



IN THE COURT OF APPEAL

AT NYERI

CORAM: MURGOR, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 88 OF 2020

BETWEEN

JANET KARWITHA KWARIA.....APPLICANT

AND

MERU FARMERS SACCO SOCIETY LIMITED.....RESPONDENT

(An application for stay of execution and warrants of arrest pending an intended appeal

from the judgment of the Employment and Labour Relations Court

(Hon. B. Ongaya, J.) made on the 15th day of May, 2015

in Nyeri ELRC Case No. 41 of 2012

RULING OF THE COURT

This Notice of Motion dated 18th September 2020 coming up for hearing on written submissions with no appearance from counsel owing to the Covid 19 Pandemic. Upon realizing that the motion sought orders for i) extension of time and ii) stay of execution of the judgment, having regard to the necessity for expeditious disposal of cases and the requirement to dispense substantive justice, this Court found it efficacious to refer the application for extension of time for determination by a single judge as required by *rule 4* of the *Court of Appeal rules* prior to determining the application for stay of execution, will be subject to the outcome of the application for extension.

The applicant, Janet Karwitha Kwaria seeks orders for extension of time to file an appeal against the decision of the Employment and Labour Relations Court (*B. Ongaya, J.*) delivered on 5th May 2015 on the grounds that the applicant instructed her counsel to file an appeal. A Notice of appeal was filed on 28th May 2015, and a request for proceedings was made on the same day. The applicant was notified that the proceedings were ready on 21st January 2016, but, the appeal was never filed.

It was claimed that her counsel did not inform her that the appeal was not filed, but which failing could not be attributed to her. The applicant contended that it would be unjust to shut her out of the appeal as it is arguable, especially considering that there are numerous outstanding issues that were not addressed by the trial court in its judgment. The applicant's concern was that a warrant of arrest pursuant to an order for her to pay the respondent Kshs. 770,164 had been issued, and her plea was that time to file the intended appeal be extended to enable her file her appeal.

In a replying affidavit sworn by the respondent's Chief Executive Officer, *Eliezer Kaburu*, it was deponed that the applicant filed a Notice of appeal and thereafter requested for the proceedings and the certified judgment. It was pointed out that the request for proceedings was not copied to the respondent's counsel; that the applicant was thereafter notified that the proceedings were ready for collection on 21st January 2016, but she did not pay for the proceedings or collect them; that the applicant does not have any plausible explanation for the delay in filing the appeal, and this Court should decline to exercise its discretion to extend time.

Under *Rule 4* of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi –Civil Application No. Nai 251 of 1997* where the Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

So, what was the period of delay, and has this been explained" The judgment was delivered way back on 5th May 2015. A Notice of appeal was filed on 28th May, 2015 and simultaneously with that, a request for certified copies was made on the same day. This application for extension was filed on 21st September, 2020. A period of over five years has lapsed since the judgment was delivered.

As to whether this has been explained, the applicant has not provided any evidence demonstrating that she vigilantly pursued the filing of her appeal, save to attribute the failure to her counsel. There is nothing in the documents or annexures that showed that after she applied for the typed proceedings she diligently followed up the instructions for the appeal to be filed with her counsel. Nothing shows that she visited the registry to pursue the proceedings, which is evident from her admission that she did not pay for or collect them after she was notified that they were ready on 21st January 2016.

She only claimed to have been “shocked” to find that the advocate did not file the appeal. She does not state when she learnt that the appeal had not been filed, and it is difficult see how the delay can be attributed to her counsel, particularly as nothing discloses that he or she was to blame.

Truth be told, the averments disclose that what woke the applicant up from her lethargy was when she learnt a warrant of arrest had been issued against her. It was then that she sought to establish if at all an appeal had been filed. I am also not able to accept her assertion that she could not come to court earlier “...*due to issues among others the unprecedented corona virus and the search for a new advocate with regard to payment of legal fees.*” The Corona -19 pandemic is a recent phenomenon. Where had she been prior to that, or since she was notified that the proceedings were ready on 21st January 2016"

I have looked at the request for typed proceedings. It is only addressed to the registry, and has not been copied to the respondent's advocate. It is therefore not lost on me that on account of this omission, the applicant cannot benefit from the *proviso* to *rule 82* of this Court's rules. *Rule 82* specifies that once an appellant has requested for proceedings and served the relevant

notification on the respondent, the registrar of the High Court should certify the time taken for the preparation and delivery of the proceedings to the appellant, which period is then excluded when computing delay. *Sub rule (2)* emphasises that;

“An appellant shall not be entitled to rely on the proviso to sub rule (1) unless his (or her) application for such copy was in writing and a copy of it was served upon the respondent.”

In effect therefore, the applicant could not have had the time for preparation of the proceedings excluded from the period of delay, which would mean that the appeal should have been filed within 60 days, failing which the appeal was deemed as having been withdrawn. And with her application coming over five years after the Notice of appeal was filed, without any viable explanation for the delay, it becomes patently clear that the delay has not in any way been explained to my satisfaction.

On whether the intended appeal would be successful, the brief facts of the case are that the applicant was an employee of the respondent. She claimed that on a particular day she received Kshs. 809,000, but at the end of the day, was unable to reconcile her account as the money had gone missing. When asked to explain, she stated that a certain customer had given her an envelope with white powder that caused her to pay out the missing money to that customer. She was subsequently dismissed for gross misconduct.

The applicant filed a claim for wrongful dismissal, and in response the respondent counterclaimed for the missing money. The trial judge dismissed the applicant’s claim and upheld the respondent’s counterclaim. In her draft memorandum of appeal, the applicant contends that the trial court was wrong to conclude that the applicant was to blame for the missing Kshs.809,000, and that the court was wrong to find that the respondent was entitled to terminate the applicant’s employment on account of the missing money. A review of the judgment discloses that the applicant will have an uphill task convincing this Court that the trial court’s decision was erroneous.

As to whether there the respondent will suffer prejudice, I think so. A delay of over five years from the date of the judgment is inordinate. The respondent is anxious to partake of the fruits of that judgment. While the applicant was away, the respondent was systematically pursuing execution of the court order, and obtained a warrant of arrest on 28th June 2018. It is therefore apparent that extending the period for filing the appeal would be immensely onerous to the respondent.

All factors considered, I decline to allow the application, and hereby order that the Notice of Motion dated 18th September 2020 be and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR



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