



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 82 OF 2018**

**ROTHMANS HOLDINGS LIMITED..... APPLICANT**

**VERSUS**

**MFI OFFICE SOLUTIONS LIMITED.....RESPONDENT**

**RULING**

1. The application dated 8th March, 2018 is anchored on the provisions of Article 159(2)(d), Sections 79G, 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Orders 50 rule 5, 51 rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant seeks the following orders:-

(i) Spent;

(ii) That this Honourable Court do order that the time limited by the rules of the court for the filing and admittance of an appeal be extended;

(iii) That upon prayer (2) above being granted, the applicant herein be given leave to file and serve its appeal upon the respondent's Advocate on record; and

(iv) That the costs of this application be provided for.

2. The application is supported by the affidavit of Naushad Jiwa sworn on 8th March, 2018. The respondent filed a replying affidavit on 4<sup>th</sup> May, 2018, sworn by Animesh Solanki, an Officer of the respondent, to oppose the application. The applicant's Counsel filed his written submissions on 9th July, 2018. The respondent's Counsel filed his on 26<sup>th</sup> July, 2018. The court undertook to peruse the said submissions and write a ruling thereof.

3. The submissions by the applicant indicate that the provisions of Sections 79G and 95 of the Civil Procedure Act and Order 50 rule 5 of the Civil Procedure Rules empower the court to extend the time for doing certain acts. The case of Edward Njane Nganga and Another vs Damaris Wanjiku Kamau & Another [2016] eKLR was cited. In the said case, the Judge considered the principles that guide a court in an application for leave to appeal out of time, as was decided in the case of Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Company Limited [2015] eKLR, where the court held that it is upon an applicant under rule 4 of the Court of Appeal rules to explain to the satisfaction of the court that he is entitled to discretion being exercised in his favour.

4. Counsel for the applicant also relied on several other cases such as Mutiso vs Mwangi, Civil Application No. Nairobi 255 of 1997 (UR), Mwangi vs Kenya Airways Ltd [2003] KLR 486 and Fakir Mohamed vs Joseph Mugambi and 2 Others, Civil Application No. Nairobi 332 of 2004 (UR). In the last case cited, the Court of Appeal held that there is no limit to the number of factors the court can consider in an application of this nature, so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are relevant but not exhaustive factors.

5. In expounding on the case of Mwangi vs Kenya Airways Ltd (supra), it was submitted for the applicant that the list of factors a court can take into account in deciding whether or not to grant extension of time is not exhaustive as rule 4 of the Court of Appeal Rules gives a single Judge unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed, so long as the factor is relevant to the issue being considered.

6. It was submitted that it is ordinarily up to the applicant to place sufficient material before the court and explain why there was delay in

filing the memorandum and record of appeal. The court would then have to balance competing interests of the applicant against those of the respondent, as was stated in the case of *M/s Port Reitz Maternity vs James Karanga Kabia*, Civil Appeal No. 63 of 1997. The case of *Haywood vs Cope* [1858] 25 BEAV 140 was also cited to show the extent to which a court can exercise its discretion.

7. In reference to the supporting affidavit, it was submitted that the failure to file the memorandum of appeal was occasioned by the Advocates on record after the applicant's file got misplaced at the Advocates' offices when they were moving to a new office. In the applicant's Counsel's view, although there was considerable delay on the part of the applicant in filing the present application, the said delay was excusable for the said reasons. It was also argued that the respondent had not shown that it would suffer prejudice if the orders sought were granted.

8. The applicant's Counsel urged this court not to visit their mistake on the applicant. He relied on the case of *APA Insurance Limited vs Michael Kinyanjui Muturi* [2016] eKLR where the court relied on the Court of Appeal case of *Philip Keipto Chemwolo & Another vs Augustine Kibende* [1986] KLR 495 where the court held that it does not follow that because a mistake has been made, a party should suffer the penalty of having his case determined on its merits. The case of *Banco Arabe Espanol vs Bank of Uganda* [1999] 2 EA 22 was referred to in emphasizing the same point.

