



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPEAL NO. 18 OF 2014

NANDI TEA ESTATES LTD APPLICANT

VERSUS

GEORGE OCHIENG ODUOGO RESPONDENT

RULING

1. Before this court is the Applicant's Notice of Motion dated 3rd February, 2014 expressed to be filed under **Section 3,3A, 75, 78, 79G** of the **Civil Procedure Act; Order 51 Rule I, Order 42 Rule 6(1) of the Civil Procedure Rules** and all enabling provisions of the Law.

The two main prayers in the application are that the Applicant be granted leave to file an appeal out of time against the decree in **Kapsabet PMCC No. 11 of 2011** and that there be stay of execution of the said decree pending the hearing and determination of the intended appeal.

2. The application is supported by an affidavit sworn by Linah Jepkosgei Kigen, an advocate who represented the Applicant, **Nandi Tea Estates Ltd** which had been sued as the Defendant in **Kapsabet Principal Magistrate's Court Civil Case No. 11 of 2011**. The Respondent herein **George Ochieng Oduogo** was the Plaintiff in that suit.

The application is premised on the following grounds:-

- a. ***That the Plaintiff/Respondent obtained judgment on 10th December, 2013 for Kshs.90,000/- in general damages, Kshs. 1,500/- in special damages hence Kshs.91,500/- less 30% contribution thus Kshs.64,050/- plus costs of Kshs. 59,800/- taxed on 23rd January, 2014 hence Kshs.123,850/- in total and the Defendant was immediately advised to pay and/or make an informed opinion on whether or not to lodge an Appeal.***
- b. ***That there is no stay in force at the moment and the Plaintiff/Respondent may execute the decree any time now and the Defendant/Applicant stands to suffer substantial loss in the event that the intended appeal succeeds as we strongly believe the same will succeed.***
- c. ***That the defendant/Applicant is ready and willing to deposit the entire decretal sum in a joint interest earning account in the names of both Advocates on record pending hearing and final determination of the intended Appeal.***
- d. ***That on 11th January, 2014, the Defendant/applicant instructed its Advocates to lodge an Appeal but the time within which to file the same has lapsed.***

- e. ***That the Memorandum of Appeal annexed hereto has triable issues and the time within which to lodge the same be enlarged and the annexed draft be deemed duly filed and served.***
 - f. ***That it is in the best interest of justice that the Applicant be allowed to file Appeal against the said judgment out of the prescribed time since the delay was not inordinate and the same is excusable in law.***
 - g. ***That the Plaintiff/Respondent shall not be prejudiced in any manner as he can be compensated by an order for costs.***
 - h. ***That this application has been brought promptly, in utmost good faith and in the interest of justice to all parties concerned.***
3. In opposition to the application, the Respondent swore a replying affidavit on 24th February, 2014. It was filed in court on even date.

In a synopsis, the Respondent opposes the application on grounds that it lacks merit in that the Applicant has not shown any good reason or sufficient cause why it should be allowed to file an appeal out of time; that the application is made in bad faith with the aim of preventing the Respondent from accessing and enjoying the fruits of his regularly obtained judgment and that if the application was allowed, he would suffer prejudice which cannot be compensated by any amount of costs.

4. The application was canvassed by way of written submissions. The Applicant through its advocates ***Messrs Kigen & Company Advocates*** filed its written submissions on 13th March, 2014 while those of the Respondent were filed on his behalf by his advocates ***Z.K. Yego Law offices*** on 20th March, 2014.

It was submitted on behalf of the Applicant that it ought to be granted leave to appeal out of time as it had satisfied the test for the grant of such leave as enumerated by the Court of Appeal in the case of ***Kenya Commercial Bank Limited -vs- Kenya Planters Co-operative Union 2010 eKLR***. It was submitted that in that case, the Court of Appeal held that for an applicant to succeed in an application such as the one before the court, he/she must demonstrate that the delay in filing the intended appeal was not inordinate; that there were reasons for the delay; that the intended appeal has high chances of success and that the Respondent would not suffer prejudice if the application was allowed.

The applicant submitted that it had demonstrated that the delay in filing the intended appeal and the instant application was not inordinate; that the court should exercise its unfettered discretion ***under Section 79G of the Civil Procedure Act*** (hereinafter the Act) by allowing the application.

