



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO. 233 OF 2015

HUMAN CAPITAL SYNERGIES

AFRICA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SMOOTHTEL & DATA

SOLUTIONS LIMITED.....DEFENDANT/APPLICANT

RULING

It is common ground that the Applicant herein was late by 97 days in filing this application for leave to appeal against the decree of the lower court passed on 24th February 2015. The present application for leave to file appeal out of time (Notice of Motion) was filed on 2nd June 2015.

The prayer for enlargement of time within which to file appeal would normally be sought under Section 79G of the Civil Procedure Act, Cap 21 (the Act) but failure to quote the rules of procedure should not by that reason alone defeat the application being a mere technicality.

It also appears common ground that the ruling (on an application to set aside ex-parte judgment) being appealed against was delivered on the date reserved by the court with notice to both parties.

The explanation offered for the delay in the supporting affidavit sworn by the Applicant's Director, **Raphael Mwangi Nderitu**, is -

- (i) That the Counsel who was seized of the matter left employment without handing over the files she was handling to his Advocates.
- (ii) That the Counsel now handling the matter attended Court on 2nd June 2015 to peruse the Court file as there were no written notes in the file on the position of this case, where he discovered that their application to set aside ex-parte judgment had been dismissed vide a ruling delivered on 24th February 2015.
- (iii) That after lengthy deliberations with his Advocates, they advised him to appeal the ruling which advise he concurred with and they thus embarked on preparation of the present application.
- (iv) That the delay is therefore not deliberate; he will suffer substantial loss if the stay of execution

is not granted 'as the decretal sum is a big sum of money'; the appeal has high chances of success; he is prepared to provide such security as the Court may order for the performance of the decree; the means of the Plaintiff are not known thus sums paid out to it are highly unlikely to be paid in the event of a successful appeal.

The Respondent has opposed the application by replying affidavit filed on 15th June 2015. It is sworn by its Director, **Njoki Mwiha**. The main points taken are that the Applicant has failed to give the Court a good reason as to why it took more than three months to file an appeal, and he should not now seek to benefit from its counsel's mistakes which can't be visited upon her as a litigant; that the mistake of the said Counsel should not have any bearing on the case as it had already been concluded by the time she left in April 2015; that the Respondent will suffer injustice if the application is allowed due to the financial implications of a prolonged litigation.

A supplementary affidavit filed on 23rd June 2015 essentially reiterates the contents of the supporting affidavit.

I have considered the submissions of the learned counsels appearing and the authorities cited.

Under Section 79G, an appeal from a subordinate court to the High Court ought to be filed within a period of thirty (30) days from the date of decree or order appealed against, excluding from such period any time which the lower court may certify as having been necessary for preparation and delivery to the appellant of a copy of the decree or order. The proviso to that section however gives this court power to admit an appeal out of time if the appellant satisfies it that it had good and sufficient reason for not filing the appeal on time.

The only reason given for the delay is that the Applicant's previous Counsel (though in the employ of the same Advocates representing the Applicant) was negligent in the way she handled the matter at the lower court hence the position of the file was not immediately clear even after she left the firm about two months before the current application was filed. No evidence has been tendered in court to buttress these assertions.

It is obvious that since the application to set aside judgment was filed in December 2014, the Applicant's Advocates went into deep slumber which they only woke up to when the Applicant's property was about to be auctioned.

No good and candid reason for the delay has been offered by the Applicant to entitle it to the Court's discretion being exercised in its favour. I find no good and sufficient cause for the Applicant's failure to file its appeal in time. The application for leave has no merit. It is hereby dismissed with costs. Any interim stay of execution is hereby vacated.

It is so ordered.

Dated, signed and delivered at Nairobi this 13th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE