REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga CJ, Tunoi, Ibrahim, Ojwang & Njoki, SCJJ)

APPLICATION NO. 50 OF 2014

–BETWEEN–

AVIATION & ALLIED WORKERS UNION KENYA .....APPLICANT

–AND–

1. KENYA AIRWAYS LIMITED
2. MINISTER FOR TRANSPORT
3. MINISTER FOR LABOUR AND HUMAN RESOURCE DEVELOPMENT
4. ATTORNEY- GENERAL

} **RESPONDENTS**

RULING

I. BACKGROUND

[1] The applicant filed a Notice of Motion under certificate of urgency on 16th December, 2014 seeking Orders that:

(a) the applicant on its own behalf and on behalf of the aggrieved members directly affected by the decision of the Appellate Court appealed against, is granted leave to appeal against the said decision as regards the interpretation and application of various provisions of the Constitution, including Articles 2(5) and (6) and the treaties, and

conventions and tenets of international law applicable to Kenya under the Constitution, by virtue of Articles 10; 40; 41 and 50;

(b) the applicant on its own behalf and on behalf of the aggrieved members directly affected by the decision of the Appellate Court appealed against, is granted extension of time to file and serve a petition of appeal, record of appeal, and to pay the prescribed fee to the Supreme court within 30 days;

(c) the applicant on its own behalf and on behalf of the aggrieved members directly affected by the decision of the Appellate Court appealed against, is granted extension of time to serve a petition of appeal and record of appeal, within seven days as from the date of filing same;

(d) the costs of this application be incorporated in the appeal.

[2] This matter was heard by *Lady Justice Rawal, DCJ* on 17th December, 2014; and she gave Orders granting leave to the applicant to file a further affidavit within 7 days. The application was to be served within 14 days from the date of filing the said affidavit, and a date would then be given for hearing of this application on the basis of priority.

[3] The applicant was unable to file the further affidavit, but returned to Court within the time earlier allowed. The applicant returned with another application under certificate of urgency, seeking extension of the time earlier granted for filing a further affidavit. This application was mentioned before the Registrar, who scheduled it for hearing on 20th January, 2015. The two-Judge Bench (*Ibrahim & Wanjala, SCJJ.)*, after hearing the parties, granted extension. The

further affidavit, sworn by Perpetua Mponjiwa, was filed on the 20th of January, 2015, just after extension of time was granted.

[4] Meanwhile, the 1st respondent had filed a notice of preliminary objection to the application of 9th January, 2015. He raised the following grounds:

(i) the application of 16th December, 2014 seeking certification that the applicant's intended appeal raises matters of general public importance, is improperly before this Court, as in the first instance such application must be filed in the Court of Appeal;

(ii) the applicant being improperly before this Court, there is no jurisdiction to grant extension of time, either as sought in both applications, or at all.

II. SUBMISSIONS

(a) 1st Respondent

[5] Both the application and the notice of preliminary objection were canvassed before this Court on 26th March, 2015. Learned counsel, Mr. Amoko and Mr. Awele appeared for the 1st respondent, and urged that the application is not properly before the Court, as notwithstanding the claim that it has been brought under Article 163(4)(a) of the Constitution, it seeks certification, in its prayer *(b)*. Counsel argued that an application for leave is first to be made before the Court of Appeal. He urged for effect, that on the face of it, the application is brought under Rule 24(1) of the Supreme Court Rules, which deals with certification of matters for appeal.

[6] Counsel further contended that a single Judge of this Court lacks jurisdiction to grant *ex parte* Orders such as those of 12th December, 2014, regarding *leave for filing of a further affidavit*. He submitted that in the absence of express statutory provision, no Court can give an *ex parte* relief, as it is a principle of

natural justice that notice be given to the other party. Learned counsel relied upon the Appellate Court's decision in ***Onyango v. Attorney General [1987] KLR 711*** for the proposition that it is a principle of natural justice, that there is no express authority to give an *ex parte* order.

(b) Applicant

[7] Learned counsel, Mr. Mwenesi for the applicant contested the preliminary objection, urging that it does not disclose a "pure point of law" as its foundation. He contended that the respondents' intention is merely to deny the applicant a hearing before this Court. He submitted that paragraph (ix) of the Notice of Motion, thus worded: "*the intended appeal will raise important issues of law and constitutional interpretation and application" ...,* falls short of a reference on a "matter of general public importance", and so does not qualify as an application seeking certification– contrary to the claim by the objector.

