REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLN. NO. 59 OF 2020

HEZEKIAH NGUGI.....APPELLANT

VERSUS

KENYA POWER & LIGHTING CO LIMITED.....RESPONDENT

RULING

1. In the Notice of Motion dated 4th February 2020, the applicant, *Hezekiah Ngugi* seeks leave to file his intended appeal against a ruling delivered on 31st October 2019 by *Hon. Ms E Wanjala (SRM)* in SRMCC No. 10525 of 2018 out of time.

2. The application is anchored on grounds stated on its face and depositions made in the supporting affidavit sworn on 4th February 2020 by the applicant's learned counsel, *Mr. Joseph Njoroge Mbugua*.

In the supporting affidavit, the deponent narrated the background to the application. He deponed that the applicant filed suit in the lower court against the respondent, *Kenya Power and Lighting Company* Ltd seeking a liquidated sum of KShs.671,273.09. The respondent filed a defence denying the plaintiff's claim and subsequently filed an application seeking to have the suit struck out on grounds that the plaint did not disclose a reasonable cause of action. At the time the application was filed, the plaintiff (applicant) had already filed an application seeking summary judgment.

3. The trial court decided to hear the two applications together by way of written submissions. On 31st October 2019 when the ruling in the two applications was scheduled to be delivered, the deponent claims that he requested another advocate to hold his brief and take the ruling as he was engaged elsewhere.

4. Mr. Mbugua further deponed that later that day, the counsel who held his brief contacted him and reported that the respondent's application seeking to strike out the suit had been dismissed. That based on this information, he believed that summary judgment had been entered against the respondent as sought in his application dated 26th February 2019 and he then applied for a decree and a certificate of costs. On 11th December 2019, he received a decree from the trial court showing that no judgment had been entered in the suit. He subsequently applied for a typed copy of the ruling which he obtained on 27th January 2020.

5. Counsel further averred that the applicant is dissatisfied with the decision of the trial court and wishes to lodge an appeal but cannot do so unless the court allows the application since the time allowed by the law for filing appeals to the High Court has expired; that the applicant has an arguable appeal and it is in the interest of justice that he be granted leave to appeal as doing so will not occasion the respondent any prejudice.

6. The application is contested by the respondent through grounds of opposition dated 9th March 2020 and a replying affidavit sworn on 25th June 2010 by *Mr. David Nyangena*, learned counsel for the respondent.

In the grounds of opposition and the replying affidavit, the respondent principally attacks the application on grounds that it was filed in bad faith with the aim of frustrating the respondent.

7. The respondent further contended that contrary to the impression created by *Mr. Mbugua*, the impugned ruling was forwarded to him on 4th November 2019 as evidenced by the letter marked as annexture *J O1*; that the applicant was from that date aware of the content of the ruling and should have taken appropriate action. The respondent urged me to find that there was inordinate and unexplained delay in filing the application and that equity aids the vigilant not the indolent; that the respondent will be highly prejudiced if the application was allowed since the dispute has been in court since 2004 and all this time the respondent has been incurring costs. I think it is important to point out at this juncture that this submission by the respondent is not correct since it is clear from the material placed before me that the plaint instituting the suit is dated 5th June 2018 and was filed on 29th November 2018.

8. By consent of the parties, the application was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered together with the authorities cited.

9. The law governing the filing of appeals to the High Court is governed by *Section 79 G* of the *Civil Procedure Act* which provides 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 satisfies the court that he had good and sufficient cause for not filing the appeal in time."***

10. It is clear from the above provision that this court has wide and unfettered discretion in deciding whether or not to enlarge time for filing of an intended appeal or to admit an appeal filed out of time provided that the applicant establishes good and sufficient cause for failure to file the appeal on time.

