



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

MISCELLANEOUS APPLICATION NO. 14 OF 2014

KENYA TEA DEVELOPMENT AUTHORITY.....1ST APPLICANT

MICHIMIKURU TEA FACTORY CO. LTD.....2ND APPLICANT

VERSUS

JULIUS BOITHI ATHERU.....RESPONDENT

R U L I N G

The applicants through a notice of motion dated 3rd February, 2014 brought under Section 3A, 79G and 95 of the Civil Procedure Act, 2010 and Order 50 of the Civil Procedure Rules, 2010 seeks the following orders:-

- 1. That leave be granted to the applicants to file an appeal out of time with respect to TIGANIA SRMCC NO. 3 OF 2011; JULIUS BOITHI ATHERU – VS- MICHIMIKURU TEA FACTORY CO. LTD & KENYA TEA DEVELOPMENT AUTHORITY.***
- 2. That costs of this application be provided.***

The application is based on the grounds on the face of the application being briefly as follows:

- a. That applicants were the defendants in Tigania SRMCC 3 of 2011 in which judgment was delivered on 11th October, 2013 in favour of the respondent.***
- b. That on 20/1/2014 the advocates filed an appeal challenging the trial court's judgment by which time the statutory period for filing the appeal had already expired.***
- c. That the delay in filing the intended appeal principally arose due to the lengthy problems of Constitution and structure of the instructions by the applicants. That the 1st applicant which is based in Nairobi is the Managing Agent of inter alia; the 2nd applicant which is based within Meru County and it is the 1st applicant which usually instructs service providers(including lawyers) of the affiliate tea factory companies, such as the 2nd applicant herein.***
- d. That the lawyers furnished applicants with copy of the judgment to which judgment the applicants settled the claim in satisfaction of court's judgment. That time elapsed beyond Board of the 2nd defendant owing to the end of the year holidays.***
- e. That the same judgment had been settled in full. The plaintiff will not be prejudiced by orders sought wherein no application for stay of execution will be agitated.***

The application is supported by the affidavit of Florence Mitey Rotich who is 1st applicant's Manager in charge of Legal and Regulatory Affairs. She deponed that the 1st applicant is the Managing Agent of inter alia; the 2nd applicant. It is deponed that judgment was delivered on 11th October, 2013 and the applicants paid the judgment sum of Kshs.133,975/- and costs of Kshs.111,522/- to avoid execution. That copy of the judgment was availed to the applicants but the same was received during the Christmas festivities had already began hence the Board of the 2nd applicant managed to meet in January, 2014 when it was resolved that an appeal should be lodged. The deponent further deponed that the applicants have an arguable appeal with high chances of success as per attached draft Memorandum of Appeal marked "F.M.R". It is further deponed that the respondent will not be prejudiced in anyway if this application is allowed because in any event he is already enjoying the fruits of the judgment.

The application on the other hand is opposed. The respondent filed a replying affidavit dated 28th February, 2014. The respondent depones that the applicants' application is devoid of merits, is incompetent and bad in law and has been caught up by laches. That judgment was delivered on 11th October, 2013 in presence and full knowledge of all the applicants' Counsel. That period for lodging the appeal expired on 12th November, 2013. That since expiry of the period of filing an appeal the application for leave to file appeal out of time is being filed after a period of more than 3 months and as such the delay is inordinate and reasons for delay do not meet the requisite legal threshold. The respondent further argues there is no indication that the applicants were not notified of the judgment on 11th October, 2013 when it was delivered. The respondents terms the applicants application as an afterthought as no evidence has been adduced by the applicant's Board meeting such as minutes or resolution to appeal against the trial court's judgment. The respondent depones litigation must come to an end and that the intended appeal raises no arguable grounds.

When the application came up for hearing Mr. Maganga learned Advocate appeared for the applicants and Mr. Mwanzia learned Advocate appeared for the respondent. Both Counsel in support of their opposing positions relied on the contents of their respective clients affidavits in support and in opposition. Mr. Maganga, learned Advocate in his arguments conceded that the trial court supplied them with the court's judgment on 18th October, 2013 within time to lodge the appeal. That instructions to appeal were not given to them till on 20th January, 2014 since the applicants had proceeded on Christmas holiday. Mr. Mwanzia, learned Advocate, on his part submitted that there is no reason why appeal was not filed in time as judgment was supplied to the advocates 7 days after delivery of judgment. That Christmas holiday came over 30 days since delivery of the judgment. That the reasons for the delay are unreasonable and insufficient in terms of Section 79G of the Civil Procedure Act. He further argued the draft Memorandum of Appeal is unsigned and undated and is no Memorandum of Appeal at all. He urged the application be dismissed.

