



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J

MISCELLANEOUS CIVIL APPLICATION NO. 20 OF 2020

RANJIT SINGH LOCHAB.....1ST APPLICANT

HARVINDER KAUR LOCHAB (Suing as the Legal Representative of the Estate of

RANDEEP SINGH LOCHAB.....2ND APPLICANT

-VERSUS-

MUMBU HOLDINGS LIMITED.....1ST RESPONDENT

JOHN MBUU.....2ND RESPONDENT

RULING

1. This application filed on 24th July, 2020 is for extension of time for the applicant to file an intended appeal against the Ruling of Hon. K. Bidali (CM) delivered on 4th March, 2020. It is brought under Order 42 Rule 5 and 6 of the **Civil Procedure Rules** and **Sections 1A, 1B, 3A, 63(e)** and **79G** of the **Civil Procedure Act**. The Rules require that every appeal from a subordinate court should be filed within thirty days from the date of the decree or order.

2. The applicant's grounds are set out in the motion. They argue that the impugned ruling was delivered on 4th March, 2020, during the closure of the courts on account of the Covid pandemic; that they sought and were granted leave to appeal; that despite applying for the record of proceedings on 10th March, 2020, the same were not availed; that their appeal has a high probability of success; and that they will suffer prejudice if not allowed to appeal.

3. The appeal is opposed by the Respondents' Replying Affidavit on the grounds set out therein.

4. The applicants in their submissions cite the case of **First American Bank of Kenya Limited v Gulab P. Shah [2002] EA 65** which states the matters a court should consider when exercising its discretion to extend time for filing an appeal namely:

- the explanation if any for the delay;

- the merits of the contemplated action;

- whether the matter is an arguable one deserving a day in court or whether it is frivolous and merely intended to delay the closure of justice;

- Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer due to the exercise of discretion.

5. The applicant further submitted that whilst awaiting the court proceedings they prepared and delivered to court a Memorandum of appeal dated 12th March, 2020 for filing; but that due to closure of courts on account of the Covid pandemic, the appeal was formally received and filed on 29th May, 2020; that the documentation availed shows that there was no inordinate delay on the applicant's part which is plainly explained.

6. Finally, the applicant argues that the Memorandum of appeal raises plausible grounds for a persuasive appeal against the trial court's decision; and if denied their right to appeal they will suffer irreparable loss and harm.

7. The respondents argue that the applicants had previously been granted leave to file the suit out of time in Nakuru HCCC No. 69 of 2014 (Originating Summons). The leave was conditional on the suit being filed within 15 days but that they did not comply with the said conditions.

8. The respondents also submitted that the ruling sought to be challenged had already been typed and was delivered in the presence of counsel for the parties. As such, they argue, the applicants did not require typed proceedings so as to prepare a Memorandum of Appeal, as they already had the typed ruling.

9. In addition, the respondents point out that the applicant stated they required the typed proceedings for purposes of preparing a Record of appeal as opposed to a Memorandum of appeal, yet the application seeks extension of time to file their intended appeal. As such they argue that the application is vague.

10. Finally, the respondents submit that the applicants are guilty of laches evidenced by: preparing a Memorandum of Appeal on 12th March, 2020 but filing it on 29th May, 2020; whilst the application was prepared on 23rd July, 2020. This delay, they say, is not explained.

11. I have carefully considered the application, the documents placed before me and the parties' representations.

12. There is no doubt that upon the reading of the Ruling of the trial court on 4th March, 2020, in the presence of both counsel, the applicant sought and obtained leave to appeal the decision. It is not disputed that they then sought the typed proceedings six days later by a letter dated 10th March, 2020. It cannot also be disputed - and I take judicial notice of the fact - that with effect from 19th February 2021, the Judiciary had taken widely publicized public measures to scale down court services to the public due to the Coronavirus pandemic.

13. In light of the foregoing, delays would naturally and as a consequence befall litigants in general. The requisite for proceedings and the filing of the Memorandum of appeal are clear signs that demonstrate the applicant's intent in as far as its attempts to challenge the Ruling are concerned.

14. Laches arises when a party is both dilatory and inefficient in its efforts and the environment in which it is operating is convenient or even enables it to act. Here, the environment was wholly inconvenient and indeed was forbidding due to circumstances beyond anyone's control attributable act of God.

15. **Section 79G of the Civil Procedure Act** which was invoked by the applicant provides:

*“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.**”* (Emphasis supplied).

16. The proviso to that section answers the question whether the prayer to enlarge time is merited. The key consideration is the court's exercise of its discretion is whether the court is satisfied that the appellant had good and sufficient cause for not filing the appeal in time.

17. It is not disputed, that the applicant prepared a Memorandum of appeal on 12th March, 2020 and according to their presented it for filing but the court did not respond due to the Covid pandemic. The filing of the Memorandum appears to have been done physically based on the fact that RSL 3 is a hand-written receipt by the Court. I take judicial notice that from February 2020 there was a national Covid lockdown effected by the Government which included, for a period, the banning of movements from county to county. It is indisputable that during the period from February 2020 there were serious interruptions in the business of the courts which were experienced both by the courts and litigants.

18. In my view, the key question is not whether the filing under those circumstances, was done in strict compliance with statutory requirements. Rather, it is whether the applicant has satisfied the court that there were sufficient reasons preventing such compliance. As already noted, I think they are demonstrated by the applicant.

19. In exercising my discretion, the factors I must consider which aid the Court's discretion on whether to extend time to file the appeal are as stated by the Court of Appeal in **Mwangi v Kenya Airways [2003] KLR** as follows:

- a) The period of the delay.
- b) The reason of the delay.
- c) The arguability of the appeal.
- d) The degree of prejudice which could be suffered by the Respondent if extension is granted.
- e) The importance of compliance to the time limits to the particular litigation or issue; and

f) The effect, if any, on the administration of justice or public interest if any is involved.

20. I have already dealt with the period and reasons for the delay. I now consider the other factors.

21. The Ruling by the trial court resulted in a finding that the applicant/plaintiff's substantive suit was time barred, and struck it out. That decision has the effect of snuffing out the substantive rights of parties under the suit. If the time to appeal against it is not extended the consequence is final, and this prejudice suffered by the applicants will be complete and irreversible. Equally, this will be a negative mark on the administration of justice in that the appellant's substantive suit will have been effectively shut down by virtue of non-substantive procedural errors committed by the applicants in an environment they could not control. To decline to grant extension of time would entrench procedure over substance, which I am not prepared to do in light of **Article 159 (2) (d)** of the **Constitution**.

22. Further, I have perused the filed memorandum of appeal. All that the applicant must show at this stage is that the appeal is arguable - not that the appeal will succeed or has a high probability of success. Are the grounds persuasive? There are five grounds in the memorandum. I think all of them are arguable. Two of them are, indeed, persuasive. In my view, the applicants have discharged the standard required of arguability.

23. In conclusion, I note that whilst the respondent has not indicated what prejudice they will suffer if the extension of time to file the appeal is granted, the applicant has. I am so persuaded.

24. Accordingly, I grant the applicant extension of time in terms of prayer 2 of their application. The applicant shall file and serve the appeal and Record of Appeal within 14 days from the date hereof. Thereafter the applicant shall take a date for directions within 60 days from the date hereof.

25. Costs will be in the cause.

Administrative directions

26. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

27. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

28. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 29TH DAY OF APRIL, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Luchema for the Applicants
2. Kokebe for the Respondents
3. Court Clerk – Quinter Ogutu