



IN THE COURT OF APPEAL AT NAIROBI

CORAM: GATEMBU J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 62 OF 2017

BETWEEN

KENYA CHEMICAL & ALLIED WORKERS.....APPLICANT

AND

ERNEST & YOUNG LIQUIDATORS FOR COTES BROTHERS E.A LTD ...RESPONDENT

(An application for the extension of time to file the record of appeal from Judgment and Decree of the

Employment and Labour Relations Court (Nzioki wa Makau, J) dated 16th March, 2015

in

Nairobi E.L.R.C. No. 1078 of 2014)

RULING

1. The applicant, Kenya Chemical & Allied Workers, instituted suit before the Employment and Labour Relations Court on behalf of former employees of Coates Brothers (East Africa) Limited, in liquidation (the Company), regarding payment of final dues. That suit was consolidated with the respondent's suit against the applicant over the same subject matter. The consolidated suit culminated in the judgment of the lower court delivered on 16th March 2015 in which the court declined to order payment of redundancy dues to the applicant's employees. Aggrieved by that decision, the applicant lodged a notice of appeal but did not file its memorandum and record of appeal within the time prescribed.

2. In its application before me dated 28th March 2017 and presented to the Court on 29th March 2017 the applicant seeks two main reliefs under Rule 4 of the Court of Appeal Rules, 2010. The first is an order for extension of time within which to file and serve its record of appeal. The second is an order that its notice of appeal filed on 27th March 2015 be deemed to be properly filed.

3. At the hearing of the application, learned counsel for the applicant Mr. Wesonga referred to the application and to the affidavit in support and submitted that the notice of appeal was filed within the time prescribed under the Rules; that the advocates previously acting for the applicant failed to file the record of appeal within the stipulated period; that the original

certificate of delay issued in February 2015 by the lower court had an error on the face of it; that a duly corrected certificate of delay was subsequently issued on 11th November, 2016; that on 14th February 2017, the applicant instructed the advocates currently on record to pursue the appeal who filed this application without delay; that no prejudice will be occasioned to the respondents if the present application is allowed; that the applicant has an arguable appeal with high chances of success as demonstrated by the draft memorandum of appeal; and that the liquidation of the Company is still under process and there is over Kshs. 7.3 million cash at hand.

4. Opposing the application, learned counsel for the respondent Mr. Wandabwa referred to the replying affidavit of Peter Obondo Kahi, the liquidator of the Company, sworn on 8th May 2018 by and submitted that the applicant is guilty of inordinate delay and is not deserving of the prayers sought; that contrary to the claim that the applicant's current advocates were appointed on 14th February 2017, there is material to show that those advocates have been seized of the matter since 28th October, 2016; that the appeal should have been filed in August 2016 and the delay in doing so since that time has not been explained; that appeal has no chance of success; and that in any event the company is at an advanced stage of liquidation.

5. I have considered the application, the affidavits and submissions by learned counsel. An application of this nature calls for the exercise of judicial discretion. As the Court stated in Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi, (Civil Application No. Nai.255 of 1997)

(unreported):

"It is now well 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."

6. The categories of factors for consideration is however not closed and the court may consider other factors as may be relevant in the circumstances of each particular case. [see Thuitha Mwangi v Kenya Airways Ltd [2003] eKLR.]

7. The applicant has a duty to offer a plausible explanation why it did not file its appeal within the time period prescribed under the rules if indeed it was serious in its intent of pursuing an appeal against the decision of the lower court. The decision of the lower court in this case from which the applicant intends to appeal was delivered on 16th March 2015. The notice of appeal dated 27th March 2015 was lodged with the registrar of the lower court within the 14 days period prescribed under Rule 75(2) of the Rules of this Court. Under Rule 82(1) of the Rules of this Court, the memorandum of appeal and record of appeal should have been lodged within 60 days of lodging the notice of appeal.