9. The provisions of Article 50 of the Constitution were relied on to stress on the importance of the applicant being given a right to a fair hearing. This court was urged not to be encumbered by procedural technicalities in making a decision herein. Counsel prayed for the application to be allowed.

10. The respondent's counsel responded to the applicant's submissions by stating that when an appeal is not lodged on time and where the delay is inordinate and it has not been explained or justified, then leave to appeal out of time ought not to be granted by the court even if the appeal is meritorious.

11. It was submitted that there was inordinate delay in filing the application, which was filed 498 days after delivery of the Judgment by the trial court. It was stated that the delay was not satisfactorily explained.

12. The respondent's Counsel relied on the decision in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others* [2014] eKLR on the underlying principles that a court should follow when exercising its discretion on whether or not to extend time for leave to appeal out of time.

13. It was further submitted that at this stage, the applicant cannot rely on the right of appeal was held by the Supreme Court of Kenya, extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court.

14. Counsel emphasized the fact that it is upon the applicant in such an application to provide the court with a full, honest and an acceptable explanation of the reasons for the delay. It was contended that such an applicant cannot reasonably expect the discretion to be exercised in his favour unless he provides an explanation for the default. The case of *United Arab Emirates vs Abdelghafar and Others* [1995] IRLR 243 which was cited with approval by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salt vs IEBC and 7 Others* (supra), was referred to by the respondent's Counsel.

15. The case of *United Arab Emirates vs Abdelghafar and Others* (supra) states that the grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The court further went on to state that the exercise of discretion is a matter of weighing and balancing all the relevant factors which appear from the matter before the Appeal Tribunal. The result of an exercise of discretion is not dictated by any set factor. Discretions are not packaged programmed responses.

16. In making reference to the applicant's affidavit, the respondent's Counsel challenged it for lack of material to explain the delay. It was submitted that the affidavit does not disclose the source of information and belief as to the deposition of the applicant's Advocates having moved offices and the misplacement of the file which contained the applicant's documents with regard to the case in the court below.

17. It was submitted that the reasons given were hearsay and of no probative value as the person who had personal knowledge of the disappearance of the file did not swear an affidavit to corroborate the averments in the applicant's affidavit. It was also submitted that there was no material placed before the court to assess whether or not the appeal has chances of succeeding. It was contended that there was no rebuttal of the depositions contained in the respondent's affidavit by the applicant.

18. The respondent's Counsel relied on the case of *Gerphas Alphonse Odhiambo vs Felix Adiego* [2006] eKLR to show that an affidavit such as the one sworn by the applicant herein should be either struck out or be given little or no weight at all because under the provisions of Order 18 rule 3(1) of the Civil Procedure Rules, facts should be proved by a person or persons who have personal knowledge of such facts.

19. Counsel also relied on the case of *Kenya Horticultural Exporters [1997] Ltd vs Pape* (trading as Osirua estate) [1986] KLR 705, where the court disregarded an affidavit filed in a matter where a court file had gone missing. The said court was of the view that the Court Clerk who had personal knowledge of the disappearance of the court file should have sworn the affidavit to support the application.

20. This court was urged not to exercise its discretion in favour of the applicant as its Advocate could have reconstructed its lost file from the court file. The case of *Alice Mumbi Nganga vs Danson Chege Nganga* [2006] eKLR was relied on to show that a litigant has the obligation to follow up on the case and should therefore not rely on the excuse that the mistake of his Advocate should not be visited upon him. It was submitted that in the present application, there was no affidavit filed by the applicant's Advocates, Court Clerk or other person to prove the alleged misplacement and loss of the file and for the said reason, the provisions of Order 19 rule 3 of the Civil Procedure Rules was not complied with.

21. On the issue of whether the respondent would be prejudiced if the orders sought are granted, it was argued that it was immaterial in an application for leave to appeal out of time. Counsel relied on the case of Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 Others (supra) to support his submissions. The foregoing notwithstanding, it was submitted that the respondent herein will suffer extreme prejudice if the prayers sought are granted as litigation in the lower court had been concluded. Its right to justice not being delayed will be infringed and it will incur considerable expenses to defend the intended appeal as the respondent is based in Nairobi. The respondent prayed for the application to be dismissed with costs.

