IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OTIENO – ODEK, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 85 OF 2019

BETWEEN

CHURCH OF GOD EAST AFRICA.....1st APPLICANT

MAHIAKALO CHILD DEVELOPMENT CENTRE.....2nd APPLICANT

AND

DINAH BULUMA.....RESPONDENT

(Being an application for extension of time to file Notice of Appeal in the intended appeal from the judgment and decree of the Employment and Labour Relations Court (Nduma Nderi, J.) delivered on 24th January 2019

in

ELRC Cause No. 115 of 2016)

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RULING

1. Before me is a Notice of Motion application for extension of time to file and serve a Notice of Appeal in an intended appeal against the judgment and decree of the Employment and Labour Relations Court delivered on 24th January 2019. The Motion is dated 20th July 2019 and was filed on 23rd July 2019.

2. The grounds in support of the Motion as stated on the face thereof is that a Notice of Appeal dated 27th June 2019 was lodged at the Employment and Labour Relations Court four (4) months and 21 days out of the time prescribed by the rules of this Court. That non-compliance with the rules was occasioned by circumstances beyond the control of the applicants. That the applicants have an arguable appeal with a high probability of success. That no prejudice will be suffered by the respondent if leave to extend time is granted.

3. The affidavit in support of the Motion is deposed by **Rt. Rev. James Obunde** who explains the circumstances that led to delay in lodging the Notice of Appeal. He deposes that the impugned judgment was delivered on 24th January 2019. That the applicants were not aware of the judgment until 12th June 2019 when the same was brought to their attention by their present counsel on record **Ms Bruce Odeny & Co. Advocates**. That on 7th March 2019, the applicants instructed their current advocates on record to take over the conduct of the matter. That the applicant's former advocates Messrs. **Wekesa S. Wekesa & Co. Advocates** did not inform the applicants that judgment had been delivered on 24th January 2019. That the applicants are aggrieved by the judgment and intend to

appeal against the same. That the delay in lodging the Notice of Appeal was beyond the applicant's control as they totally relied upon their former advocate to update them on the outcome of the case. That the applicants are both a religious and an educational institution and it takes time to obtain resolutions to instruct a firm of advocates. A draft memorandum of appeal is attached to the application.

4. The respondent in opposing the instant application filed a replying affidavit dated 30th August 2019. It is deposed that on 5th July 2018, both parties consented before the trial court to have the dispute determined by way of written submissions. That on 18th August 2019, the trial court set the judgment date as 24th January 2019. That counsel for both parties were present in court when the judgment date was set. That the applicants were represented by learned counsel **Wekesa S. Wekesa & Co. Advocates**. That on the day when the judgment was read on 24th January 2019, the applicants were represented by counsel in court. That the applicants cannot complain of lack of information as they were ably represented by legal counsel when the impugned judgment was read in court. That the applicants have not demonstrated any steps that they took to find out the progress of the mater from their then counsel on record. That the applicants have not placed before this Court sufficient material to warrant the exercise of discretion for extension of time. That the respondent stands to be prejudiced as the dispute has been in court since the year 2012. That the applicants have not demonstrated a prima facie case with probability of success.

5. At the hearing of this application learned counsel **Ms Imbaya** appeared for the applicants. Learned counsel **Mr. Dennis Odhiambo** holding brief for Mr. Kundu appeared for the respondent. Both parties relied on their written submissions and affidavits filed in this matter.

6. I have considered the Notice of Motion dated 20th July 2019 and the affidavit filed in support of thereof. I have also considered the grounds averred in support of the application for extension of time as well as the submissions made on behalf of the respondent.

7. I am cognizant that the discretion to extend time within which to file a Notice of Appeal is a discretion vested upon me under rule 4 of the rules of this Court. In *Abdul Aziz Ngoma –v- Mungai Mathayo* [1976] Kenya LR 61, 62, this Court stated:

"We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."

8. In **Leo Sila Mutiso – v- Hellen Wangarir Mwangi, Civil Application No. Nai 255 of 1997**, it was stated the relevant factors to be considered in an application for extension of time include the length of delay; the reason for delay; the chances of appeal succeeding and the degree of prejudice (if any) likely to be caused to the respondent if extension is granted.

9. The Supreme Court **in Nicholas Kiptoo Arap Korir Salat - v - Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** identified salient principles to be considered in an application for extension of time. The Court expressed:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion that:-

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

2. a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;

3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;

4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;

5. whether there will be any prejudice suffered by the respondents if the extension is granted;

6. whether the application has been brought without undue delay; and,

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time."

10. In this matter, the impugned judgment was delivered on 24th January 2019. The application for extension of time was filed on 23rd July 2019. There is a six (6) month delay after the delivery of the impugned judgment.

11. There are several issues that I need to consider. First, have the applicants satisfactorily explained the reason for six-month delay in filing the present application. Second, is the six-month delay inordinate. Third, has the application for extension of time been brought without undue delay and fourth, have the applicants demonstrated the respondent stands to suffer no prejudice if extension is granted"

12. Subject to the law on limitation period, whereas the law does not set the minimum or maximum period of delay, in my view, an applicant is expected to account for every single day of the delay.

13. In **Ratnam - v - Cumarasamy (1964) 3 All ER 933** it was stated thus: -

"The rules of court must, prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise discretion. If the laws were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide for a time table for the conduct of litigation. "

14. In **Bernard Kibor Kitur – v - Alfred Kiptoo Keter & another [2018] eKLR**, the Supreme Court expressed that when considering an application for extension of time, the Court considers whether there are any extenuating circumstances that would allow it to exercise its unfettered jurisdiction to extend time.

