



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO.1 OF 2019

DIAMOND TRUST BANK (K) LIMITED.....APPELLANT/RESPONDENT

VERSUS

GALAXY VENTURES (K) LIMITED.....RESPONDENT/APPLICANT

R U L I N G

(1) Before this Court is the Notice of Motion dated **1st April 2019** by which **GALAXY VENTURES (K) LIMITED**, (the Respondent/Applicant) seeks the following Orders:

“(1) That this honourable Court be pleased to grant leave to the Respondent/Applicant to file a cross Appeal out of time against the judgment of Honourable D.W Mburu, Principal Magistrate delivered on 14th December 2018 in Nairobi CMCC 3869 of 2017.

(2) THAT the Respondent/Applicant do file it’s Cross Appeal within such time as the Honourable Court should direct.

(3) The costs of this application be provided for.”

(2) The application which was premised upon **Order 42 Rule 32** and **Order 51 Rules** of the **Civil Procedure Rules Sections 1A, 1B, 3, 3A, 63(e), 79G** of the **Civil Procedure Act Cap 21, laws of Kenya** and all other enabling provisions of the law was supported by the Affidavit dated **8th April 2019** sworn by **ANDREW KHAKULA** the Director of the Respondent.

(3) The Application was opposed by the Appellant through the Replying affidavit dated **27th May 2019** sworn by **AMAAN KASSAM**, the Debt Recovery Officer with the Appellant. The application was canvassed by way of written submissions. The Applicant filed their written submissions on **28th June 2019** whilst the Respondent filed its submissions on **26th July 2019**.

BACKGROUND

(4) On **14th December 2018**, the Hon Principal Magistrate delivered a Ruling in **Nairobi CMCC 3869 of 2017**. The Respondent/Applicant herein being dissatisfied by that decision lodged an appeal to the **High Court being High Court Civil appeal No.1 of 2019**. The Applicant herein was also aggrieved by a portion of the judgment and resolved to file a cross-appeal. However the applicants did not file their cross-appeal within the stipulated time hence the present application.

ANALYSIS AND DETERMINATION

(5) In support of their application, the Applicants have cited **Order 42 Rule 32 of the Civil Procedure Rules 2010**. The said order provides:-

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”

The Applicant relies on the above provision as authority for their contention that they are entitled to file a cross-appeal.

(6) On the other hand the Respondents maintain that there exists no provision in the Civil Procedure Act or Rules for filing of cross-appeals to the High court. According to the Respondent the law only allows each party to file a separate appeal against a judgment and then seek consolidation of the appeals. The Respondents in support of their contention cite the case of **GEORGE HANDA & Another –Vs JUDITH KATUMBI KATHENGE & Another [2018]eKLR** in which Justice George Odunga held as follows:-

“Secondly, this court is not aware of a procedure for filing of a cross-appeal in this Court as opposed to the Court of Appeal. This court is however aware of the provisions of Order 42 Rule 32 of the Civil Procedure Rules which makes a reference to a cross-appeal but in a negative manner as follows:-

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”

The known procedure, in the absence of an express provision dealing with cross-appeals in the High Court, is however for each party to file separate appeals and apply for their consolidation.”

This decision being from a court of concurrent jurisdiction is however not binding on this court.

(7) I note that in **KENYA POWER & LIGHTING COMPANY –VS- PETER OWUOR OMOLLO [2016] eKLR**, Hon Justice David **Majanja** allowed a cross-appeal filed in the High Court against a decision of a subordinate Court and likewise in the case of **KENYA BUS SERVICES MANAGEMENT COMPANY LIMITED –VS- PATRICK IRUNGU GICHURE (2018) eKLR** Hon Justice **Sergon** entertained a cross-appeal filed in the High Court and only dismissed the same for want of leave. I am satisfied that in light of **Order 42 Rule 32** which makes reference to a cross – appeal, the Applicant has legal authority to file a cross-appeal in the High Court against the decision of the learned Principal Magistrate.

(8) **Order 79G of the Civil Procedure Rules 2010** provide 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.” [own emphasis]

(9) The applicant herein did not file their cross-appeal within the 30 day period provided for in law. They have now come to court seeking an extension of time within which to file their cross-appeal. Grant of leave to file appeal out of time is discretionary.

(10) In determining whether the Applicant has satisfied the conditions for leave to file an appeal out of time, I am guided by the principles laid down in **THUITA MWANGI VS KENYA AIRWAYS LTD, (2003) eKLR** thus:

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

(11) Similarly the Supreme Court in **NICHOLAS KIPTOO ARAP KORIR SALAT VS IEBE & 7 OTHERS, (2014) eKLR**:

“(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, 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 respondent 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 a consideration for extending time.”

(12) The judgment of the lower court was issued on **14th December 2018**. The Applicant needed to peruse the appeal filed by the Respondent before filing a cross-appeal. The present application was filed on **9th April 2019**. In the meantime an application for stay of execution filed by the Respondent was heard and determined. The delay of about 3 months (excluding the period for the Christmas restricted) is not in my view excessive.

(13) The applicant gives as a reason for its failure to file the cross-appeal within time, the facts that they were negotiating with the Respondent in an attempt to reach a consent on leave to file cross-appeal out of time. The parties failed to reach a consent on this issue thus it became necessary to file this application. Although the fact of negotiation was not a bar to filing the application, I do find that the delay was not intentional. Further I find that the Respondents stand to suffer no prejudice if the current application is allowed. Accordingly I hereby make the following orders:-

(a) Leave to file a cross-appeal out of time be and is hereby granted to the Applicants.

(b) The said cross-appeal to be filed and served within 30 days of today's date.

(c) Failure to comply with (b) above means the said leave will automatically lapse.

(d) Costs of this application to be met by the Applicant.

Dated in Nairobi this 24th day of February 2020.

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Justice Maureen A. Odero