#### ANALYSIS AND DETERMINATION.

The issue for determination is if there was inordinate delay in the filing of the application for leave to appeal out of time.

22. The applicant through an affidavit sworn by Naushad Jiwa, the applicant's Director, deposed that delay in filing the appeal in time was caused by the misplacement of its file when the law firm of Balala & Abed Advocates, which represents the applicant was moving from one office to another. He further deposed that their Advocates on record obtained a copy of the Judgment in Mombasa Resident Magistrate's Court Civil Case No. 1728 of 2014 on 28th October, 2016 but they could not file an appeal up to the month of February, 2018 when the misplaced file was found.

23. Having gone through the said affidavit, I find the argument advanced by Counsel for the respondent with regard to the applicant's deponent not being the proper person to have sworn the affidavit valid to some extent, as the applicant's deponent is neither an Advocate nor a Court Clerk in the law firm of Balala & Abed Advocates. The best approach should have been for one of the Advocates to swear an affidavit on how the applicant's file was misplaced when they were shifting from their previous office. The said misplacement of the file was firsthand information which was within the knowledge of the proprietors of the said law firm and not the applicant who is their client. It is apparent that the aim of the applicant in swearing an affidavit on matters he had no direct knowledge of, is to persuade this court that the mistake of its Advocate should not be visited upon it.

24. The provisions of Order 19 rule 3(1) of the Civil Procedure Rules provide as follows:-

*“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:*

*Provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”*

25. The applicant's deponent though referring to some matters that he had no personal knowledge of however disclosed in his affidavit that the source of most of the information contained therein was Mr. Mohamed Ali Advocate, who personally had conduct of the case before the lower court. For the said reason, I will consider the depositions in the said affidavit and determine this application on merit.

26. Section 79G of the Civil Procedure Act confers on an Appeal Court the powers to grant leave to appeal out of time to an appellant who satisfies the court that he had good and sufficient cause for not filing an appeal in time. The applicant relied on the misplacement of the file in issue to advance its case. It is however surprising to note that since the undisclosed date when the applicant's file was misplaced, no effort was made to obtain copies of the pleadings and documents from the lower court file. Had the applicant done so, he would have obtained all the relevant paperwork necessary in the filing of an appeal.

27. Although the applicant prays for the mistake of his Advocate not to be visited against it, the applicant's deponent stated that he was told that their file was missing, but he like his Advocate sat back and waited for a prolonged duration of time without doing anything.

28. In the case of John Ongeri Mariaria and 2 Others vs Paul Matundura, [2004] 22 EA 163, it was held thus:-

*“Legal business can no longer be handled in such a sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders..... whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him.....whereas it is true that the court has unfettered discretion, like all judicial discretion must be exercised upon reason, not capriciously or sympathy alone..... justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”*

29. In the instant application, the applicant cannot lay the blame squarely on his Advocate. The time has come when a litigant should seek a second opinion on a legal issue when he/she gets a hunch that all is not *kosher* or that his/her case is not progressing well. The nonchalant attitude by litigants which has been the norm, should be a thing of the past. Litigants must be pro-active in propelling their cases forward.

30. On the issue of this court exercising its discretion in favour of the applicant, the Supreme court in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR had the following to state with regard to underlying principles that a court should consider in exercise of its discretion:-

*“(i) 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;*

*(ii) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;*

*(iii) Whether the court should exercise discretion to extend time is a consideration to be made on a case to case basis;*

*(iv) Where there is a reasonable cause for the delay. The delay should be expressed to the satisfaction of the court;*

*(v) Whether there will be any prejudice suffered by the respondents, if extension is granted;*

*(vi) Whether the application has been brought without undue delay and;*

*(vii) Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.”*

31. In the instant application, the applicant has failed to explain its delay in filing an appeal to the satisfaction of the court. It is thus not deserving of the orders sought. For the said reason, the application dated 8th March, 2018 is hereby dismissed. Costs are awarded to the respondent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of October, 2018.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Mr. Said holding brief for Mr. Abed for the applicant

Ms Obura holding brief for Mr. Kieti for the respondent

Mr. Oliver Musundi - Court Assistant