Case Number:	Civil Application 195 of 2018
Date Delivered:	07 May 2021
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	William Ouko
Citation:	Amazon Motors Limited v Amalgamated Union of Kenya Metal Workers [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Cause 2002 of 2014
Case Outcome:	Motion dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), IN CHAMBERS)

CIVIL APPLICATION NO. 195 OF 2018

BETWEEN

AMAZON MOTORS LIMITED.....APPLICANT

AND

AMALGAMATED UNION OF

KENYA METAL WORKERS.....RESPONDENT

(Being an application for leave to file and serve a notice of appeal out of time against part of

the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Ndolo, J.)

dated13th February, 2018 and delivered on 2nd March, 2018 in Cause No. 2002 of 2014)

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RULING

The issue in contest between the parties was whether some of the respondent's members whose services had been terminated by the applicant on account of redundancy were entitled to gratuity. On one hand, the applicant was adamant that they were not entitled by dint of the terms of the prevailing Collective Bargaining Agreement (CBA) while the respondent, on the other hand held a contrary position. Eventually, the respondent instituted a suit, Cause No. 2002 of 2014, in the Employment and Labour Relations Court.

Upon considering the respective cases of the parties, Ndolo, J. by a judgment dated 13th February, 2018, which was delivered on 2nd March, 2018 by Makau, J., found in favour of the respondent. The learned Judge construed the CBA and in particular Clauses 20(2) & 21 thereof as entitling the respondent's members to gratuity.

The applicant was aggrieved with this part of the judgment and intend to challenge it in this Court. But because the applicant did not file the notice of appeal within the requisite time frame it has, by this application applied for leave to do so out of time. It has also applied for leave for the firm of Githogori & Harrison Associates Advocates to come on record in place of Musyimi & Company Advocates.

The application was premised on the grounds that despite instructing its then advocates, M/S Musyimi & Company Advocates to file the notice of appeal, the said firm failed to do so; that the applicant only learnt of that failure on 31st May, 2018; that the delay was wholly attributable to the applicant's erstwhile advocates and should not been visited upon it; that the intended appeal is arguable; and that the current application was filed without inordinate delay.

According to the respondent, the applicant had not placed anything before this Court to demonstrate that it had issued instructions to its former advocates to file a notice of appeal; that the reason advanced for the delay was not sufficient or excusable; that the intended appeal was frivolous, in that, the issue of gratuity was clearly provided for in the concerned CBA, and what is more, the

applicant had paid gratuity to its employees during previous redundancies.

Beginning with the prayer for leave for M/S Githogori & Harrison Associates Advocates to come on record, **Rule 23(1)** of this Court's Rules only requires a party who wishes to change advocates to simply lodge a notice to that effect. Further, I do note that there is a pending application by the said M/S Githogori & Harrison Associates Advocates dated 12th January, 2021 seeking leave to cease acting for the applicant. Therefore, that is as much as I am prepared to say concerning that prayer.

Moving on, an application for extension of time under **Rule 4** of this Court's Rules**,** calls for the exercise of unfettered discretionary power. Some of the factors to be considered include the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of the success of the intended appeal. See **Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees** [2020] eKLR.

Pursuant to **Rule 75(2)** of this Court's Rules, the applicant should have filed the notice of appeal within 14 days of the delivery of the judgment on 2nd March, 2018, that is, on or before 16th March, 2018. Therefore, taking into account that the current application was filed on 4th July, 2018, the delay was for 106 days excluding the Easter holiday which fell between 30th March, 2018 and 2nd April, 2018, both days inclusive.

Assuming, I was to accept that the applicant's advocates failed to file the notice of appeal despite instructions to do so, that explanation caters for the period between delivery of the said judgment up to 31st May, 2018 when the applicant allegedly learnt of the omission. There was still the period between 31st May, 2018 up until 4th July, 2018 when the application was filed. Consequently, I find that the explanation given by the applicant was unreasonable rendering the delay on its part inordinate.

Having looked at the intended grounds of appeal and being cognisant that it is not in my place to determine the merits of the intended appeal, I have my doubts on its arguability.

For those reasons I decline to exercise my discretion in the applicant's favour. Accordingly, the motion is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR