



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC APPLICATION NO 41 OF 2020

GEE TEE & SONS LIMITED.....APPLICANT

=VERSUS=

LYDIA WANJUE MWANGI.....RESPONDENT

RULING

1. On or about 23/6/2020, **M/s Gee Tee & Sons Ltd [the applicant]** brought this Miscellaneous Application through a notice of motion dated 22/6/2020. They sought an order enlarging the time within which to bring an appeal against the decision made by the **Business Premises Rent Tribunal [the Tribunal]** on 6/3/2020 in **BPRT Case No. 83 of 2018**. The application was supported by an affidavit sworn on 22/6/2020 by George Ngaruiya and a supplementary affidavit sworn by the same deponent on 5/10/2021. The application was canvassed through written submissions dated 12/10/2021, filed by the firm of *Kanyi Kiruchi & Co Advocates*.

2. The case of the applicant was that, when the case giving rise to this application came up for hearing on 6/3/2020, the applicant's then advocate was ill and both the Tribunal and the respondent's counsel were duly informed about it by the applicant's representative who was present in the Tribunal. The Tribunal nonetheless declined to adjourn the hearing and proceeded to consider the rent assessment report filed by the respondent whereupon it proceeded to make a finding, on the same day, to the effect that the monthly rent payable by the respondent was Kshs 85,000 as opposed to the Kshs 190,000 which the respondent was paying at the time. Further, the Tribunal backdated the effective date of the assessed rent to December 2018. The applicant contended that the Tribunal did not give any reasons for the above order and findings.

3. It was the case of the applicant that, upon learning about the above orders and findings, they decided to lodge an appeal. However, due to the COVID-19 pandemic, all courts and tribunals were shut on 16/3/2020. Due to the nationwide closure of courts and tribunals, they were not able to access the Tribunal File and they were not able to lodge the intended appeal within the prescribed time. Further, due to the fact that there was a cessation of movements occasioned by the COVID-19 pandemic, there was further delay. Ultimately, they brought the present application on or about 23/6/2020.

4. In their written submissions dated 12/10/2021, the applicant identified the following as the two key issues falling for determination in the application: (i) *Should the applicant be allowed to file his (sic) appeal out of time?*; and (ii) *Is the applicant's delay justified?* On the first identified issue, the applicant relied on **Rule 4** of the Court of Appeal Rules [*which in my view is inapplicable because this court does not exercise jurisdiction under the said Rule*]. Counsel cited the Court of Appeal decision in **Civil Application NAI 255 of 1997, Leo Sila Mutiso v Rose Hellen Wangare** in which the Court of Appeal observed that whether or not to extend the time for lodging an appeal was essentially discretionary and outlined the following as some of the matters to be considered by the court: the length of delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted.

5. On the second issue, counsel contended that there was a delay of only about 4 months and the same was occasioned by the COVID-19 pandemic which was a factor beyond the applicant's control. Counsel urged the court to grant the extension.

6. The application was opposed by the respondent through her replying affidavit sworn on 18/9/2020 and her written submissions dated 21/9/2021 filed by the firm of *Nzaku & Nzaku Advocates*. The case of the respondent was that, the applicant lacked *locus standi* to bring this application because the applicant was an agent of George Thuo Njuguna [the deceased] and the said George Thuo Njuguna died on 15/6/2010. The respondent contended that because the suit property remained in the name of George Thuo Njuguna as the registered proprietor, the deceased was not capable of appointing or retaining the applicant as an agent. She added that the High Court had, through a ruling rendered on 19/2/2020, appointed administrators to the estate of George Thuo Njuguna, and the applicant was not one of the administrators.

7. In her written submissions dated 21/9/2021, the respondent identified the following as the three issues falling for determination in the application: (i) *Whether the applicant had the locus to bring the application or the intended appeal*; (ii) *Whether the application dated*

22/6/2020 is merited; and (iii) Who should bear costs of this application?

8. On whether the applicant had the *locus standi* to bring the application, and/or the intended appeal, the respondent submitted that the applicant did not have the *locus standi*, capacity or authority to bring the application because neither it nor the deponent of the supporting affidavit was the administrator of the estate of the deceased. Counsel contended that because the applicant lacked the *locus standi*, it did not stand to suffer any prejudice if the application was disallowed.

9. On whether the application dated 22/6/2020 was merited, counsel cited the criteria set out by the **Supreme Court of Kenya** in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2013] eKLR** and contended that the applicant had failed to satisfy the said criteria. Counsel added that the delay of 4 months was inordinate and had not been sufficiently explained. On costs, counsel invoked **Section 27** of the Civil Procedure Act and argued that costs follow the event.