Section 79G of the Civil Procedure Act which is relied upon by the applicants in support of their application provides:-

79G. 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:

The issue for determination in this application is whether the applicants have satisfied the conditions to warrant leave being granted to them to file an appeal out of time.

The matters which the court has to take into account in deciding whether or not to grant an extension of time are now well settled in a number of decisions of Court of Appeal.

In the case of **MWANGI V KENYA AIRWAYS LITD(2003) KLR 486** the Court of Appeal laid down the matters to be considered when it held as follows:-

“Matters which the court takes into account in deciding whether or not to grant an extension of time

are:-

- (a) The length of the delay;**
- (b) The reasons for the delay;**
- (c) Possibly, the chances of the appeal succeeding if the application is granted; and**
- (d) The degree of prejudice to the respondent if the application is granted.**

(5). The chances of the appeal succeeding if the application is granted is merely stated as something for a “possible” consideration, not that it must be considered.

On the other hand in **BAGAJO V CHRISTIAN’S CHILDREN FUND INC.(2004) 2 KLR 73** Ringera, Ag. J.A as he then was held:

“In exercising its discretion, the court’s primary concern should be to do justice to the parties. The court should, inter-alia, consider:-

- The length of the delay in lodging the notice and record of appeal;**
- Where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;**
- Whether or not the intended appeal is arguable;**
- The prejudice to the respondent if the application is granted;**
- The public importance, if any, of the matter, and**
- Generally the requirements of the interest of justice in the case.”**

In dealing with this application I am very much aware that in dealing with an application of this nature the Court is vested with a perfectly clear and unfettered discretion to extend the time limited by the relevant provisions and such discretion should be exercised judicially, that is to say on sound grounds rather than on sympathy. That the decision must take into account the facts of the case as presented by the parties and apply the correct principle to the issue before the court.

In the instant application judgment was delivered on 11th October, 2013 and by 18th October the applicants’ counsel who was present at the time of the delivery of judgment was supplied with copies of the judgment. The length of the delay from the time of delivery of the judgment to the time of filing the applications that is on 5th February, 2014 is a period of about 4 months. The delay of four months with all due respect after someone who is serious with filing an appeal and having been supplied with proceedings and judgment 7 days after delivery of judgment is unreasonable delay to say the least.

The delay in filing an appeal in time or notice for extension of time has to be explained. The applicant’s reasons for the delay is that they were notified of the judgment towards Christmas holiday. The counsel has not stated so and if that was the case how come the decretal sum was paid expeditiously to avoid execution?

The applicants did not explain the reasons for delay between 18th October, 2013 and Christmas period and period of over 60 days. The applicants did not even explain why they met in January, 2014 nor attached any resolution to appeal. The reasons for the delay given by the applicants are insufficient and not good enough. The applicants had all necessary documents to enable them lodge an appeal in time and chose not to do so. They have no one to blame but themselves.

I am not convinced that their explanation is genuine but is an afterthought. The applicants argue that the intended appeal has overwhelming chance of success or the intended appeal is arguable appeal. I have looked at the order and unsigned draft Memorandum of Appeal but before I say much, I would like to state for any pleading to be relied upon it must be signed by the drawer otherwise any unsigned document is a mere paper which serves no purpose at all. In any pleadings. All the above notwithstanding I believe

at this stage, I need not consider the intended appeal whether it is arguable appeal or not for the purposes of this application. I will leave that part at that.

The respondent has been paid the decree sum and has put the case behind and is only interested in enjoying the fruits of his judgment. The applicants are seeking to file an appeal out of time after a period of 4 months since judgment was delivered. The filing of appeal will definitely affect the respondent negatively as he will be derailed from other business to pursue a case that he has long forgotten. This will greatly prejudice the respondent if the application is granted. In a situation where the judgment debtor has voluntarily paid the decretal sum and has not sought stay of execution and time for lodging appeal has lapsed and has not met the conditions for granting leave to appeal out of time. I find that it would greatly prejudice the decree holder if an application for filing appeal out of time is allowed.

Having said the above, I find and hold that the applicants have failed to meet the conditions for them to be granted leave to file appeal out of time.

The upshot is that the applicants' application dated 3rd February, 2014 is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF APRIL, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Maganga for the applicants
2. Mr. Mwanzia for the respondents

J. A. MAKAU

JUDGE