



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 643 OF 2019

ARBA PUBLICATIONS LIMITED.....1ST APPLICANT

MARTIN KIARIE KARANJA.....2ND APPLICANT

VERSUS

STARBRIGHT SERVICES LIMITED.....RESPONDENT

RULING

1. The application dated 9th October, 2019 principally seeks orders **that an order be granted to enlarge the time within which to file an Appeal from the ruling delivered on 19th January, 2019 and order issued on 22nd August, 2019 in Milimani Commercial Chief Magistrate's Court Case Number 1660 of 2016.**

2. Secondly, **that if enlargement of time is granted, the Applicants be granted leave to file an Appeal within 30 days of the order or within such other times as the court may deem fit to grant and the hearing of Milimani Commercial Chief Magistrate's Court Case Number 1660 of 2016 be stayed pending the hearing and determination of the Appeal.**

3. It is stated in the grounds and the two affidavits in support of the application that the ruling in an application to have the 2nd Applicant struck out from the Amended Plaintiff was delivered on 19th January, 2019 after being postponed several times. That the ruling was delivered without notice to the Applicants. Further delay is blamed on the missing court file. It is further stated that the Applicants discovered on 21st May, 2019 that the ruling had been delivered. Further delay is blamed on the extraction of an erroneous order which was corrected and re-issued on 22nd August, 2019. It is further averred that the proceedings of the lower court are yet to be supplied to the Applicants.

4. The Applicants are dissatisfied with the said ruling and are desirous of filing an Appeal. However, the time within which to appeal has ran out. It is contended that the intended Appeal is arguable but stands to be rendered nugatory if the orders sought are not granted.

5. The application was opposed as per the grounds of opposition dated 15th January, 2020 which states as follows:

1. The application filed herein is an abuse of the court process and should be dismissed with costs.

2. No appeal has been filed herein. No order of stay of proceedings pending an appeal can be issued in the absence of an appeal to this court

3. The ruling was delivered on 19th January, 2019 and the Applicants moved the court on 9th October 2019, over nine (9) months later, seeking leave to appeal out of time. The Applicants have not offered good and sufficient cause for not filing the appeal in time.

4. The delay in filing the application herein is inordinate and inexcusable.

5. The intended appeal is without merit. The Plaintiff has categorically stated that it conducted business with the first Applicant through the second Applicant. The second Defendant is a necessary party to this proceedings.

6. The 1st Applicant has not disputed the validity of the suit against it. By seeking to stay the proceedings, it is seeking to

delay the matter without justifiable cause.

7. The 2nd Applicant can be compensated by way of costs in the event that the intended appeal is ultimately filed and determined in his favour.

8. The suit sought to be stayed was filed in March, 2016 seeking a monetary relief. Any further delay in the proceedings will prejudice the Respondent who is owed money by the Applicants highly.

9. The application has not met the test laid in *Annah Mwiwaki Wairuru v Hannah Wanja Wairuru* [2017] eKLR.

10. The application should be dismissed with costs to the Respondent.

6. I have considered the application, the response to the same and the submissions made by the respective counsel for the parties.

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 30 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

8. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”

9. The Applicant has exhibited a copy of a notice issued by the Chief Magistrate on 14th February, 2018. The same reflects that the ruling in the suit herein would be on notice as the trial magistrate was engaged in an Election Petition. The copy of the ruling annexed to the affidavit in support herein shows that the same was delivered on 19th January, 2019. The extracted order herein reflects it was issued on 26th June, 2019 and re-issued on 22nd August, 2019. Also exhibited is a letter dated 27th August, 2019 by the Applicants’ counsel. The letter which is stamped as received in court on 28th August, 2019 complains about the non-availability of the court file. Another letter dated 31st July, 2019 written by the Applicants’ counsel and received in court on 4th September, 2019 requests for typed copies of the proceedings.

10. The above scenario demonstrates that the Applicants were unaware of the date of delivery of the ruling and thereafter obtaining the court file appears to have been an uphill task. The Applicants’ averments in support of the application have not been controverted by any other evidence. This court is therefore persuaded that the Applicants were not to blame for the delay in filing the Appeal and the instant application. The delay has been explained to the satisfaction of the court.

11. I have considered the Memorandum of Appeal exhibited herein. The same raises arguable issues. This court is inclined to have the intended Appeal proceed on merits.

12. The upshot is that the application is allowed with costs to be in the intended Appeal. The Record of Appeal to be compiled, filed and served within 60 days from the date hereof. In default the application herein to stand dismissed with costs.

Date, signed and delivered at Nairobi this 27th day of Feb., 2020

B. THURANIRA JADEN

JUDGE