



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 58 OF 2017**

**MWANZIA KANYELE.....APPLICANT**

**-VERSUS-**

**SBI INTERNATIONAL HOLDING AG (KENYA).....RESPONDENT**

**RULING**

1. The applicant herein took out the Notice of Motion dated 30<sup>th</sup> January, 2017 and sought for the substantive order of leave to lodge an appeal out of time against the ruling delivered on 8th July, 2016 in Milimani CMCC No. 174 of 2012; and a further order that the draft memorandum of appeal annexed thereto be deemed as duly filed and served.
2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of advocate Donald W. Muyundo.
3. The respondent resisted the Motion by putting in a replying affidavit sworn by its Operations Manager, Shaul Cohen on 4<sup>th</sup> April, 2017.
4. At the interparties hearing of the Motion, the parties filed and exchanged written submissions.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; and the rival submissions and authorities cited in support thereof.
6. The gist of the matter as derived from a copy of the plaint annexed to the replying affidavit of Shaul Cohen is that the applicant instituted a suit against the respondent before the trial court and sought for general and special damages for injuries arising out of a claim for negligence and/or breach of statutory and/or contractual duty of care.
7. The parties aver that subsequently, the respondent herein filed the application dated 25th February, 2016 and sought for an order of dismissal of the applicant's suit on the basis of being statute barred by dint of the provisions of Section 90 of the Employment Act, a copy of which is also annexed to the replying affidavit.
8. According to the parties, the trial court vide the ruling delivered on 8th July, 2016 allowed the application and dismissed the suit. However, none of the parties annexed a copy of the impugned ruling for this court's reference.
9. Be that as it may, the impugned ruling has prompted the instant Motion.

10. It is clear that the substantive order sought in the Motion is that for leave to file an appeal out of time.
11. Section 79G of the Civil Procedure Act sets the timelines for lodging an appeal against the decision of a subordinate court at 30 days from the date of the decree or the order being appealed against. The provision goes on to express that an appeal may be admitted out of time where sufficient cause has been shown.
12. Furthermore, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 5 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.
13. The guiding principles to be satisfied for an application seeking for leave of the court to file an appeal out of time/for the extension of time to succeed were the laid out in the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR** cited in the applicant's submissions, and were reaffirmed in the case of **Growth Africa (K) Limited & another v Charles Muange Milu [2019] eKLR**.
14. On the first condition touching on the length of delay, the respondent is of the view that there has been an unreasonable delay in bringing the Motion, whereas the applicant submits that he has taken active steps towards bringing the Motion.
15. Going by the averments made by the parties, it is apparent that the impugned ruling was delivered on 8th July, 2016 whereas the instant Motion was filed about seven (7) months later on 9th February, 2017. In my view, while there has evidently been a delay, I do not find the same to be inordinate or unreasonable in the circumstances.
16. Concerning the reason(s) for the delay, advocate Donald W. Muyundo explains the same by stating in his affidavit that when the application dated 25th February, 2016 was to be dispensed with through written submissions and that when the matter came up on 13th June, 2016 to confirm filing of submissions and to take a ruling date, a pupil at the deponent's firm was in attendance.
17. The deponent states that the pupil mis-diarized the ruling date as being 8th September, 2016 instead of 8th July, 2016 and that it was only later that the deponent discovered that the ruling had already been delivered.
18. The deponent further explains that it was not until 16<sup>th</sup> January, 2017 that the applicant instructed him to lodge an appeal against the impugned decision.
19. The applicant also submits that the delay in filing the appeal and the instant Motion was the result of inadvertence on the part of his advocate and that he should not be made to suffer for the same.
20. In reply, Shaul Cohen states that on the date on which the ruling date was issued, both the respective counsels for the applicant and the respondent were in attendance and hence the applicant's advocate was aware of the ruling date.
21. It is the contention of the respondent that the delay has not been adequately explained.
22. Upon considering the rival positions taken herein above, it is apparent that the delay was largely occasioned by the inadvertence of the applicant's advocate whether directly or through his agent/employee. In such a case, the legal position is that the mistake of an advocate should not be visited upon the client. Consequently, I find the explanation for the delay to be reasonable in the circumstances.
23. On the principle to do with whether or not an arguable appeal exists, the applicant is of the view that an arguable appeal  
exists. The respondent did not discuss this issue.
24. From my study of the grounds of appeal put forward in the draft memorandum of appeal annexed to the Motion, I observed that the appeal lies against the dismissal order made by the trial court, with the applicant

essentially arguing that the trial court did not exercise its discretion judicially and that it erred in finding that the suit was time barred. Taking these factors into account, I am satisfied that the applicant has established arguable points of law and fact in his draft memorandum of appeal.

25. Under the final principle on prejudice, the applicant states and contends that he stands to suffer a grave injustice if he is denied the opportunity to challenge the decision of the trial court on appeal, while contending that the respondent does not stand to be prejudiced in any manner whatsoever.

26. On its part, the respondent submits that it stands to be prejudiced but did not elaborate any further on this argument.

27. Upon my perusal of the record, I note that it is not in dispute that the applicant's suit was dismissed at the preliminary stage and without the parties being heard on merit. The interest of justice therefore enjoins me to grant the applicant an opportunity to challenge the subordinate court's dismissal order on appeal, being supported by the case of **Blue Nile E. A. Ltd v Lydia Gode Yusuf & another [2018] eKLR** where the court held thus:

*“The right to be heard is a Constitutional right provided for under Article 48 of the Constitution of Kenya, and in all circumstances it will be in the interest of all parties to hear a matter on merit. The only consideration the Court ought to take into account is to balance the rights of both parties. I am therefore inclined to grant the Applicants an opportunity to file their Appeal out of time so that the same can be heard on merit.”*

28. Having taken the above into account, I am satisfied the motion dated 30th January 2017 has merit. The same is allowed thus giving rise to issuance of the following orders:

**i. The applicant is granted leave to file an appeal out of time within 14 days from today.**

**ii. Costs of the application to abide the outcome of the appeal.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

.....for the Respondent