5. As regards the prayer for stay of execution of the decree pending the intended appeal, the Applicant submitted that stay should be granted as sought for the following reasons;

The first one was that the application had been made without unreasonable delay; that the intended appeal was arguable; and that it would suffer substantial loss if stay was not granted because the Respondent's financial means were unknown and if execution proceeded and the appeal was eventually successful, the Respondent may be unable to refund the Applicant the decretal amount;

The Applicant further contended that if stay was not granted, the intended appeal would be rendered nugatory.

Lastly, the Applicant offered to deposit the decretal amount in an interest earning account operated jointly by counsel for both parties or such security as the court may order for the due performance of the decree pending the outcome of the intended appeal.

6. In his written submissions, the Respondent urged the court to dismiss the application on grounds that no plausible reason had been given to explain the delay in filing the instant application considering that the judgment of the lower court was read on 10th December, 2013 and the application was filed on 4th February, 2014 by the same firm of advocates who represented the Applicant in the suit in the lower court.

Secondly, the Respondent argued that the reasons cited by the Applicant for failure to file its intended appeal within the time prescribed by the law are unsatisfactory and cannot form the basis of allowing the application. The Respondent further contended that the application ought to fail in any event since it was supported by a defective affidavit. That contrary to the law, the supporting affidavit was sworn by the Applicant's Counsel on contentious matters and not by its authorized officers. He invited the court to strike out the affidavit which would automatically lead to the collapse of the application hence its dismissal.

7. In response to this latter submission, the Applicant's Counsel tactfully avoided to directly respond to the accusation that she had deposed to contentious matters in the supporting affidavit but chose to dismiss the Respondent's claims as objections on procedural technicalities which ought to be disregarded in the Spirit of administering substantive justice. It was argued that any defect in the affidavit amounted to an irregularity which could not cause the nullification of the entire affidavit.
8. I have fully reflected on the application, the affidavits filed therein and the rival submissions made by the counsel for the respective parties. I take the following view of the matter.

Starting with the submission that the application should be dismissed as it was allegedly predicated upon a defective affidavit, it is worth noting that the Respondent's complaint is not that the Applicant's Counsel deposed to matters which were not within his knowledge. His only complaint was a vague and generalized one to the effect that the Applicant's Counsel made depositions touching on contentious matters in the dispute before the parties which made the affidavit defective. The Respondent did not however specify any paragraph in the affidavit which contained a deposition which in his view related to contested facts.

9. On my part, I have gone through the said affidavit and in my view, the depositions therein cannot be said to relate to contentious matters. The depositions largely relate to facts regarding the judgment, decree, and order sought to be appealed against; the conduct of counsel after delivery of the judgment; his communication with his client among other matters that would reasonably be expected to be within the personal knowledge of Counsel seized of the conduct of a suit on behalf of his client. Most of the depositions in the affidavit related to facts which could be verified from the trial court's record. There is therefore no basis upon which this court can declare the affidavit sworn in support of the instant application defective. Consequently, I decline the Respondent's invitation to have the affidavit struck out.
10. Turning now to the merits of the application, the law that governs the filing of appeals from decisions of the subordinate courts to the High Court is contained in **S.79G of the Civil Procedure Act** which states 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:

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”.

From these provisions, it is clear that any party aggrieved by a judgment or order of a subordinate court must file an appeal to the High Court within 30 days from the date the decision challenged on appeal was made. The proviso to **S.79G** however, leaves no doubt that this court has wide and unfettered discretion to extend the time within which to file or admit an appeal filed outside the prescribed time if the applicant satisfied the court that he had good and sufficient

cause for not filing the appeal within time.

11. In this case, the Applicant's Counsel contends that she was unable to file the intended appeal within time because though she notified the Applicant of the terms of the judgment delivered on **10th December, 2013** in letter dated **11th December, 2013**, she received instructions to lodge an appeal on 14th April, 2014 through letter dated 11th January, 2014. Counsel did not however explain why on receiving such instructions, she did not file the intended appeal immediately or so soon thereafter.
12. I think this is an appropriate time to consider what I believe is a self defeating argument by the Applicant that even at the time the instant application was made, the prescribed time to file an appeal had not expired since in computing time, going by the provisions of **order 50 Rule 4 of the Rules**, the period between 21st December, 2013 to the 13th January, 2014 was excluded. I found this argument quite interesting because if this was the Applicant's view, why then was it necessary for it to include prayer 3 in this application?

