



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 201 OF 2010

GENERAL CARGO (TRANSPORT) LIMITED.....PLAINTIFF

VERSUS

TEXAS ALARMS (K) LIMITED.....DEFENDANT

R U L I N G

1. The Defendant, as judgment debtor in the suit, has sought from court an order for extension of time within which to file and serve a Notice of Appeal against this court's decision and judgment dated and delivered on 2/12/2016. The Application is dated 23/10/2018, file the same day and supported by the Affidavit of one RANDOLPH M. TINDIKA Advocate.
2. The application attributes failure to file the Notice of Appeal to have been occasioned by the fact that an initial Notice of Appeal was duly and timeously lodged on the 16/12/2016 but was not served in time hence the same was, at the request of the respondent which was conceded by the respondent struck out on the 17/10/2019 by the Court of Appeal by a ruling of the same date in **Court of Appeal Case Application No. 36 of 2018**.
3. Despite that setback, the Defendant/Applicant maintains its desire to appeal and now needs time extended to start the journey afresh.
4. The application was opposed by the Replying Affidavit of ABDULRATAK OMAR AL AMIN filed on 14/3/2019 whose gist is that there is unexplained delay of some 46 days and that the application to strike out the Notice of Appeal was necessitated after request to the Applicant to regularize the notice of appeal fell on deaf ears and that the current application is an afterthought.
5. The application was argued by parties filing written submissions which were then highlighted orally in court. The highlights of the Applicant's submissions is that this court is vested with jurisdiction under Order 50 Rule 6 read with Section 7 of the Appellate Jurisdictions Act and that the cause of delay was the occasioned by the inadvertence to serve in time which was a mistake or blunder by counsel for which the litigant should not be punished. For such submissions the Applicant cited to court the decisions in **Edward Njane Nganga vs Damaris Wanjiku Kamau [2016] eKLR**, **Belinda Murai & Others vs Amos Wainaina [1979] eKLR** as well as **Phillip Chemuolo vs Augustine Kubenye [1986] eKLR**.
6. For the Respondent, submissions were offered to the effect that the application was brought with a delay of almost two years and represents an inordinate and inexcusable.
7. On the extent of discretion of the court to grant stay, it was submitted that the courts discretion is unfettered but there must be explanation for delay which must not be inordinate to portray the applicant as dilatory or just intent on obstruction. The Respondent cited to court the decision in **LEO SILA MUTISO vs ROSE HEIKEN WANGARI** cited with approval in **Annah Mwihaki vs Hannah Wanja [2017] eKLR** on the factors to be considered by the court. **Nicholas Kirptoo Arap Korir Salat vs IEBC and others [2014] eKLR** was cited for the principle of law that extension of time is not a right but an equitable remedy only available to deserving parties.
8. The Respondent then cited to court the decision in **Njuguna Cithuri vs AG [2016] eKLR** for the proposition of law that the discretion will not be exercised in favour of a party who has slept on this rights over a great length of time and that a party must show consistency, good faith and diligence to merit an order for extension.
9. I have had the benefit of reading both the written and oral submissions by the parties and considered the court decisions cited by both sides.
10. The principles that guide the court in an application of this nature include the indubitable right of access to justice when weighed against the right to dispense justice in a just and expedient manner which then discourages parties from delaying the process of dispute adjudication by the courts.

11. The consideration are that while every citizen has a right to access the justice system, even by way of an appeal, one has to demonstrate that it has not acted in a manner that portrays him as bent on delay or overreaching. To sleep on ones rights over a long period of time cannot be divorced from a strategy at delay and overreach and therefore deemed inordinate and thus goes against the constitutional dictate that justice shall not be delayed.

12. In this matter the Notice of Appeal was struck out on the 17/10/2018 and on the sixth day next, 23/10/2018, the current application was filed. Those dates are important for me to answer the question whether the delay is inordinate or reasonable.

13. I have no hesitation in finding that the period of six days can never be termed inordinate delay I have not reckoned with the period from the date the Notice of Appeal was due for service and the date the Notice of Appeal was struck out for I consider that the same was dealt with and concluded before the Court of Appeal.

14. On reasons for delay, this court is convicted and proceeds from the position of law that even though a mistake of counsel is at time capable of being visited and left to rest on the shoulders of litigant, where a Kenyan is faced with prospects of being denied the right to be heard, a blunder by counsel should be seen to be by the counsel and not be made the only reason to deny the litigant his day in court.

15. For those reasons, I do find merit in the application by the defendant/judgment-debtor, I do allow it on terms that the Notice of Appeal, if not yet filed, be filed and served within 7 days from today.

16. The costs of this application are awarded to the plaintiff/deedee-holder in terms of Order 50 Rule 6.

Dated and delivered at Mombasa this 27th day of September 2019.

P.J.O. OTIENO

JUDGE