[8] Counsel urged that the intended appeal is anchored on the interpretation and application of the Constitution. He stated that the appeal had not been challenged by the 1st respondent, and that neither Article 2(5) and (6) of the Constitution, nor the ILO conventions, had been the subject-matter before the High Court and the Court of Appeal. He urged further that the question of fair trial, in the terms of Article 50 of the Constitution, had been an issue both in the Industrial Court and the Court of Appeal.

[9] Mr. Mwenesi submitted that the 1st respondent had not opposed grounds (c) and (d) of the application which sought extension of time. Counsel urged that this Court has the power to grant these prayers. He submitted that the list of authorities filed by the 1st respondent in support of the preliminary objection, is concerned with the question of certification of a matter as one of general public importance, which was not the case here. Hence, he urged that there is no proper preliminary objection before this Court.

[10] As regards the granting of an *ex parte* Order by a single Judge, Mr. Mwenesi submitted that this was certainly tenable in law. He urged that a Judge determining an application can, *suo motu,* decide on the propriety of a supplementary affidavit. Further, counsel submitted that this question could not be raised now, as the relevant act had already taken place; the affidavit in question had already been filed. He prayed that the application be granted, and the preliminary objection dismissed.

(c) Respondents in reply

[11] In reply, learned counsel Mr. Awele for the respondents, urged that the applicant should move the right forum, given that he expressly seeks certification in his application. He submitted that the application is brought under Section 16 of the Supreme Court Act, and Rule 24 of the applicable Rules, which provisions relate to an application for certification. He perceived the applicant as resiling now from its application, and urged that the preliminary objection be allowed.

III. ANALYSIS AND DETERMINATION

(i) The Issues

[12] Three issues emerge for this Court's determination, as follows:

(a) *has the 1st respondent put forward a competent preliminary objection?*
(b) *has the applicant made a sufficient case for extension of time?*
(c) *in granting leave to file a further affidavit, did the single Judge act without jurisdiction?*

(ii) The Preliminary Objection

[13] The crux of the preliminary objection is that the application before the Court is one seeking certification and, as such, it ought to have been filed before the Court of Appeal in the first instance. The applicant's case, on the other hand, is that his intended appeal is "as of right", under Article 163(4)(a) of the Constitution, and hence no certification is required.

[14] This Court has had occasion in the past, to consider the nature of a preliminary objection. The Court endorsed the long-standing jurisprudence set in the ***Mukisa Biscuit case,*** on the nature of a preliminary objection. In ***Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others,*** Sup. Ct. Application No. 23 of 2014, the Court cited its earlier decision in the ***Joho case*** thus [paragraph 51]:

> **"**The principles in the ***Mukisa Biscuit*** case were restated by this Court in the ***Joho*** case [as follows…]
>
> ***'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration … a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."***

[15] Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

[16] What point of law is being raised in this preliminary objection? It is clear that it is a jurisdictional point, that an application for certification falls to the Appellate Court's jurisdiction in the first place. It is a point already considered in this Court's earlier decisions: ***See Sum Model Industries Ltd v. Industrial & Commercial Development Corporation [2011] eKLR; Koinange Investment & Development Ltd v. Robert Nelson Ngethe [2013] eKLR; Malcom Bell v. Daniel Torotich Arap Moi & another [2013] eKLR***.

[17] Thus, if indeed the application before the Court seeks certification, then the next point of inquiry will be, whether it was first brought before the Court of Appeal. However, there is a contest as to whether the application before the Court is one for certification.

[18] Upon close examination, we have come to the conclusion that the contest on this point relates to *mode of drafting*, an element of forensics in which the undoubted benchmark is *clarity* and *avoidance of equivocation,* in the formulation of pleadings and averments. An application such as the one before us, should be *focussed, and targeted with precision*. A focussed application, while saving the Court's time, also enhances access to justice for all parties involved. The applicant would then be able to look forward to the Court readily comprehending his case, while the respondent(s) also properly apprehend the case falling due for a defence.

[19] Mr. Mwenesi has maintained that the application before the Court only seeks extension of time, rather than certification and/or leave. But this is not

precisely the impression gained by the respondents, as emerges from the detailed form of their pleading.