My reading of Order **50 Rule 4** reveals that the rule only applies to time limited by the court for the doing of any act or time limited by the **Civil Procedure Rules** for amending, serving or filing any pleading. In my opinion, the rule cannot be applied to time limited by statute such as the time limited for the filing of an appeal. This is so because the Orders in the **Civil Procedure Rules** are basically Subsidiary Legislation which cannot prevail over statutory provisions of their parent Act.

13. It is important to note at this stage that the **Civil Procedure Act** is silent on how time limited under its provisions should be computed. However, **Section 57 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya** provides for the method that should be used to compute time limited by statute. The section reads as follows:-

“In computing time for the purposes of a written law, unless the contrary intention appears-

- a. ***a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- b. ***if the last day of the period is Sunday or a public holiday or all official non working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- c. ***where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- d. ***where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time”.***

Using the formula for computation of time provided by **Section 57** above which would exclude the date the judgment was delivered and the last day of the 30 day period, time for the Applicant started running from 11th December 2013 and expired on 14th January 2014. The 30th day fell on 11th January 2014 which was on a Saturday which together with Sunday the 12th January 2014 were excluded from the computation of time.

14. The Applicants undated memorandum of appeal which is annexed to the application was filed simultaneously with the application on 4th February 2014. No reason has been given to explain why the Applicant had to wait until 11th January, 2014 the date on which time to file its intended appeal expired to instruct Counsel to file an appeal against the learned magistrate's decision.

It is also not lost on this court that a further delay of about three more weeks occurred before

counsel filed the instant application. This delay has also not been satisfactorily explained.

15. The Applicant has urged this court to exercise its discretion to extend time within which to file its intended appeal allegedly because it has an arguable appeal.

I am however unable to form any opinion regarding the merits or otherwise of the Applicant's intended appeal since, as correctly pointed out by the Respondent, the Applicant did not avail to this court the proceedings and judgment of the lower court. But given the content of letters annexed to the supporting affidavit marked as **annextures LJK -1 and LKJ 2**, the allegation by the Respondent that the application is not made in good faith and is aimed at delaying the enjoyment of fruits of his regularly obtained judgment cannot be said to be farfetched.

16. Having said that, I wish to correct an impression given by both counsel in this matter that the test for the grant of leave to appeal out of time to the High Court was the one set out in the case of **Kenya Commercial Bank Ltd vs Kenya Planters Co-operative Union 2010 eKLR**. In my view, this is not the position. The only test applicable to this court in determining whether or not to grant leave to extend the time within which an applicant can file an appeal out of time or to admit one filed out of time is the test contained in the proviso to **S79G** reproduced earlier in this ruling.

The Kenya Commercial Bank Limited case (Supra) related to an application seeking enlargement of time to file an appeal to the Court of Appeal and not to the High Court outside the prescribed time. The application was filed under the **Appellate Jurisdictions Act** and the then **Rule 4 of the Court of Appeal Rules** the equivalent of the current Rule 5(b) of the aforesaid Rules.

The principles enunciated therein as enumerated by the Applicant's counsel in her submissions are however relevant and are some of the factors that the High Court should bear in mind in determining whether an applicant had established sufficient cause to warrant the exercise of the courts discretion in his favour by enlarging time as sought. Needless to say, each case must be determined on its own merit.

17. In this case, I am satisfied that the Applicant has failed to demonstrate that there was good or sufficient cause which prevented it from lodging its appeal within the prescribed time. I am persuaded to find that the delay of about 20 days was not satisfactorily explained. The delay in my view was inordinate and inexcusable. I therefore find no basis upon which I can exercise my discretion in the Applicant's favour by granting it leave to file an appeal out of time. I consequently decline to grant orders in terms of prayer 3 of the application.
18. Having declined to grant prayer 3, the other prayer for stay of execution of the lower court's decree pending the hearing and determination of the intended appeal falls by the way side. I will not therefore waste any time considering the merits or otherwise of the said prayer since doing so will not serve any useful purpose.

The upshot of this ruling is that the application dated 3rd February 2014 is devoid of any merit. It is accordingly dismissed with costs to the Respondent.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF JANUARY 2015.

In the presence of:-

Ms. Kayo holding brief for Mr. Kagunza for the Applicant.

Mr. Paul Ekitela Court Clerk.

No appearance for the Respondent.