



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 467 OF 2019

CREEKVIEW LIMITED.....APPELLANT

VERSUS

SCRATCH LOGISTICS LIMITED T/A SCRATCH BAR..... RESPONDENT

RULING (2)

1. In its Notice of Motion application dated 1st November 2019 and filed on 4th November 2019, the Appellant sought an order for extension of time to file an appeal out of time and that the Memorandum of Appeal that was dated 14th August 2019 and filed on the same date be deemed to have been properly filed within time. It's said application was supported by the Affidavit of its advocate, Michael Muchemi Ndegwa. The same was also sworn on 1st November 2019.

2. It contended that it filed its Memorandum of Appeal dated 14th August 2019 a day after the expiry of the thirty (30) days as its advocate was under the impression that Sundays and Public holidays were excluded in the computation of time as provided in Section 57 of the Interpretation and General Provisions Act Cap 2 (Laws of Kenya). It averred that the failure to file the Appeal on time was due to an honest mistake on the part of its advocate who had owned up to his mistake and which mistake ought not to be visited on it.

3. It also pointed out that a day's delay could not be said to have been inordinate and contended that it was eager to have its day in court. It pointed out that it was willing to bear the costs of the application unless the court ordered otherwise and thus urged the court to allow its application as prayed.

4. In support of its application, it relied on the cases of **Mwangi vs Kenya Airways Limited [2003] KLR** and **AIG Insurance Company Limited vs Michael Okoth [2018] eKLR** where in the latter case, the court therein held that a delay of thirty (30) days was excusable.

5. On its part, the Respondent submitted that the present application was an afterthought and merely intended to delay and frustrate it from the fruits of its judgment.

6. Right at the outset, it is important to point out that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

7. While Section 75 G of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, it does provide that an appeal can be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in **Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR**.

8. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”

9. In the case of **Mwangi vs Kenya Airways Limited** (Supra), it was held that the factors to be considered before extension to file suit out of time was granted included:-

- a. the period of delay;
- b. the reason for the delay;
- c. the arguability of the appeal;
- d. the degree of prejudice which could be suffered by the respondent if the extension was granted;
- e. the importance of compliance with time to the particular litigation or issue; and
- f. the effect if any on the administration of justice or public interest if any is involved.

10. There was evidently lack of diligence on the part of the Appellant's advocate. They ought to have exercised due care and diligence. Failure to do so greatly prejudiced the Appellant herein.

11. However, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

12. This court was satisfied that the reason for not filing the appeal within the stipulated time was excusable as mistakes by advocates do occur from time to time and parties should not be punished for the mistakes of their advocates. Further, a delay of a day from the date the Appellant was required to file its Memorandum of Appeal could not in any way have been said to have been inordinate or at all.

13. Notably, the Appellant had raised several arguable grounds of appeal in its Memorandum of Appeal that was filed on 14th August 2019 and in this regard, this court fully associated itself with the holding of Joel Ngugi J in the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** where, in allowing an application for extension of time that had been filed thirty one (31) days after the lapse of the time for lodging an appeal, he rendered himself as follows:-

“...all the Applicants have to show at this stage is arguability- not high probability of success...”

14. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that were relied upon by the parties herein, this court found and held that the duty of the court to do substantive justice demanded that the Appellant be granted leave to file an appeal out of time so that its Appeal could be heard and determined on merit. Indeed, there was more prejudice in it being denied its right to have its dispute determined as compared to the prejudice the Respondent would suffer for the delay in the conclusion of the Appeal herein.

DISPOSITION

15. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 1st November 2019 and filed on 4th November 2019 was merited and the same is hereby allowed in terms of Prayer No (1) therein in the following terms:-

1. THAT the Memorandum of Appeal dated and filed on 14th August 2019 be and is hereby expunged from the court record for having been filed without leave of the court.

2. THAT the Appellant be and is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

3. The Appellant be and is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling.

4. Either party is at liberty to apply.

5. As the Appellant had expressly indicated that it should bear the costs of the application herein, it is hereby directed that it shall meet the Respondent's costs of this application. This court was reluctant to make any other order in this regard as doing so, there was potential of the Respondent feeling as if it was biased against it which should never be the case because at all times, courts must remain neutral and impartial when dealing with matters before them.

16. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of July, 2020

J. KAMAU

JUDGE