[20] We have noted that the applicant has cited Sections of the Supreme Court Act and Rules which are applicable when one seeks leave, and grant of certification. In ***Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone,*** **Sup. Ct. Application 2 of 2012,** this Court stated [paragraph 23]:

> ***" ... It is trite law that a Court of law has to be moved under the correct provisions of the law."***

A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make 'omnibus' applications, with ambiguous prayers, hoping that the Court will grant at least some.

[21] The applicant in his submissions, was categorical that his intended appeal was "as of right", and the application was solely for extension of time. We thought the applicant would move to abandon prayer *(b)* in this application; but all he did was to make no further reference to it.

[22] While, therefore, the preliminary objection was in no way frivolous, it is our considered opinion that the same did not meet the threshold set in the ***Mukisa Biscuit case.*** There was a dispute between parties as to the nature of the application before the Court, and the applicant persuaded the Court sufficiently that it only sought extension of time. Hence, the preliminary objection fails.

(iii) The Case for Extension of Time

[23] We now consider the question whether a case for extension of time was duly made. Rule 33(1) of the Supreme Court Rules, 2012 provides that a party is

allowed 30 days from the date of filing a notice of appeal, to lodge its appeal in the Supreme Court.

[24] Rule 53 of the Supreme Court Rules provide that the Court may extend the time limited by its rules, or by any other decision of the Court. It was held in the case of ***Nicholas Kiptoo Arap Korir Salat v. IEBC and 7 Others, Sup Ct. Application 16 of 2014,*** that the Court has an unfettered discretion to extend time, and that it is incumbent upon the applicant to explain the reasons for delay, when making an application for extension. In the ***Salat case***, this Court pronounced itself on the equitable nature of extension of time, as a remedy, thus:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of the Courts which litigants have to lay a basis [for],where they seek [grant of it.]"*

[25] In determining whether such a basis has been laid, the Court in the ***Salat case*** set the guiding principles for consideration thus:

> *"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:*
>
> 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 [good] reason 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 und ue delay*; and**
7. ***whether in certain cases, like election petitions, the public interest should be a consideration for extending time."***

[26] Does this application meet the principles set out above? The Court of Appeal delivered its decision on 11 July 2014. The applicant filed and served a notice of appeal on 24 July, 2014. This was, in our view, quite timely. Time for lodging an appeal to the Supreme Court expired on 23 August 2014. The applicant has applied for extension of time to file and serve a petition of appeal more than 4 months later, that is, on 16 December 2014. The applicant averred that it applied for the typed proceedings of the Court of Appeal on 24 July 2014, and sought the other parties' approval for the draft-decree of the Court of Appeal. The other parties did not approve the draft-decree, and it had to be referred to the Court for approval. The approved decree was not received by the applicant's advocates until 13 November, 2014. The applicant did not receive the typed proceedings from the Court of Appeal, until after a further reminder-letter dated 4 December, 2014.

[27] Before this Court, on 26 February, 2015 the applicant averred that it could not file an appeal while the required documents were held by the Court of Appeal. This Court, in ***Bwana Mohammed Bwana v. Silvano Buko Bonaya & 2***

Others, *Application 20 of 2014,* thus remarked [paragraphs 18-19] in relation to the motions prior to lodging appeal:

> *"For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:*
>
> > ***An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal—***
> >
> > ***(a) a petition of appeal;***
> >
> > ***(b) a record of appeal; and***
> >
> > ***(c) the prescribed fee.***
>
> *Rule 33(2), (3) and (4) further provides for the specific documents that must be contained in the record of appeal for it to be complete."*

[28] This Court has pronounced itself on the cast of an appeal, in the case of ***Law Society of Kenya v. Centre for Human Rights and Democracy & Others,*** Supreme Court Petition 14 of 2013, as follows [at paragraph 36]:

> ***"The use of the word 'shall' in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the components of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition of Appeal, the Record of Appeal, and the prescribed fee";***

and as follows [at paragraph 38 and 39]:

> ***"The Record of Appeal is the complete bundle of documentation, including the pleadings,***

submissions, and judgment from the lower Court, without which the Appellate Court would not be able to determine the appeal before it.

"If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine 'the appeal' on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed this is the gist of Rule 33(1) of the Supreme Court Rules."

