEEN**

**AFRICAN SAFARI CLUB LIMITED.....APPLICANT**

**AND**

**TRANSPORT & ALLIED WORKERS UNION.....RESPONDENT**

*(Application for extension of time to appeal against the award of the Industrial Court delivered at Nairobi (Madzayo, J.) dated 15<sup>th</sup> September, 2010*

*in*

**INDUSTRIAL CAUSE NO. 648 OF 2009**

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**RULING**

Following an Industrial dispute between Members of the Transport & Allied Workers Union and the African Safari Club Limited, the Industrial Court to which the dispute was referred rendered its award on 15<sup>th</sup> September, 2010. The *African Safari Club Limited*, the applicant herein, was aggrieved with the award and intends to appeal against that award to this Court. It did not, however, file a notice of appeal within time, and by its notice of motion dated 3<sup>rd</sup> March, 2011, but filed in Court on 4<sup>th</sup> March, 2011, it seeks an order extending the time within which to lodge and serve a notice of appeal. The applicant also prays for further orders and/or directions as this Honourable Court deems fit to grant.

It is the applicant's case that it presented a copy of the notice of appeal at the court registry of the Industrial Court within time, but the same was not accepted. A clerk who presented it on behalf of the applicant was referred to the High Court Registry, at Nairobi, which too declined to accept it on the ground that the dispute which gave rise to the decision to be appealed from was not handled by the High Court. As a result of the uncertainty as to where the notice would be filed, the time within which the notice of appeal was to be filed ran out, thus, necessitating this application.

The *Transport & Allied Workers Union Kenya*, the respondent, opposes the motion on amongst other grounds, that the intention to appeal was an afterthought and that the applicant's failure to lodge a notice of appeal timeously was deliberate. Mr. Simon Kigalu, the National General Secretary of the respondent, swore a replying affidavit to the motion and he blames the applicant's firm of advocates for delegating

their responsibility to a clerk. In his view, filing a notice of appeal is the responsibility of the advocate not his clerk. He deponed that the applicant and its counsel were indolent and that this Court should for that reason, decline to exercise its discretion in the applicant's favour.

There is no doubt, and both Mr. Jaoko for the respondent, and Ms. Sijeny for the applicant conceded this, that rules governing appeals from the Industrial Court to this Court have not been promulgated. The Court of Appeal Rules are made pursuant to the provisions of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya, which Act expressly deals with appeals from the High Court. It is however, axiomatic that under the Constitution of Kenya, 2010 and **section 17** of the **Industrial Court Act, 2011**, appeals from the Industrial Court, lie directly to this Court. In view of that fact, an issue arises, whether the absence of clear rules as to how to approach this Court by way of an appeal from the Industrial Court should deny an intending appellant extension of time under **rule 4** of the Court of Appeal Rules?

The applicant has deposed through its advocate, that steps were taken in time to file a notice of appeal, but because of the absence of clear rules to show where such notice should have been lodged the time within which to file the notice expired before it was filed. I accept that as plausible explanation for the delay in filing the notice of appeal on time. I also rule that the Court has jurisdiction under **rule 4** of the Court of Appeal Rules, to extend time within which an intending appellant against a decision of the Industrial Court should file its notice of appeal. **Rule 75(1)** which makes provision for the filing of a notice of appeal provides that:-

***“75(1) Any person who desires to appeal to the Court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior court.”***

Before the promulgation of the Constitution of Kenya 2010, only the High Court was generally referred to as the Superior Court. The Constitution in **Article 162(2)(a)** includes the Industrial Court as one of the Superior Courts of record. That being the case, a reference to the registrar of the Superior Court in **rule 75(1)**, above, could also extend to the registrar of the Industrial Court.

Regarding the complaint by the respondent that it was improper for the applicant's counsel to send a clerk to file a notice of appeal, it is my view that there is nothing objectionable for an advocate to send his or her clerk to file a document in any court, unless where the law expressly states otherwise.

I am inclined to grant an extension of time. Before I do so, however, it is clear from the material on record that the time for filing a memorandum and record of appeal has also already expired. The applicant has not included in its application a specific prayer in that regard. An extension of time within which to file a notice of appeal, without a further order extending the time within which to lodge and serve a record of appeal will serve no purpose.

I have agonized on the question whether I should exercise my discretion to grant the order extending the time within which to lodge and serve a Memorandum and record of appeal on the basis of the general prayer for “Such further orders” and are minded to do so pursuant to the provisions of **Section 3A** and **3B** of the Appellate Jurisdiction Act.

In the result, I allow the application, extend the time within which to lodge and serve a Notice of appeal, by 10 days from the date hereof, and I extend the time for a further 30 days within which to lodge and serve, a memorandum and record of appeal. The applicant shall bear the respondent's costs of the motion dated 3<sup>rd</sup> March, 2011. It is so ordered.

***Dated and delivered at Nairobi this 9<sup>th</sup> day of December, 2011.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**