

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 94 OF 2015

KENYA RAILWAYS CORPORATION.....APPELLANT

VERSUS

MARGARET AJWANG JURA.....1ST RESPONDENT

HEZRON OSSOREY JURA ODONGO.....2ND RESPONDENT

R U L I N G

By a Notice of Motion dated 2nd February, 2016, the Applicant Kenya Railways Corporation seeks two orders that:

- a. **The appellant be granted leave to appeal out of time against the whole Ruling and Order of the Hon. M.s Lucy Gitari, Chief Magistrate, delivered on the 5th day of June 2014 at Kisumu**
- b. **The Memorandum of Appeal annexed hereto be deemed as duly filed and served.**

The grounds upon which the application for extension is based is deposed in the affidavit of David Njogu, the legal officer of the applicant wherein it is stated that the applicant was not able to file an appeal in time for reasons that it was not able to obtain certified copies of the proceedings in time to enable it prepare a record of appeal, that the applicant's efforts to obtain the proceedings in time bore no fruits thus frustrating its endeavours to prepare a record of appeal.

Mr Njogu deposed that by the time the Hon. Magistrate was making her ruling Hezbon Ossorey Jura Odongo was already deceased and his estate had not obtained a legal representative against whom an appeal would be mounted, it rendered it impossible to file an appeal within the required time. Mr. Njogu stated further that the applicant is a big corporation whose decision making process goes through a series of procedures for approval hence by the time sufficient instructions to its advocates were given time had already lapsed. He concluded by stating that the applicant had an arguable appeal with overwhelming chances of success and it should therefore be allowed.

The respondent filed a replying affidavit opposing the application for extension of time. The gist of opposition is that the applicant has unduly delayed in making this application and the same is an afterthought and a means to further frustrate the respondent as it did to her late husband. The respondent deposed that the right to appeal was not automatic and the applicant has not given compelling reasons justifying the application for leave to appeal out of time.

When the application came up for hearing the parties opted to file written submissions. Counsel for the applicant relied on the grounds stated in the application and the contents of the supporting affidavit. It was submitted that time could only start running after the estate obtained a legal representative as an appeal could not be successfully filed without substitution. Counsel submitted that they filed a memorandum of Appeal on the 19th November 2015 interpreting into 9 months between the date of substitution and the date of filing the Memorandum. The applicant's reason for the 9 months delay in lodging an appeal is that a number of persons and agencies had to be consulted, through intra-departmental arrangements in order to ascertain with utmost precision the amount due to the deceased. Further that the matter was of public importance hence the need to have the right information before filing.

Counsel for the respondent opposed the application emphasizing that the applicant had not been candid

before this Court. That the applicant has not attached any documentary evidence to show that he made an attempt to obtain certified copies of proceedings or even expressing his frustration to the court over the delay in availing the same to him. It is the case for the respondent that the intended appeal and subsequently the application herein is an afterthought intended to delay justice.

I have anxiously considered the application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion of this court is unfettered and does not require establishment of sufficient reasons. Nevertheless, it ought to be guided by consideration of factors such as the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance – See **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, COURT OF APPEAL, CIVIL APPLICATION NAI. 332 OF 2004**. There is also a duty to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.

The application before this court was filed over a year after delivery of the ruling by the chief magistrate. The applicant argues that time should be counted from the date when the late Hezron Jura Odongo was substituted. If the court is to go by that argument then the delay is of 9 months. I pose the question whether a delay of over nine months is inordinate. The initial explanation given by the applicant is that it could not obtain certified copies of proceedings in time. It is my opinion that the applicant is not truthful in its application. I will agree with the respondent that the applicant has not annexed any documentary evidence to show the frustrations in obtaining the proceedings. Again the applicant did not have to wait for the substitution for him to request for the proceedings. This is something it could have done even as the estate of the deceased was pursuing substitution. The applicant then shifted its explanation for the delay from the issue of substitution and obtaining the proceedings to the fact that it is a big corporation and various departments, persons and agencies had to be consulted before an appeal was filed.

Taking into account the period of time that lapsed between when the ruling was read to the filing of the memorandum of appeal It is my opinion that the delay was inordinate. The respondent indicated the kind of prejudice that she is likely to suffer if this application is allowed. Her late husband was retrenched in the year 1993 and he successfully sued the applicant for severance benefits. Since then there was a tag of war between the applicant and himself until he met his death in 2014. The respondent filed a judicial review application for mandamus to compel the applicant to pay his benefits, he even cited the applicant for contempt to no avail. The respondent attributes his death to frustration by the applicant and now she is likely to suffer the same fate. I find that the respondent has demonstrated the prejudice she is likely to suffer. I also agree that the appeal is a delaying tactic and a way to beat justice.

For the foregoing reasons I shall disallow the application. The respondent shall have the costs of the application.

Dated, signed and delivered this 18th May 2016

H. K. CHEMITEI

J U D G E