[29] In our view, the delay in receiving proceedings and documents which are necessary for instituting an appeal, is a reasonable cause for failing to file a petition of appeal on time. The applicant submitted that it filed its notice of appeal in time (in accordance with Rule 31(1) of the Rules of this Court), and also filed the application for extension of time shortly after receiving the transcribed proceedings from the Court of Appeal. This Court has noted that the respondents did not make any submissions in regard to this limb of the application. Hence the Court is left to make a determination on the basis of only the factual foundation raised by the applicant. This Court, however, may still analyse the facts on the basis of the principles indicated earlier-on. The application is brought after a period of four months. Is this an unduly long period of time? Given the explanation made by the applicant, we would not regard the four months as inordinate delay.

[30] The prejudice if any, that may befall the respondent(s), is a relevant issue for consideration. However, while the respondents are best-placed to signal the prejudice that they will suffer, if at all, they have remained silent. From our assessment, there is no apparent prejudice confronting the respondents, that ought to be taken into account by this Court, at this preliminary stage of the proceedings.

[31] Whether the intended appeal has a bearing on the public, is a question to be considered on a case-by-case basis. The applicant submitted that the intended appeal will raise important issues of law and constitutional interpretation and application, especially in relation to fair labour practices. These issues include *inter alia*: whether the Court of Appeal whose jurisdiction is limited by law to matters of law only, had the competence to enquire into and determine the level and extent of injury of the affected members of the appellant Union, or to determine matters of fact related to their injuries, or the level of damages awardable. The respondent's position was that, whether or not the Appellate Court had overstepped the bounds of its powers, by inquiring into the extent of injuries of the applicant's members, is a factual inquiry, the resolution of which will have no impact beyond the parties appearing before the Court, and so no element of the public interest is entailed.

[32]It is clear to us that this application is for allowing; and there is no need to inquire into such other constitutional questions as will be raised if, and when, the appeal is filed. It is our opinion that the applicant has laid a satisfactory basis for extension of time for the filing of a petition of appeal.

(iv) Ex parte Order by Single Judge

[33] The respondent questioned the power of a single Judge to grant extension of time to file a further affidavit. We will first consider the nature of the *'relief'* that was granted. The applicant approached the Court and realized that there was need for a further affidavit, to support its application. It is worth noting that the single Judge did not grant any relief prayed for in the application *ex parte*. If there were proceedings before the Court, and as an interlocutory matter, an application sought the filing of a further affidavit, that could prejudice the respondent; and so the respondent would have a right to raise any concerns.

[34] However, at this preliminary stage, where the substantive application has not yet been served to the respondents, and the respondents have not at all filed any response, they stand to suffer no prejudice. The respondent cited the persuasive Appellate Court decision in ***Onyango v. Attorney-General [1987] KLR 711,*** urging that it is to be implied that unless the contrary intention appears, Parliament does not authorize the exercise of powers in breach of the principle of natural justice. Although the said decision bears progressive principle and is, in our view, good law, it should be distinguished from the current case. The *ex parte* decision in that case amounted to a material denial to a prisoner, by the Commissioner of Prisons, of the right of remission, by failing to give him an opportunity to be heard on the substantive allegations of wrong-doing on his part.

[35] In the instant case, by contrast, the 'relief' that was granted was not directed against the respondent, and formed no part of the substance of a claim. It only goes to facilitate the applicant, by giving the applicant an opportunity to clearly present its case before the Court, after which the respondent once duly served with the required papers, will have an opportunity to respond. The action taken by the single Judge is in all respects regular, and is for the accomplishment of the procedural arrangements preparatory to the laying out of the framework for a fair hearing, in the interests of all the litigants.

[36] We hold that the directions by the single Judge, at that preliminary stage of proceedings, was well within the mandate of the Court. It was action that enhances access to justice for both parties: the applicant is given leave to clearly state its case before the Court; while the respondent is accorded an opportunity to respond to a clearly-defined case, duly lodged and served.

(v) ORDERS

[37] Consequently, we now make Orders as follows:

(a) ***The notice of preliminary objection dated 9th January, 2015 is disallowed.***

(b) ***The application by Notice of Motion, dated 16th December, 2014 is hereby allowed.***

(c) ***The applicant is granted leave to file and serve his appeal within fourteen (14) days from the date hereof.***

(d) ***The applicant shall bear the costs of this application.***

DATED and **DELIVERED** at **NAIROBI** this 6th **Day of** May **2015.**

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W.M.MUTUNGA

CHIEF JUSTICE &
PRESIDENT OF THE SUPREME COURT

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P. K. TUNOI

JUSTICE OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J.B. OJWANG

JUSTICE OF THE SUPREME COURT

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S.N. NJOKI
JUSTICE OF THE SUPREME COURT