



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 394 OF 2012

LOCHAB BROTHERS LIMITED.....APPELLANT/APPLICANT

VERSUS

TOBIAS OWINO.....RESPONDENT

AS CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 430 OF 2012

LOCHAB BROTHERS LIMITED.....APPELLANT/APPLICANT

VERSUS

ELSAPHANE LITUNYA.....RESPONDENT

RULING

1. The appellant/applicant in both instances took out the Notice of Motion dated 1st October, 2021 and sought for the substantive order of extension/variance of time to enable it comply with the order issued on 11th June, 2021 requiring it to file its record of appeal out of time; and a further order that the record of appeal annexed thereto be deemed as duly filed.
2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of advocate Christine Adhiambo Oraro.
3. The respondent resisted the Motion by putting in a replying affidavit sworn by advocate Kennedy Ombati on 21st October, 2021.
4. At the interparties hearing of the Motion, the parties' advocates replied on the averments made in the supporting and replying affidavits respectively.
5. I have considered the grounds laid out on the body of the Motion and the facts deponed in the affidavits supporting and opposing the Motion.
6. It is clear that the main order sought in the Motion is that of extension of time to enable the applicant comply with the order issued on 11th June, 2021 requiring it to file its record of appeal out of time.
7. Under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 6 of the Civil Procedure Rules, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. In her affidavit, Christine Adhiambo Oraro states that the reason for the delay in filing the record of appeal within the set timelines was occasioned by negligence on the part of the advocate who was assigned the file to work on, and further occasioned by the difficulties in accessing certified copies of the requisite documents online.
9. The deponent also states that the respondent who has already filed a Party and Party Bill of Costs does not stand to be prejudiced if the orders sought are granted, but that the applicant is likely to suffer prejudice if the orders are denied and the appeal is taxed before it has an

opportunity to prosecute its appeal.

10. In retort, the respondent through advocate Kennedy Ombati states that the instant Motion is inter alia, an afterthought, an abuse of the court process and that no appeal exists since the timelines for compliance have long lapsed.

11. The respondent is of the view that the instant Motion is actuated by malice and is purely intended to delay the pending taxation proceedings, adding that the applicant was only prompted to bring the Motion upon being served with the Bill of Costs.

12. Upon my consideration of the above and my perusal of the record, I observed that the applicant in both instances lodged the memorandum of appeal on 27th July, 2012 and thereafter filed the original record of appeal on 16th November, 2017 pursuant to an order previously made by this court and which order was extended.

13. The record shows that subsequently, the respondent approached the court by way of the application dated 22nd May, 2015 and sought for the dismissal of the applicant’s appeal for want of prosecution. Upon hearing the parties on that application, this court in its ruling delivered on 11th June, 2021 again extended the time required for compliance by the applicant in filing its record of appeal for a further 15 days from the abovementioned date.

14. According to the record, it is not in dispute that the above order has not been complied with. Upon considering the explanation given by counsel for the applicant and set out hereinabove, I find the same to be reasonable in the circumstances. It is apparent that the delay in compliance was largely occasioned by the inadvertence of the applicant’s advocate and it would be unfair for the applicant to suffer the punishment as a result.

15. In any event, I note from the record that the applicant has annexed the draft supplementary record of appeal bearing copies of the requisite documents to the instant Motion.

16. In my view, while I acknowledge that there has been a prolonged delay and inconvenience in the prosecution of the appeal since its filing and a further delay of four (4) months in bringing the Motion since the making of the order of 11th June, 2021, in the interest of substantive justice, I will grant the applicant a final opportunity to put its house in order.

17. Resultantly, I will allow the Motion dated 1st October, 2021 succeeds in terms of order 2 and the following orders are hereby made:

- i. The applicant is granted leave of ten (10) days from today file and serve its supplementary record of appeal.**
- ii. Costs of the Motion shall abide the outcome of the appeal.**
- iii. The aforementioned orders shall apply to High Court Civil Appeal No. 430 of 2012 accordingly.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent