



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E189 OF 2020

CHASE BANK (K) LIMITED.....APPELLANT/RESPONDENT

VERSUS

CONINX INDUSTRIES LIMITED.....RESPONDENT/APPLICANT

RULING

1. This is the Notice of Motion by the respondent/applicant dated 28th September 2020 filed under Section 79G, Section 3A of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. It seeks to have the appeal filed herein struck out and/or it be dismissed with costs. The main ground is that the appeal was filed out of time granted by Justice Kamau on 30th June 2020.

2. The application is also supported by the affidavit of Mr. Kelvin Mogeni counsel for the respondent/applicant. He has averred that the impugned judgment was delivered on 24th September 2020. The appellant/respondent did not file an appeal within the required period. It sought leave to file appeal out of time vide High Court Miscellaneous Application No. 706 of 2019 in an application dated 9th December 2019. By the ruling dated 30th June 2020 by Justice Kamau the court granted the leave sought with timelines and other conditions to be adhered to (KM1).

3. It's counsel's averment that the Appellant filed the appeal on 4th September 2020 and served it on 18th September 2020. This was outside the 14 days granted by the court. The Respondent/applicant therefore prayed for the striking out or dismissal of the appeal with costs.

4. A replying affidavit sworn by Henry Macharia advocate on 26th February 2021 was filed in opposition to the application. He avers that the application is misconceived, lacks merit, incompetent and fatally defective. He gives the reason for failure to comply with the court orders as the difficulties experienced in filing its memorandum of appeal as a result of the suspension of the appellant/respondent's advocates judiciary's e-filing account at various instances.

5. That it was not until the mess was rectified that the appeal was filed. The said experience he avers was beyond the control of the appellant/respondent and its advocates. He asks the court not to condemn the appellant/respondent unheard, as this would violate the provisions of article 50 of the constitution. He also depones that procedural technicalities should not hinder the administration of justice as espoused under article 159(2) (d) of the constitution.

6. Directions were given for the application to be disposed of by way of written submissions, which was complied with by both parties.

7. Learned counsel for the respondent/applicant- M/s Purity Makori in her submissions gave brief facts of the matter plus the Ruling of 30th June 2020. She referred to section 79G of the Civil Procedure Act which provides that:

“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.”

8. She has cited the court of Appeal case of **Kyuma vs Kyema Civil Appeal No. 16 of 1988 eKLR** where the court stated at page 186 as follows:

“...5.This meant that the Appellant did not file a Memorandum of Appeal within thirty days and had no valid certificate of delay within the time contemplated under section 79G.

6. The Appellant could only file a competent appeal if the Court granted him an extension of time. Since such extension was granted on terms and the appellant failed to comply with the terms, the judge was entitled to strike out the appeal. The Judge

was also right in finding that there was no pending appeal on which he could grant an injunction...” (emphasis mine).

9. She has further submitted that there is a record of appeal with no order or decree being appealed against which is not proper. She has referred to the case of **Kulwant Singh Ropra vs James Nzili Maswili [2014] eKLR** where the court stated thus:

“It is clear from this provision of the law a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate Court without the decree or order appealed from there is, in effect, no appeal it is clear for this reason that section 79G provides a window for extension of time to file the appeal if the decree or order could not, for one reason or another, be secured within the limitation period. It therefore follows that the preparation and delivery of the decree or order for the purpose prescribed in section 79G of the Act is a mandatory step without which no legitimate appeal can be said to have been lodged in the High Court against a decision of the subordinate Court.”

10. Submissions by learned counsel for the appellant/respondent Mr. Robson Harris are dated 15th March 2021. He has submitted that the Notice of Motion dated 28th September 2020 is frivolous, preposterous and tantamount to an abuse of the court process. He too gave a brief background of the case herein plus the Ruling by Justice Kamau dated 30th June 2020, where the appellant/respondent was granted 14 days within which to file the memorandum of appeal.

11. Relying on the case of **Independent Electoral & Boundaries Commission & Anor vs Stephen Mutinda Mule & 3 others [2014] eKLR**. Counsel has submitted that the respondent/applicant’s introduction of new issues/facts in its submissions is not acceptable. What it is claimed to have introduced is the issue of a record of appeal having been filed without an order and/or decree which issue is not in the pleadings. The introduction of the said issue he submits has denied the appellant/respondent an opportunity to respond to the same by way of affidavit.

12. On whether the memorandum of appeal should be struck out and/or dismissed counsel referred to the replying affidavit dated 26th February 2021, which clearly sets out the grounds supported by fact and law in response to the application. Further that the memorandum of appeal raises prima facie and bona fide issues for the court’s determination. He has stressed on the reason for the delay in filing the memo of appeal which he says was beyond the appellant/respondent’s control. In support he has cited article 159(2)(d) of the constitution of Kenya 2010.

13. Counsel has also referred to the case of **Nicholas Kiptoo Korir Salat vs Independent Electoral & Boundaries Commission & 6 others [2013] eKLR** where the court of Appeal in dismissing an application to strike out a Notice of Appeal and Record of Appeal opined as follows:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...”