15. In **Mugo –v- Wanjiru [1970] EA 481, 483**, Spry V-P said:

"... I do not think the fact that an appeal appears likely to succeed can of itself amount to 'sufficient reason'.

Normally, I think the sufficient reason must relate to the inability or failure to take the particular step in time, but I am not prepared to say that no other consideration may be invoked."

16. In the instant matter, the applicants explain the delay that they were not aware that judgment had been delivered by the trial court. That their previous advocate on record Ms Wekesa S. Wekesa did not inform them of the existence of the judgment. That they only became aware of the judgment in June 2019.

17. In **Rajesh Rughani –v- Fifty Investment Ltd. & Another (2005) eKLR** this Court held:

"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".

18. In **Bains Construction Co. Ltd. –v- John Mzare Ogowe (2011) eKLR** the court observed: "It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences". In **Habo Agencies Limited –v- Wilfred Odhiambo Musingo (2015) eKLR,** it was thus stated: *"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."*

19. The applicants in their supporting affidavit depose that they instructed their new advocate on record to take over the conduct of this matter on 7th March 2019. There is no averment or explanation as to what prevented the new advocate from filing a Notice of Appeal immediately after 7th March 2019. What is averred is that a Notice of Appeal dated 27th June 2019 was lodged at the Registry of the trial court. No explanation has been given for the delay between 7th March 2019 when the new counsel was instructed and 27th June 2019 when the Notice was lodged at the Registry. I am aware that under **rule 4** of the Rules of this Court a

party may apply for extension of time either before or after taking the action in respect of which extension of time is sought. (See **Imperial Bank Limited (In Receivership) & another - v - Alnashir Popat & 18 others [2018] eKLR**; **Civil Appeal (Application) No. 395 of 2017). Nonetheless, in this matter, no explanation or reason has been given for inaction on the part of the new advocate on record between 7th March 2019 and 27th June 2019.**

20. This Court in **Donald O. Raballa - v - Judicial Service Commission & another [2018] eKLR** when considering delay and inaction by a new advocate on record expressed as follows*:*

"In our view, the new advocates of the applicant cannot be said to have faired any better than the previous advocates, and it is no wonder that the learned single Judge posed the pertinent hypothetical questions he did. According to the applicant, the advocates were instructed in October 2014 but did nothing on the matter until December 22nd when they made a draft of the application before us. They then waited until 15th January the following year to file it in court. Even assuming without deciding that time does not run for some functions of the court between mid-December and January, it is not argued that the court registries were closed and the filing of the application was impossible. This was not an ordinary matter. A judgment had been in existence unchallenged since 13th May, 2013. There was already a long delay caused by inaction by previous advocates. Surely in those circumstances, it behooved the new advocates to move with alacrity to save the situation before a court of equity. But no, they took their sweet time before drawing up the application and before filing it. We say they took their time because they have not sworn any affidavit to explain the inaction apparent in the matter. In court, counsel appeared to tell us, not in so many words, that he was entitled to go on vacation because the court was also on vacation between 21st December and 15th January! That is why he did nothing. A court of equity would frown on such conduct and we do not blame the single Judge for the findings he made. "(Emphasis supplied)

21. In this matter, the applicants further urged that the delay in filing the Notice of Appeal was due to circumstances beyond their control. There is no explanation was to what these circumstances are. However, it appears that the circumstances alluded to are that the former advocate did not inform them that judgment had been delivered. There is nothing in the Motion or its supporting affidavit to indicate any steps undertaken by the applicants to ensure that they became aware of the delivery of the judgment or made enquiries on the conduct and outcome of their case. The applicants have also not show what steps that they took to ensure that both their previous advocates and the current advocate filed the Notice of Appeal without undue delay.

22. In the persuasive case of **Dilpack Kenya Limited - v - William Muthama Kitonyi [2018] eKLR**; the High Court in considering an application for extension of time correctly stated:

*"30. What then is the explanation for the default in this matter" The only reason given by the applicant for not taking action within the prescribed time is that of inadvertence. However, the nature of the inadvertence is not explained at all. In **Itute Ngui & Anor vs. Isumail Mwakavi Mwendwa Civil Application No. Nai. 166 of 1997, Omolo, JA** held that whereas advocate's bona fide error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. It is therefore clear that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence, as the applicant did in this case."*

23. In this matter, I am persuaded by the merits of the decision in **Habo Agencies Limited –v- Wilfred Odhiambo Musingo (2015) eKLR,** and the above cited dicta by Omollo JA in **Itute Ngui & Anor –v- Isumail Mwakavi Mwendwa, Civil Application No. Nai. 166 of 1997, that** parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

24. In my considered view, on the date when the impugned judgment was read and delivered by the trial court on 24th January 2019, the applicants were represented by counsel. The applicants have not demonstrated to my satisfaction any steps that they took to follow up on the outcome of the case before the trial court. It is not a sufficient explanation to simply state and aver that counsel did not inform client the outcome a case. It behooves a client/litigant to exercise diligence and follow up the progress and outcome of his/her case. I find that there are no extenuating circumstances that would allow me to exercise my jurisdiction and discretion to extend time to file and serve a Notice of Appeal in this matter. I find that the applicants have not given a sufficient and satisfactory explanation for the delay in filing the present application.

25. For the foregoing reasons, I decline to exercise my discretion to extend time to file and serve a Notice of Appeal. Accordingly, the Notice of Motion dated 20th July 2019 be and is hereby dismissed with costs.

Dated and delivered at Kisumu this 1st day of October, 2019.

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR