



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E322 OF 2020

UNIVERSAL ENGINEERING SYSTEMS LIMITED.....APPLICANT

-VERSUS-

TULSI CONSTRUCTION COMPANY LIMITED.....RESPONDENT

RULING

1. The two live prayers in the motion dated 1st September 2020 (prayers (4) and (5)) seek that the court be pleased to grant leave to **Universal Engineering Systems Limited** (hereafter the Applicant) to file an appeal out of time and to enlarge time for the Applicant to file an appeal against the ruling and orders issued on 6th March, 2020 by **Gesora, CM** in **Milimani CMCC No. 1384 of 2017**. The motion is expressed to be brought under Sections 1A, 1B, 3A & 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, *inter alia*. On grounds, among others, that the Applicant is dissatisfied with the ruling in **Milimani CMCC No. 1384 of 2017** delivered on 6th March, 2020 and intends to prefer an appeal; that reason for the delay in filing the appeal within prescribed time was that the ruling was delivered without notice to the Applicant and matters compounded by the onset of the Covid-19 pandemic which resulted in the scaling down of court operations, and hence the difficulty encountered by the Applicant's advocate to promptly peruse the court file.

2. The motion is supported by affidavit sworn by **Naureen Alam** who describes himself as the Managing Director of the Applicant, familiar with the facts in issue thus competent and duly authorized to depone the affidavit. She deposed that the Applicant is aggrieved by the ruling of the lower court delivered on 6th March, 2020 by **Gesora, CM** intends to prefer an appeal; that the ruling had been deferred for delivery on numerous occasions and was eventually delivered without notice to the Applicant; and that with the onset of the Covid-19 pandemic court operations were downscaled hindering perusal of the court file and consequent filing of the present appeal within time. She asserts that the Applicant has an arguable appeal and proceedings in the lower court are not stayed, the retrial of the lower court suit will commence as ordered, to the prejudice of the Applicant, and rendering the appeal nugatory.

3. The motion was opposed by way of a replying affidavit sworn by **Suryakant Bhailalbai Patel**, who describes himself as the managing director of the **Tulsi Construction Company Limited** (hereafter the Respondent). He states that there is no appeal preferred against the ruling delivered on 6th March, 2020; that parties had notice of the delivery of the ruling on 6th March, 2020 and that the filing of the instant motion six (6) months after delivery of the ruling indicates indolence on the part of the Applicant. He points out that no reasonable explanation has been proffered for delay or evidence has been tendered by the Applicant to indicate steps taken to follow up on the ruling. Defending the ruling of the lower court, he deposes that the lower court proceedings ought to be allowed to proceed to conclusion.

4. The motion was canvassed by way of written submissions. For the Applicant, it was submitted that by dint of Sections 79G & 95 of the Civil Procedure Act and Order 50 Rules 5 & 7 of the Civil Procedure Rules, this court has unfettered discretion to extend time to comply with prescribed timelines of filing pleadings or other process. Placing reliance on the decisions in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR** and **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR**, on the applicable principles in the exercise of the discretion. Secondly, the Applicant submitted delay in filing the appeal within time was not inordinate and had been explained in the supporting affidavit. In this regard, counsel called to his aid the case of **Hassan Nyanje Charo v Khatib Mwashetani & 3 Others [2014] eKLR**, among others. He asserted that the intended appeal was arguable and would be rendered nugatory if the lower court proceedings were not stayed.

5. On the part of the Respondent, it was argued the Applicant did not exercise due diligence as required and the explanations offered are lacking in candour and as such, leave to appeal out of time should not be granted. Counsel relied on the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** and **Berber Alibhai Mawji v Sultan Hasham Lalji & 2 others [1990-1994] EA 337** in support of the submission. Regarding the arguability of the intended appeal, counsel cited the case of **Subru Motors Limited v Linet Nehema Onyoni & 2 others** and submitted that the motion is incompetent as there was no appeal or draft memorandum of appeal for this court's consideration. He submitted that the Applicant had failed to establish substantial loss or prejudice to be suffered if stay of proceedings is not granted and buttressed its argument by relying on two decisions, namely, **David M. Silverstein v Atsango [2002] 1 KLR** and **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** on the aforementioned.

6. The court has considered the application in light of the parties' respective material and submissions and proposes to first deal with the prayer for enlargement of time for filing an appeal. But first, to note that prayers 4 & 5 in the motion are similar and seek essentially the same thing. The Court will consider both as one prayer for leave to appeal out of time; there is no fundamental difference between a prayer for leave to appeal out of time or for the admission of an appeal out of time.

7. Section 79G of the Civil Procedure Act 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. The successful Applicant must demonstrate *“good and sufficient cause”* for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

9. While the discretion of the court is unfettered, a successful Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

10. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he is underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 for 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 a case-to-case basis;

4. Whether there is a reasonable 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 Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7.”

