REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC CIVIL APPLICATION NO.16 of 2017

HERITAGE FOODS KENYA LIMITED.....APPLICANT

VERSUS

ELIZABETH WAMBUI KIMANI

(Suing on behalf of the estate of Joseph

Ndichu Kimani (Deceased) **….…….....RESPONDENT**

RULING

1. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time. The intended appeal is from a judgment delivered by the Learned Honourable N. Makau in Limuru PMCC No. 238 of 2014 on 29/07/2016. The Application is supported by a Supporting Affidavit by Catherine Njeri Ngunjiri, an advocate who is conducting the matter on behalf of the Applicant.

2. The Application is opposed. In opposition, the Respondent's lawyer, in apparent matching of tactics, has sworn a Replying Affidavit.

3. The facts are as follows. Judgment in the lower court matter was delivered on 29/07/16. The Applicant does not deny knowing about the judgment. The Applicant wrote to the Executive Officer on 02/08/2016 requesting for a typed copy of the judgment. This was four days after the judgment. The Applicant says they were only able to collect the typed copy of the judgment on 02/09/2016. This was thirty-four (34) days after the delivery of the judgment. The letter did not ask for typed proceedings; only a copy of the judgment.

4. One month later, on 03/10/2016, the Applicant moved to court to seek stay of execution and, interestingly, asking for orders to be given for a certified copy of the proceedings. That application also asked for extension of time to file an appeal. This application was filed sixty-five (65) days after the delivery of the judgment.

5. The ruling to that application was, apparently, given on 20/12/2016. The sought orders were granted. This included, amazingly, an order granting leave to file an appeal out of time to this Court. This order was granted one hundred and fourty-four (144) days since the date the judgment was delivered in the case.

6. The Applicant did not extract the order from that ruling until 20/01/2017. This was one hundred and seventy-five (175) days since the delivery of the judgment.

7. Realising that it needed leave from the High Court in order to perfect its appeal, the Applicant

approached this Court on 01/02/2017 seeking an order for extension of time. That is one hundred and eighty-six days since the judgment was delivered.

8. The only issue for determination is whether the Applicant is entitled to an extension of time.

9. By dint of the Civil Procedure Act, the Applicants ran out of time to file their appeal on 29/08/2016.

10. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides 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:
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> 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.

11. Our case law has now provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

12. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR***. They include the following:

a. The period of delay;

b. The reason for the delay;

c. The arguability of the appeal;

d. The degree of prejudice which could be suffered by the Respondent is the extension is granted;

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any on the administration of justice or public interest if any is involved.

13. Consequently, these are the factors upon which I will construct the crucible against which the Applicants' prayer for extension of time will be measured.

14. The Respondent complains that this Application is an abuse of the Court process and that the Applicant has simply been waiting for time to run out before rushing to court for orders. They see this as an attempt by the Applicant to prevent the Respondent from enjoying the fruits of her judgment.

15. The Respondent also argue that each step of the way, the Applicant has acted with unforgivable delay. They are therefore not deserving of the exercise of Court's discretion.

16. Finally, the Respondent argues that the Applicant has failed to abide by the express orders of the lower court to deposit Kshs. 700,000 in Court – and has instead come to this Court for further relief.

17. Primarily, the Applicant argues that while they regret the series of mishaps that caused the delay in

filing the appeal, the delay has not been inordinate. Further, the Applicant argues that it has an eminently arguable appeal and that it should be the policy of the Court to determine all matters on their merit.

18. I would readily agree that the Court always tries to determine disputes on their merits. Indeed, the Applicant may as well have cited the Ugandan Supreme Court in ***Banco Arabe Espanol V Bank of Uganda [1999] 2 EA 22*** where it remarked that:

> The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuant of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.

However, adhering to this salutary policy in the administration of justice does not ***at all*** mean that parties will be granted leave for extension of time automatically and in spite of their conduct in the litigation and the effect their inattention to the rules of the game would have on the other party to the suit

20. In this case, as outlined above, the Applicant only approached a Court of suitable jurisdiction for extension of time one hundred and eight-six (186) days since judgment was delivered. That is a little more than half a year. It is difficult to say that this delay is not inordinate. The inordinateness of the delay becomes even clearer when one considers how the Applicant acted at each step:

> a. Four days after the judgment was delivered, the Applicant wrote to request for a copy of the judgment. Rather than request for a copy of the judgment and proceedings, it merely asked for the judgment.
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> b. The Applicant put no demonstrable efforts to get the copy of the judgment timeously. Instead, it only collected the judgment thirty-four (34) days after the delivery of the judgment – and already out of time to appeal.
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> c. As if that is not enough, the Applicant waited a further thirty-one days (making it a total of sixty-five (65) days since the date of delivery of the judgment) before it approached a court, *any court*, to extend time. Even then it approached the wrong court!
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> d. There is no explanation whatsoever for this delay of thirty one (31) days – even assuming that the Applicant needed to have sight of the judgment before asking for extension of time.
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> e. Even though the Applicant had approached the wrong Court, they prosecuted their application to fruition and got an order which is, needless to say, void. They then waited a further thirty-three (33) days to extract that order.
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> f. After extracting the order and apparently realizing that it would be of no avail to them, the Applicant waited a further eleven days to file the correct application to this Court.

21. Even while one would be willing to accept that blunders occur in law offices (see ***Phillip Keipto Chemwolo & another V Augustine Kibende [1986] KLR 495***), this "blunders-occur theory" cannot explain this perfect storm. It also cannot explain the three different delays before each blunder is corrected by way of court intervention. In my view, these delays are so compounded that it would be unjust to the Respondent for the Court to exercise its discretion in favour of the Applicant.

22. As the Respondent's lawyer points out, the conduct of the Applicant also makes it undeserving of the exercise of the Court's discretion. The Applicant had a stay of execution of thirty days when the judgment was delivered. It let it lapse without troubling itself to as much as contact the Respondent about settling the judgment. Instead, it moved to Court to get extra stay. This was granted on the condition that the Applicant should pay Kshs. 700,000 into Court within 60 days. The Applicant failed to do so. Instead, it approached this Court for extension of time – conveniently forgetting the orders granted by the lower

Court. While this alone would not disentitle the Applicant from leave to enlarge time, it cumulatively informs the Court's views of whether the extension should be granted or not.

23. Given all these considerations, I am not persuaded to exercise discretion in favour of the Applicants here. I find that there is no sufficient cause to extend time for the Applicant to file its appeal out of time. I dismiss the Application dated 01/02/2017 with costs.

24. Orders accordingly.

Dated and delivered at Kiambu this 27 thday of February, 2017.

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JOEL NGUGI

JUDGE