



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 651 OF 2018

HYDRO WATER (K) LIMITED.....APPLICANT

VERSUS

MATTHEW NYAEGA OSORO.....RESPONDENT

RULING

1. In the Notice of Motion dated 6th December 2018, the appellant, *Hydro Water (Kenya) Limited* seeks two substantive prayers in which it implores this court to order stay of execution of the judgment delivered on 3rd December in Nairobi Milimani Commercial Court Civil Case No. 7895 of 2014 pending the hearing and determination of the applicant's intended appeal and that time for filing the intended appeal be enlarged for a period of 30 days.

2. The application is premised on the grounds stated on its face which are largely reproduced in the depositions made in the supporting affidavit sworn on 6th December 2018 by *Deepti Rashiklal Vara*, the applicant's Finance and Administration Manager.

3. It is the applicant's contention that it is aggrieved by the judgment delivered against it by the trial court and that if orders of stay of execution of that judgment are not granted, the respondent may execute at any time and this will render the intended appeal nugatory; that the applicant was unable to file its appeal within time since the judgment was delivered on 3rd December 2015 as opposed to the scheduled date of 21st December 2015 without notice to the parties; that the applicant's numerous efforts to peruse the court file to ascertain whether or not judgment had been delivered were unsuccessful as the court file was missing from the court registry until 15th November 2018 when it was traced; that the delay of about three years in filing the intended appeal was thus not deliberate but was occasioned by circumstances beyond the applicant's control.

4. The application is opposed through the replying affidavit sworn on 8th January 2018 by learned counsel for the respondent *Mr. Michael B. Mwangi*. Counsel denied the applicant's allegations that the court file had been missing from the court registry for around three years claiming that the file was available in the court registry in January 2016 when his law firm perused it and confirmed that indeed judgment was delivered on 3rd December 2015 and not on 21st December 2015 as earlier scheduled; that the applicant has not advanced good reasons to explain the delay of three years in filing the intended appeal and has not also demonstrated that the intended appeal is arguable; that the application amounts to an abuse of the court process and should be dismissed.

5. The application was argued orally before me on 17th January 2019. Learned counsel *Mr. Muriithi* represented the applicant while learned counsel *Mr. Mwangi* appeared for the respondent. In their submissions, learned counsel reiterated and buttressed the positions taken by their respective clients in supporting and opposing the motion.

6. I have carefully considered the prayers in the application, the affidavits filed by the parties and the submissions made on their behalf as well as the authorities cited by *Mr. Mwangi*.

I find that the applicant's prayer for stay of execution pending hearing of its intended appeal is dependent upon this court's determination of its prayer for enlargement of time within which to file its intended appeal and consequently, logic dictates that I should address the latter prayer first.

7. The law governing the filing of appeals to the High Court is governed by *Section 79 G* of the *Civil Procedure Act* (the Act) which states as follows:

“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.”

8. The above provision makes it clear that appeals from decisions of the subordinate court to the High Court must be filed within 30 days of the delivery of the order or decree appealed against but the High Court has wide and unfettered discretion to admit an appeal filed outside the prescribed time if the applicant demonstrates that he had good and sufficient cause for not filing the appeal within the time limited by the law.

9. The Supreme Court’s decision in *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, [2014] eKLR* laid down the principles which should guide the court in the exercise of its discretion in deciding whether or not to enlarge time for filing of appeals. The court enumerated the principles as follows:

a. 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;

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

e. Whether there will be any prejudice suffered by the respondents if the extension is granted;

f. Whether the application has been brought without undue delay; and

g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

10. The Court of Appeal in one of the cases cited by the respondent namely *Thuita Mwangi V Kenya Airways Limited, [2003] eKLR* also addressed itself to the factors that should be considered in determining applications seeking extension of time to file an appeal. The court identified four factors as follows:

(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 to the respondent if the application is granted.

A reading of the above authority reveals that the court was careful to give a rider to the effect that the above list was not exhaustive and was not meant to be exhaustive and that a judge considering such an application was at liberty to consider any other factor in the exercise of his discretion provided that it was relevant to the issues being considered. Although the court was addressing the exercise of a single judge’s discretion under *Rules 4 and 42 of the Court of Appeal Rules* to enlarge the time for filing of appeals to the Court of Appeal, it is my finding that the aforesaid factors just like the principles enunciated by the Supreme Court in the *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, (supra)* also apply to the exercise of discretion by the High Court in deciding whether or not to extend time for filing of appeals to the High Court.

11. Guided by the holdings in the above authorities, I find that in this case, it is not disputed that there has been a delay of about three years in seeking to have an appeal against the trial court’s decision filed outside the prescribed time.

The applicant has totally blamed the trial court for this long delay by claiming that it was unaware of the existence of the judgment till 15th November 2018 because the trial court delivered the judgment on an unscheduled date without notice to the parties and that the court file was not availed for its perusal despite numerous requests as the same was missing from the court registry. The applicant did not however provide any evidence to substantiate this claim. The applicant did not annex any evidence in the form of letters to the executive officer of the court seeking to have the file availed for its perusal or complaining that the file was missing from the court registry.

In the replying affidavit sworn by counsel on the respondent’s behalf, it is deponed that the said file was available in the court registry from as early as January 2016. This claim has not been controverted by any evidence to the contrary as none was offered by the applicant.

12. The applicant also sought to blame the delay on the respondent by claiming that the respondent failed to execute the judgment entered in its favour for three years and that had the respondent started the execution process earlier, the applicant would have been made aware of the existence of the judgment in time to lodge its intended appeal.

13. In my view, the respondent’s delay in executing the judgment is neither here nor there since the respondent did not in law have immediate timelines within which to commence the execution process and was even entitled to forfeit its right to execute the judgment. The

respondent did not have any obligation to notify the applicant about delivery of the judgment considering that the judgment was not a default judgment but one delivered after full hearing of the suit.

14. Even if it is true that the judgment was delivered on an unscheduled date as this is not disputed by the respondent, it was the responsibility of each of the parties to follow up with the trial court to establish the status of the matter just like the respondent did in January 2016. The applicant cannot blame the respondent for its apparent lack of diligence.

15. Since the applicant failed to avail any evidence to demonstrate that it had made any efforts to establish within a reasonable time whether or not judgment in the suit had been delivered and if so on what date and there is no evidence to demonstrate that the court file in the lower court was missing from December 2015 to 15th December 2018 when it allegedly resurfaced, I find that the applicant has failed to offer a credible and plausible explanation to satisfy the court that it had good and sufficient cause for not filing the intended appeal within the time prescribed by the law.

16. It is thus my finding that in the circumstances of this case, the delay of almost three years is not only prolonged but it is also inordinate and inexcusable. Consequently, I am not persuaded that the applicant is entitled to the exercise of the court's discretion in its favour by granting it leave to file its intended appeal out of time. I thus decline to grant the applicant's prayer for enlargement of time to lodge an appeal out of time.

17. Having found no basis upon which to grant the applicant's prayer for enlargement of time, to file an appeal, the prayer for stay of execution pending disposal of the intended appeal falls by the way side since the prayer was pegged on the success of the prayer for extension of time which has been unsuccessful.

18. For all the foregoing reasons, it is my finding that the Notice of Motion dated 6th December 2018 is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of March, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wepo holding brief for Mr. Gathu for the applicant

Mr. Ndegwa holding brief for Mr. Ngugi for the respondent

Mr. Salach: Court Assistant