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**.

11. The delay in this case is about seven (7) months. While the lower Court ruling had been delivered on 6th March 2020, it was not until September 2020 the instant application was filed. The explanation given for the failure to attend the delivery of the ruling of the lower court is that the ruling having been deferred severally, was eventually delivered without notice to the Applicant and that the subsequent outbreak of the Covid-19 pandemic led to downscaling of court operations thereby hindering access to the court for purposes of perusal and follow up. Counsel, for the Applicant vehemently disputed the alleged notice attached to the Respondents' affidavit as annexure **“SP1”**, questioning its authenticity and absence of evidence that the notice was uploaded on the Court's website as alleged by the Respondent. It is not in dispute that the ruling had been adjourned on several occasions, especially after the transfer of the trial magistrate and no evidence has been tendered by the Respondent to prove that the notice was uploaded on the day's cause list on the Court's website. Indeed, even the Respondent's counsel did not attend the delivery of the ruling.

12. Equally, it is true that due to the onset of the COVID-19 pandemic by early March 2020, the court operations were scaled down from mid-March 2020, limiting access to court services. There is a copy of a letter marked annexure **“NA3”** to the Applicant's affidavit and dated 17th August 2020 requesting copies of proceedings for purposes of appeal. In these circumstances, it is reasonable to believe that indeed the Applicant is not entirely to blame for the delay, which in this courts' opinion is not inordinate.

13. On the secondary issue raised by the Respondent regarding the failure to file an appeal or draft memorandum of appeal, the Respondent have argued that there is no appeal or intended appeal before this court for consideration to warrant this court exercise its discretion under Section 79G of the Civil Procedure Act and consequently, the prayer for enlargement of time to file an appeal and/or leave to file an appeal out of time is moot *ab initio*. The failure by the Applicant to attach a draft memorandum of appeal or to file appeal prior to seeking time

enlargement is not fatal. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone 92006) limited (2020) eKLR** in grappling with a similar situation stated:

“It is appreciated no draft memorandum of appeal is annexed. That default notwithstanding the principle of law set out above on this issue indicates clearly that in the absence of a draft memorandum of appeal the

Court can gauge the arguability of an intended appeal from other supportive evidence. Herein the applicant intends to challenge the dismissal of its liquidated claim which according to counsel involves a colossal amount of money. In my view, that in itself is arguable notwithstanding that it may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court. In my view, the issue of whether the applicant's claim was meritorious or otherwise is arguable notwithstanding that it may not succeed.”

14. Similarly in this case, the Applicant has by its supporting affidavit at paragraphs 6 and 7 cited several grounds of appeal which *ex facie* are not frivolous and appear deserving of consideration by the appellate court. The Applicant intends to challenge the ruling of the lower court which set aside a judgment in its favour concerning a large sum of money. It seems that the Respondent is eager for the *de novo* trial of the lower court suit which had earlier been heard to conclusion, but judgment therein was reversed in the ruling intended to be appealed from. It seems to me that on the facts of this case, the Applicant which had already obtained a judgment in its favour would suffer more prejudice if the motion were denied, than would be suffered by the Respondent if the orders sought are granted. In **Vishva's** case the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow applicant to exercise his now undoubted constitutionally, underpinned right of appeal the position in as crystalized by case is as set in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding *inter alia* that:

(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;

(ii) the right to be heard is a valued right; and

(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

15. The court is persuaded that justice of the instant case lies in allowing a chance to the Applicant to lodge and ventilate its appeal. The Respondent would be compensated through costs in any event and would not be unduly prejudiced. This Court therefore allows the prayer for enlargement of time to file an appeal. The Applicant is to file its memorandum of appeal within 14 days of today's date.

16. So far as stay of proceedings pending appeal is concerned, the applicable provision is Order 42 Rule 6 of the Civil Procedure Rules which provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

17. The issue of stay of proceedings pending appeal which parties have addressed in their respective material is moot: no such prayer is contained in the instant motion, and even if it were, such prayer could only properly be considered in the context of an existing appeal. That is clear from a plain reading of Order 42 Rule 6 of the Civil Procedure Rules. The existence of an appeal is the condition precedent to the grant of an order to stay execution or proceedings pending appeal. See the decision of the Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo (2018) eKLR**.

18. However, in order that the leave granted to the Applicant is not defeated especially given the current Court recess, the Court hereby directs that in the interest of justice, there be an order to maintain the *status quo* in respect of the suit in the lower Court for a period of 30 days. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 12TH DAY OF AUGUST 2021.

C.MEOLI

JUDGE

In the presence of:

Miss Njoroge h/b for Mr Waithaka for the Applicant

Mr Ochieng h/b for Nyawara & Co. Advocates

C/A: Carol