10. I have considered the application; the response to the application; and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. Two key issues fall for determination in this application. The first issue is whether the applicant has *locus standi* to bring the present application and the intended appeal. The second issue is whether the applicant has met the criteria upon which our courts exercise jurisdiction to enlarge time within which to lodge an appeal. I will make brief sequential analysis and pronouncements on the two issues in the above order.

11. On whether the applicant has the *locus standi* to bring the present application and the intended appeal, the respondent contends that the applicant lacks *locus standi* because the suit property is registered in the name of the late George Thuo Njuguna and the applicant is not the administrator of the deceased's estate. For this reason, it is the position of the respondent that the applicant lacks *locus standi*. I do not agree with that view for a number of reasons. First, from the materials presented to the court by the respondent, the deceased died on 15/6/2010 [see paragraph 5 of the High Court Ruling]. Secondly, the case giving rise to the present application was initiated in the BPRT by the respondent against the applicant in 2018, about 8 years after the death of George Thuo Njuguna. If the applicant did not have locus, he should never have been sued in the first place. Thirdly, while aware that George Thuo Njuguna had died in June 2010, the respondent proceeded to procure orders in the BPRT against the applicant in March 2020. Those are the orders which the applicant, as the sued and aggrieved party, seeks to appeal against.

12. Further, it emerges from the evidence presented by the respondent that prior to the time the respondent procured the impugned orders against the applicant, the High Court had, on 4/6/2019, appointed administrators of the estate of the deceased the applicant was not one of the administrators. The respondent nevertheless proceeded to obtain the orders. It cannot, in the circumstances, be said that the applicant lacks the *locus* to initiate proceedings to set aside the orders obtained against it by the applicant in the above circumstances. There is no evidence that the circumstances which obtained on 6/3/2020 when the respondent procured the impugned orders have changed. For the above reasons, my finding on the first issue is that the applicant has the *locus standi* to initiate proceedings to challenge the orders obtained against them by the respondent on 6/3/2020.

13. The second issue is whether the applicant has met the criteria upon which our courts exercise jurisdiction to enlarge time for lodging an appeal. The **Supreme Court of Kenya** in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2013] eKLR** outlined the following principles which guide our courts when exercising jurisdiction to enlarge time:

“(1) 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.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(5) Whether there will be any prejudice suffered by the respondent if the extension is granted.

(6) Whether the application has been brought without undue delay, and;

(7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

14. The Court of Appeal in **Leo Sila Mutiso v Rose Hellen Wangare Mwangi [Civil Application NAI 255 of 1997]** stated the following regarding factors which should guide the court when exercising this jurisdiction:

“It is also well settled that in general, the matters which the court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of success of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

15. In the present application, the reason advanced to explain the delay is that the courts and tribunals were shut nationwide in March 2020 to mitigate the spread of Covid-19. Secondly, cessation of movement was effected. It is true on or about 16/3/2020, all courts and tribunals were shut countrywide. It is also true that cessation of movement into and out of Nairobi and Kiambu Counties was effected. Subsequently, in or about June 2020, the Judiciary rolled out an ICT Programme through which litigants were able to access court services electronically. In the above circumstances, it is the view of the court that the reasons advanced by the applicant to explain the delay are *bonafide*. It is also the view of the court that the delay of 4 months during which time the courts and tribunals were shut is not inordinate.

16. The applicant contends that the Tribunal should not have proceeded with an *ex-parte* hearing and determination on 6/3/2020. It has emerged through the affidavit and submissions of the respondent that the applicant was not an administrator of the estate of the deceased at the time the respondent initiated the case against them and at the time it obtained the impugned orders against them on 6/3/2020. At this point, I can only say that these are some of the circumstances which make the court to come to the conclusion that there could be an arguable appeal.

17. For the above reasons, the court finds that the applicant has satisfied the criteria upon which our courts exercise jurisdiction to enlarge the time within which to lodge an appeal.

18. Consequently, the application dated 22/6/2020 is disposed in the following terms:

(a) The time for lodging an appeal against the decision made by the Business Premises Rent Tribunal in Tribunal Case No. 83 of 2018; Lydia Wanjue Mwangi v Gee Tee & Sons Ltd is hereby enlarged by fourteen (14) days from today.

(b) Because delay was caused by the nation-wide closure of courts and tribunals in response to the COVID-19 pandemic, parties shall bear their respective costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr. Warutere for the Applicant

Mr. Muriithi for the Respondent

Court Assistant: Phylis Mwangi

NOTE

This ruling was not delivered on 20/12/2021 as earlier scheduled because I was assigned work outside the station.