8. However, by a certificate of delay issued on 11th November 2016 the Deputy Registrar of the lower court certified that the period between 27th March 2015 and 7th December 2015 was taken up in the preparation and delivery of the typed and certified proceedings and that notification that the proceedings were ready for collection was given on 7th December 2015. The certificate of delay was prepared and ready for collection on 11th November 2016. That was almost a year after the said notification by the letter dated 7th December 2015. Subsequently, the present application seeking extension of time was not filed until 29th March 2017.

9. How then does the applicant explain its present predicament" What reason(s) has the applicant tendered for seeking an extension of time" In his affidavit in support of the application, Justin Kahindi Katoi, a member of the applicant union and a former

employee of the Company, deposed that upon delivery of the judgment by the lower court on 16th March 2015, Mr. Alfred Nyakundi of the firm of Nyabena Nyakundi & Co. Advocates was duly instructed to file an appeal; that a notice of appeal was promptly filed and typed and certified proceedings were applied for; that the certificate of delay was then issued on 11th November 2016 despite which those advocates failed to file the record of appeal; that the applicant was constrained to engage the services of a different law firm to pursue the appeal and that on 14th February 2017 the firm of Wesonga, Mutembei & Kigen was then appointed by which time the period prescribed for lodging the memorandum and record of appeal had lapsed hence necessitating the present application, which as I have indicated was filed on 29th March 2017.

10. The affidavit of Peter Obondo Kahi, the liquidator of the Company however shows that the certified copies of the proceedings and judgment were paid for and collected from the registry of the lower by the advocates for the applicant Ms. Nyabena Nyakundi & Company Advocates on 7th December 2015; by a letter dated 10th December 2015 filed in the registry of the lower court on 17th December 2015, those advocates applied for a certificate of delay which was issued by the Deputy Registrar on 9th February 2016 but the year was incorrectly indicated as 2015. There was then a lull in activity until 28th October 2016 when the firm of Wesonga, Mutembei & Kigen advocates entered the scene for the applicant and wrote to the lower court seeking a correction of the date in the certificate of delay from 9th February 2015 to 9th February 2016. The applicant does not explain what was happening between February, 2015 when the certificate of delay with the incorrect date was issued until October, 2016 when Wesonga, Mutembei & Kigen advocates got onto the scene.

11. I note that in its application and in the affidavit in support, the applicant makes no reference to the background as brought out by the respondent in the replying affidavit. There is therefore merit in the complaint by the respondent that the applicant was “*economical with the truth*” when it says that it was let down by its previous advocates namely the firm of Nyabena Nyakundi & Co. Advocates who failed to pursue the matter after the certificate of delay that was issued on 11th November 2016 when in fact the original certificate of delay had been issued to those advocates on 9th February 2015. Further, it is also evident that the firm of Wesonga, Mutembei & Kigen advocates were involved in the matter since October 2016 when they applied for rectification of the certificate of delay. It was not until this matters were raised by the respondent in its replying affidavit that the applicant addressed them in a supplementary affidavit of Justin Kahindi Katoi that was filed on 28th May 2018.

12. The upshot of the foregoing is that there is unexplained delay for period between 9th February 2016 and 28th October 2016 when Wesonga, Mutembei & Kigen Advocates applied for correction of the erroneous certificate of delay. There is also unexplained between 11th November, 2016 being the date of the corrected certificate of delay and the date of filing of this application on 29th March, 2017. But that is not all, the applicant appears to have withheld relevant information in its application until it was prompted by the disclosures in the replying affidavit. Even if the applicant was let down by its advocates, I think the following sentiments expressed by Waki J.A in *Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR* apply here. In that case, the Judge stated that:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

13. In the foregoing circumstances, I am not satisfied that the applicant has laid sufficient basis for me to exercise my discretion in its favour. I accordingly dismiss the application with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of December, 2018.

GATEMBU KAIRU, FCIArb

I certify that this is

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JUDGE OF APPEAL

The true copy of the original.

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