



IN THE COURT OF APEAL

AT NAIROBI

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 139 OF 2017 (UR 106/2017)

BETWEEN

THE ATTORNEY GENERAL.....APPLICANT

AND

SYLVANUS OTIENO ODIAGA.....RESPONDENT

*(An application for extension of time to file and serve a notice of appeal
out of time from the judgment and decree of the Employment & Labour*

Relations Court (Ndolo, J.) dated 8th July 2014

in

ELRC CAUSE No. 891 of 2012)

RULING

The **Attorney General (the applicant)**, who at all material times was acting for the **Ministry of State for Defence**, took out the motion on notice to which this ruling relates, on 21st June 2017. Brought primarily under **Article 159 of the Constitution** and **rule 4** of the **Court of Appeal Rules**, the application seeks extension of time to appeal against the judgment of the **Employment and Labour Relations Court (ELRC) (Ndolo, J.)** delivered some three years earlier, on 8th July 2014. By dint of **rule 75(2)** of the rules of this Court, the applicant was obliged to file a notice of appeal, which under the same rules originates an appeal, within 14 days of the delivery of the judgment. The burden is on the applicant to explain why he did not comply with the rule and why he has taken up to three years to apply for extension of time to file the notice of appeal (See ***Kenya Revenue Authority v. Habimana Sued Hemed & Another, SC. CA. No. 23 of 2015***).

The dispute leading to the judgment that the applicant wishes to appeal was fairly straightforward. The **respondent, Sylvanus Otiemo Odiaga** was at all material times a commissioned officer in the Kenya Army and the **Commanding Officer, Armed Forces Ordnance Depot**. Between July and August 2006, he averred, he was away on special assignment at Lanet, Nakuru and had to delegate his duties at Kahawa Garrison, where he was ordinarily based, to another officer. Upon return he was charged with 8 counts of unlawfully incurring expenditure arising out of procurement of goods. He was tried by a court martial, which acquitted him of four of the counts and convicted him of the other four. As punishment he was fined eight days pay and loss of three months seniority in rank.

What aggrieved the respondent was that despite the punishment meted out to him, his commission was also terminated on 23rd May 2007. Contending that the termination was in violation of due process, contrary to the **Armed Forces Act** (repealed) and illegal, he filed a claim in the ELRC. After hearing the parties, the learned judge found in his favour and awarded him **Kshs 5,000,000** as damages for unlawful termination of his commission and costs of the claim.

As I adverted earlier, the applicant did not file a notice of appeal within the prescribed time. The explanation he has given for failure to do so is that the counsel who handled the matter in his office resigned without bringing the judgment to the notice of the necessary officer.

The respondent opposed the application by a rather lengthy replying affidavit sworn on 31st July 2017 in which he set out the history of the litigation both before the ELRC and the High Court, in a bid to demonstrate the applicant's proclivity for delay. As far as is relevant to this application, the respondent deposes that after the judgment, his advocates taxed their bill of costs and the applicant participated in the taxation. Subsequently the applicant's advocates obtained a certificate of order against the Government under the **Government Proceedings Act**, which they served upon the applicant and the Ministry of State for Defence on 1st December 2014. The respondent added that on 11th March 2015 he took out judicial review proceedings for *mandamus*, which were duly served upon the applicant, to compel payment of the decree. Accordingly, the respondent maintained that the applicant was less than candid by claiming that he was not aware of the judgment until February 2017 when he filed the notice of appeal.

Learned counsel for the parties filed written submissions in which they reiterated the respective positions that I have set out above. The applicant submitted that the discretion of the court to extend time is unfettered; that an applicant is no longer required to present a "sufficient reason" for extension of time; that an order for extension of time should be liberally granted; that an applicant who has a right of appeal should not be readily shut out; and that mistake of counsel ought not to be visited on the client. In support of those submissions counsel relied on **John Njoroge Michuki & Another v. Kentazuga Hardware Ltd, CA No. Nai. 16 of 1998**; **Edith Gichugu Koine v. Stephen Ngagi Thoithi, CA No. Nyr 11 of 2014**; and **Murai v. Wainaina [1984] KLR 82**.