14. He has also cited the case of **Abdirahman Abdi vs Safi Petroleum Products Ltd & 6 others [2011] eKLR** at length. He has asked the court to consider the prejudice to be occasioned to the parties if the application were to be allowed. That the authority cited by the respondent/applicant is an old case of 1988. Further that the respondent/applicant will suffer no prejudice if the appeal goes to full trial.

Analysis and determination

15. I have duly considered the application, its grounds, both affidavits and submissions. The case law cited has equally been considered. The main issue I find to be falling for determination is whether there is merit in the notice of motion dated 28th September 2020.

16. In filing this application the respondent/applicant relied on Sections 3A and 79G of the Civil Procedure Act and Order 50 Rule 1 of Civil Procedure Rules.

Section 3A provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Section 79G 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.”

Order 50 R1 provides;

“Where by these Rules or by any judgment or order given or made, time for doing any act or taking any proceedings is limited by months, and where the word “month” occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months unless otherwise expressed.”

17. The impugned judgment by Hon. P. M. Gesora was delivered on 24th September 2019. Any appeal should have been filed on or before 24th October 2019. Was this done? The answer is NO. That being the case, the appellant/respondent filed a notice of motion dated 6th November 2019 on 7th November 2019. The same was heard and a Ruling by Justice Kamau delivered on 30th June 2020 allowing the said application with conditions.

18. The conditions were as follows;

1. *The Applicant is hereby directed to file and serve its memorandum of appeal within fourteen (14) days from the date of this ruling.*
2. *The Applicant is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from the date of this ruling.*
3. *The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the applicant comply with the timelines within which to file their Record of Appeal aforesaid.*
4. *There shall be a stay of execution of the decree in Milimani CMCC No 7806 of 2014 Connix Industries Limited vs Chase Bank (K) Limited & Another that was delivered on 24th September 2019 on condition that the Applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondent the sum of sum of Kshs 9,66,433/= within thirty (30) from the date of this Ruling.*
5. *For avoidance of doubt, in the event, the Applicants shall default on Paragraph 33(4) hereinabove, the conditional stay of execution shall automatically lapse.*
6. *Either party is at liberty to apply.*
7. *Costs of application will be in the cause.*

19. Conditions Nos 1, 2, and 4 were to be executed by the appellant/respondent who has not complied with any of them. The parties were given liberty to apply.

20. The 14 days within which the memorandum of appeal was to be filed and served lapsed on 14th July 2020.

21. It is clear that despite being in default of the conditions set the appellant/respondent never made any application for the court to accommodate it any further. It instead filed the memorandum of appeal on 4th September 2020 without seeking any leave for extension of time.

22. I have read the reasons for the delay in filing the memorandum of appeal within the time given by the court. This court could have considered them if they were in support of an application for extension of the time granted vide the Ruling of 30th June 2020. It is true a party should not be locked out of a hearing in terms of article 159(2)(d) of the constitution. It is also true that one who comes to court must do so with clean hands and court orders MUST be obeyed. Even as the memorandum of appeal herein was being filed on 4th September 2020 counsel was clearly aware of the orders of 30th June 2020 which had not been complied with, by the appellant/respondent.

23. Counsel for the respondent/applicant relied on the case of Kyuma vs Kyema (supra) which counsel for the appellant/respondent submitted was an old case and said no more.

The supreme court of Kenya in Civil Application No. 3 of 2016: County Executive of Kisumu – Applicant vs County Government of Kisumu & others stated this:

Para 35:

“We are in total agreement with the respondent that an appeal filed in this court out of time without leave of this court is irregular and this court will not invoke such “novel” principles as urged by applicant so as to validate that petition and deem it properly filed. We buttress this court’s position in Nicholas Salat when this court stated thus;

“...In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the petition of appeal already filed be deemed to have been duly filed. What we hear the applicant telling the court is that he is acknowledging having filed a “document” he calls “an appeal” out of time without leave of the court. Pursuant to rule 33(1) of the Court’s Rules it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the court’s Rules, this court can indeed extend time. However, it can not be gain said that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension

of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time and subsequently seeking the court to extend time and recognize such “an appeal” is tantamount to moving the court to remedy an illegality. This, the court cannot do.” (emphasis – mine).

To file an appeal out of time and seek the court to extend time is presumptive and in-appropriate without leave of the court. Such a filing renders the “document” so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this court’s registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the least (sic) he can do is to annex the draft intended petition of appeal for the court’s perusal when making his application for extension of time, and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this court extending time) is expunged from the court’s Record (Emphasis mine).

24. Being guided by the law and the above decision by the Supreme court of Kenya I find that the appellant/respondent’s action of filing the memorandum of appeal without seeking leave to further extend time for filing of the memorandum of appeal to be irregular. There is therefore no proper Appeal before this court.

25. I hereby strike out the memorandum of appeal dated 10th July 2020 and filed on 4th September 2020, with costs to the respondent/applicant.

DELIVERED, SIGNED AND DATED THIS 19TH DAY OF MAY 2021 IN OPEN COURT AT NAIROBI.

H. I. ONG’UDI

JUDGE