11. Over time, courts have developed jurisprudence regarding the principles that should guide them in the exercise of their aforesaid discretion to ensure that it is exercised judiciously as opposed to whimsically or capriciously. The Court of Appeal in ***Thuita Mwangi V Kenya Airways Limited, [2003] eKLR*** enumerated at least four factors which a court should bear in mind when considering an application for extension of time to file an appeal. These are:

i. The length of the delay;

ii. The reason for the delay;

iii. The chances of the appeal succeeding if the application is granted; and

iv. The degree of prejudice that may be occasioned to the respondent if the application is allowed.

12. The Supreme Court in ***Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, [2015] eKLR*** emphasized that extension of time is not a right of any party but is an equitable remedy which should only be availed to a deserving party at the discretion of the court. The court also specified that the period of delay and whether it was sufficiently explained should be considered as well as the prejudice if any which might be occasioned to the respondent if the application was allowed. Each case however must be determined on its own merits.

13. Starting with the length of delay, it is not disputed that the ruling subject matter of the intended appeal was delivered on 31st October 2019. The applicant therefore had up to around 2nd December 2019 to file his intended appeal considering that the date on which the ruling was delivered and the last day of the 30-day period ought to be excluded in the computation of time - See: *Section 57* of the *Interpretations and General Provisions Act*.

14. Taking into account the provisions of *Order 50 Rule 4* of the *Civil Procedure Rules* which provides for exclusion of the days falling within the Christmas Vacation in the computation of time, the period of delay in this case amounted to a total of 41 days.

15. The respondent has submitted that the said delay was inordinate and inexcusable as it was not sufficiently explained.

In my view, there is no standard measure of what constitutes inordinate or inexcusable delay. This varies from case to case depending on the facts and circumstances of each case. It is however my opinion that even where there is inordinate or prolonged delay, if the applicant demonstrates to the satisfaction of the court that there was good and sufficient cause for the delay, the court can still exercise its discretion and enlarge time to file an intended appeal if doing so will meet the ends of justice and the respondent will not suffer prejudice which cannot be compensated by way of costs.

16. In this case, the period of delay is about $1^1/_2$ months. In my opinion, the delay is not inordinate and is excusable given the explanation given by the applicant. I am satisfied that the reasons explaining the delay are plausible given that the respondent has admitted that indeed, the applicant's counsel was not in court when the ruling was delivered and another counsel held his brief.

17. Without delving into the merits of the intended appeal, I note that one of the grounds advanced in the draft memorandum of appeal is that the trial court totally failed to consider the applicant's application for summary judgment which was to be heard together with the respondent's application for striking out the suit. Looking at this ground and what the applicant generally intends to raise in the intended appeal, I am unable to say that the intended appeal is not arguable or that it is frivolous.

18. Whilst I concur with the respondent's submission that allowing the application will mean further delay in the resolution of its dispute with the applicant, this argument must be weighed against the applicant's right to exhaust the appeal process considering that he is aggrieved by the trial court's decision. The right of appeal is both a constitutional and statutory right and to deny a party an opportunity to exercise that right may amount to a violation of his right of access to justice guaranteed under *Article 48* of the *Constitution* and the right to have his dispute determined conclusively by a competent court or tribunal which is enshrined in *Article 50 (1)* of the *Constitution*.

19. Having weighed the interests of both parties, I find that if the application was dismissed, the applicant will suffer grave prejudice as he will be removed from the seat of justice before his intended appeal is heard on merit. If on the other hand the application is allowed, the respondent is not likely to suffer any prejudice other than delay in the resolution of the dispute which can be ameliorated by an award of

costs.

20. Given the foregoing, I am satisfied that the ends of justice will be better served if I exercised my discretion in favour of the applicant by granting him the orders sought. I therefore find merit in the Notice of Motion dated 4th February 2020 and it is hereby allowed on condition that the applicant will file his intended appeal within the next 14 days. The applicant will also pay the respondent thrown away costs in the sum of KShs.20,000.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of December 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mbugua for the appellant

Mr. Nyangena for the respondent

Ms Mwinzi: Court Assistant