



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 241 OF 2018

NEHEMIAH STONEBIC MISIANI

T/A STONEBIC HIGH SCHOOL.....APPELLANT

VERSUS

RADIO AFRICA GROUP LIMITED.....1ST RESPONDENT

NJENGA GICHEHA.....2ND RESPONDENT

STAR PUBLICATIONS LIMITED.....3RD RESPONDENT

RULING

1. In his Notice of Motion application dated 29th November 2019 and filed on 2nd December 2019, the Appellant sought leave to file and issue a Notice of Appeal against the judgment that was delivered by this court on 14th November 2019. He stated that he was unable to make payment for the Notice of Appeal on 28th November 2019 and thus did not file the said Notice on that date, which was the last date for filing the said Notice of Appeal.
2. In response to the Respondents' Grounds of Opposition, he swore a Replying Affidavit on 5th February 2020. He was emphatic that the Respondent would not suffer any prejudice if his application was allowed and thus urged this court to allow the same as prayed.
3. In opposition to the said application, on 27th January 2020, the Respondents filed Grounds of Opposition and a Notice of Preliminary Objection both dated 17th January 2020. The ground of the preliminary objection was that this court lacked jurisdiction to hear the said application by virtue of Rule 4 of the Court of Appeal Rules, 2010 and consequently, the entire proceedings were null and void *ab initio*.
4. In the said Grounds of Opposition, the Respondents had stated that there had been unjustifiable delay in filing the Appeal and that inability to make payment by close of business on 28th November 2019 was not sufficient reason to extend time within the meaning of Rule 4 of the Court of Appeal Rules. They termed the present application an abuse of the court process and urged this court to dismiss the same.
5. None of the parties filed any Written Submissions. They both relied on the pleadings they had filed, in their entirety. This court deemed it prudent to address the Respondents' Preliminary Objection first.
6. Whereas the Respondents had argued that this court had no jurisdiction to entertain the present application, this was not the correct position as its jurisdiction to grant the order the Appellant had sought was derived from Section 7 of the Appellate Jurisdiction Act Cap 9 (Laws of Kenya) that provides as follows:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

7. The Respondents' Preliminary Objection was therefore not merited. Turning to the Grounds of Opposition, the court noted that although the Appellant acted on the last day of his right to appeal, it took judicial notice that it was not uncommon for parties to experience difficulties in effecting payments on time, whether such payments were being made physically or electronically. Such is the reality of life.

8. Even if one was to find the reason not to have been a good one, this court took the view that a delay of one (1) working day period between the date the Appellant's right to appeal was lapsing and the date he filed his present application could not be deemed to have been inordinate by any standard. Indeed, he filed his application without any delay.

9. This court took cognisance of the fact 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 as can be seen in Paragraph 6 hereinabove.

10. Weighing the Appellant's right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if he was denied an opportunity to ventilate his Appeal on merit.

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 29th November 2019 and filed on 2nd December 2019 was merited and the same is hereby allowed in terms of Prayer No (a) therein. The effects of this is that the Respondents' Preliminary Objection dated 17th January 2020 was not merited and the same is hereby dismissed. Costs of the application and the Preliminary Objection will be in the cause.

12. In view of the fact that court business has been scaled down due to COVID-19 pandemic, the Appellant is hereby directed to file and serve his Notice of Appeal within fourteen (14) days from the date of this Ruling.

13. Either party is at liberty to apply.

14. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of September 2020

J. KAMAU

JUDGE