On his part the respondent attacked the competence of the Notice of Appeal, which the applicant had belatedly filed on 1st March 2017. Relying on the ruling of the Supreme Court in **Nicholas Kiptoo arap Salat v. IEBC & 7 Others, SC. App. No. 16 of 2014**, the respondent submitted that the notice of appeal was null and void because it was filed out of time without leave. He relied on the same authority and the

ruling of this Court in **Vitalis Omondi Othuon v. National Water Conservation & Pipeline Corporation** regarding the principles governing extension of time such as that extension of time is discretionary; a party who seeks extension has the duty to satisfy the court why he did not comply with the rules; the reason for the delay; whether the application for extension of time has been made timeously; and the prejudice that the respondent is likely to suffer, among others.

Lastly the respondent submitted that the applicant was not entitled to extension of time because he had not told the truth regarding the reason for failure to file the notice of appeal on time; that he was aware of the judgment at all times; that the delay was inordinate and unexplained; that the intended appeal had no chances of success; and that the respondent stood to suffer great prejudice because the High Court had issued an order of mandamus compelling the applicant to satisfy the decree, which was yet to be done.

It cannot be gainsaid that the power to extend time is a discretionary power. However, like all other discretion of the court, even where it is unfettered, it must be exercised judiciously and on the basis of reason, rather than capriciously or arbitrarily. (See **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA No. Nyr. 14 of 2013**). True, the applicant is no longer required to show “sufficient reason” why the court should extend time, but still he has to place before the court material upon which it can exercise discretion in his favour. That material should not be fanciful or contrived.

I readily accept that the principles upon which this court exercises discretion to extend time are as set out in the authorities relied upon by the parties. (See also **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, C.A. Nai. 251 of 1997**) and **Fakir Mohamed v. Joseph Mugambi & 2 Others C.A. No. Nai. 332 of 2004**). Two of the considerations are the length of delay and the reasons for the delay. In this matter, the delay in filing the notice of appeal is close to three years. The reason given for the delay is that the advocate in the applicant’s office who was handling the matter resigned and left without proper handing over, thus the applicant was not immediately aware of the judgment.

Having carefully perused all the documents on record, I agree with the respondent that the applicant has been less than candid in explaining the reason for the failure to file the notice of appeal within the prescribed period. Other than the fleeting statement that the advocate handling the matter resigned without handing over, the applicant, deliberately in my view, refused to divulge the name of the advocate or even the date when he resigned. As a matter of fact, the person who deposed to the alleged resignation was the ***Principal Secretary, Ministry of Defence*** on the basis of information received from a person who was similarly not disclosed. If the applicant were serious, someone in his office with first hand information about the alleged resignation and the date thereof would have sworn the affidavit. As it is, all I have before me is a mere statement on the alleged resignation without any information on who it was that resigned.

It is also disingenuous of the applicant to claim that it was not aware of the judgment until it filed the notice of appeal on 28th February 2017. The record shows that when the judgment was delivered, a ***Mr. Maina*** represented the applicant. Assuming that is the officer who resigned, at the taxation of the respondent’s bill of costs, the applicant was represented by ***C. Kassim, litigation counsel***, who on 23rd October 2014, filed detailed submissions to oppose the bill of costs. It does not make any sense

therefore for the applicant to claim that he was not aware of the judgment until February 2017. In addition, the record is replete with more evidence of the respondent notifying the applicant of the judgment on several occasions, long before February 2017. Thus for example the applicant was served with and acknowledged receipt of the certificate of order against the Government on 2nd December 2014. The Notice of Motion for an order of mandamus was served upon the applicant, who acknowledged it on 11th March 2015. Even the applicant's own exhibit, the letter dated 16th July 2015 from the Ministry of Defence shows that the applicant was notified by the said Ministry way back on 9th December 2014 of the ELRC award.

In light of the clear and cogent evidence on record, I find that the applicant has not explained the delay of close to three years, which I find to be inordinate. Even after he filed the notice of appeal on 28th February 2017, when he claims to have known of the judgment, the applicant did not file the application for extension of time until almost four months later. No explanation has been given even for that delay. Instead of being candid, the applicant has opted to literally lead the court down the garden path. A party who is not forthright and truthful does not deserve exercise of discretion, however unfettered, in his favour. (See *Ephantus Stanley Njagi Moko v. Monica Ruguru Njiru, CA No. 74 of 2016*).

In the circumstances of this application and granted my findings as regards delay and the reasons therefor, I do not think it will serve any purpose to consider other matters in this case. In the event, I do not see any basis upon which I can exercise discretion in favour of the applicant and extend time. This application is utterly bereft of merit and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 17th day of November, 2017.

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR



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