



**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 285 OF 2006**

COSMAS MUTISO MUEMA.....PLAINTIFF

-versus-

KENYA ROAD TRANSPORTERS LIMITED.....1ST DEFENDANT

FORKLIFT & EQUIPMENT LIMITED.....2ND DEFENDANT

**RULING**

**Introduction**

1. The Defendant/Applicant filed a Notice of Motion Application dated 16th April 2014 (“the Application”) in which it seeks extension of time for giving notice of intention to appeal from the judgment of this court delivered on 20th March 2014 (“the judgment”) and that the Notice of Appeal lodged at the Court of Appeal's Mombasa Registry on 15th April 2014 be deemed as properly filed. The Application also seeks a stay of execution of the judgment pending hearing and determination of the appeal lodged at the Court of Appeal on 15th April 2014.
2. Before the Application could be heard, the Plaintiff/Respondent filed Preliminary Objection to the Application on the basis that the High Court lacks the jurisdiction to entertain it.
3. The parties argued the Preliminary Objection before this court on 21st May 2014.

**The Plaintiff/Respondent's (Objector's) Arguments**

4. The Plaintiff/Respondent argues that this court lacks jurisdiction to entertain the Application. Mr. Jengo, learned counsel for the Plaintiff/Respondent submitted that under **section 7** of the Appellate Jurisdiction Act as read with **Rule 74 (1) and (2)** of the Court of Appeal Rules, the High Court only has the power to extend the time for a party to file a Notice of Appeal, and not to rectify a Notice of Appeal that is already filed irregularly out of time. That asking the court to grant extension when a Notice of Appeal is already filed is tantamount to asking the court to make a decision on the competence or otherwise of the Notice of Appeal, a power that this court does not have under **section 7** of the Appellate Jurisdiction Act. The Plaintiff/Respondent submitted that it is only the Court of Appeal that has powers to grant the extension sought by the Applicant.
5. On stay of execution, the Plaintiff/Respondent's learned counsel argued that the court has jurisdiction under **Order 42 Rule 6 (4)** of the Civil Procedure Rules only after the Notice of Appeal has been filed. Counsel therefore urged that at the moment, this court has no power to grant a stay order.

**Arguments for the Defendant/Applicant**

6. Ms. Muyaa, learned counsel for the Defendant/Applicant submitted that the decision to extend time within which to file the Notice of Appeal is discretionary on the court. She relied on the case of **Ordermann Company (K) Limited v Ferdinand Kombo [2007] eKLR** in which the Osiemo, J. quoted with approval the decision of the Court of Appeal in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. Nairobi 251 of 1997 as follows:

***“In LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI- CIVIL APPLICATION NO. NAIROBI 251 OF 1997 the Court of Appeal said:***

***'It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary.'***

7. While relying on section **1A and 1B** of the Civil Procedure Act, Cap. 21, Ms. Muyaa urged the court to apply its inherent power and discretion in a wider sense with a view to serving justice.
8. Ms. Muya submitted that although the Court of Appeal Rules define “court” to mean the Court of Appeal, the High Court has the power under **section 7** of the Appellate Jurisdiction Act to enlarge time within which to give notice of intention to appeal. Counsel urged that this court has jurisdiction under **Order 50 Rule 6** of the Civil Procedure Rules to enlarge time even if the stipulated time has already expired.
9. The Defendant's/Applicant's learned counsel further submitted that since the decision whether to extend the time or not is discretionary on the court, a preliminary objection cannot be raised on the exercise of the court's discretion.

### **Reply by the Plaintiff/Respondent**

10. In a rejoinder to the submissions by counsel for the Applicant, Mr. Jengo conceded that the power to extend time as sought by the Defendant/Applicant is discretionary on the court and that a preliminary objection cannot be sustained on a question that calls for the exercise of the court's discretion. However, Mr. Jengo sought to clarify that the Plaintiff's/Respondent's preliminary objection is on the court's jurisdiction to grant the orders sought which is a matter of law.
11. The Plaintiff's/Respondent's counsel submitted that although section **1A and 1B** of the Civil Procedure Act gives the court inherent power to act in the interest of justice, that power cannot be exercised in violation of the express provisions of the law and where the court is lacking in jurisdiction.
12. Mr. Jengo argued that the procedure as to filing of the Notice of Appeal is governed by the Appellate Jurisdiction Act and hence the provisions of **Order 50 Rule 6** of the Civil Procedure Rules do not apply.
13. While admitting that this court has the jurisdiction to extend the time within which to file the notice of intention to appeal, Mr Jengo argued that such power is futuristic in nature and cannot be applied in a case, like this one, where a Notice of Appeal is already irregularly on record. He urged that the jurisdiction cannot be exercised to regularise what is already improperly filed.

### **The Issues for Determination**

14. In my view the main issue for this court's determination is whether the High Court has jurisdiction to extend the time within which to give a notice of intention to appeal in a case where a Notice of Appeal is already filed out of time.

### **Analysis and Determination**

15. **Section 7** of the Appellate Jurisdiction Act provides as follows:

***“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”***

16. That section, no doubt, gives this court the jurisdiction to extend the time for giving notice of intention to appeal from judgment of the High Court. In deed, both parties agree that this court has jurisdiction to so extend the time. The Respondent's preliminary objection however, in my understanding, is that time can only be extended before the Notice of Appeal is filed and not after the Notice of Appeal has been filed out of time. Put differently, the Respondent argues that the Applicant should have first sought leave to extend time before filing the Notice of Appeal. That since the Notice of Appeal has already been filed out of time without leave of court, the court cannot act retrospectively, extend the time now and deem the Notice of Appeal as properly filed.
17. The judgment was delivered by this court on 20th March 2014. The Notice of Appeal was filed by the Defendant/Respondent on 15th April 2014, 25 days after the judgment. Under Rule 74 (1) and ((2) of the Court of Appeal Rules, the Notice of Appeal should be lodged with the Registrar within 14 days of the judgment. The Notice of Appeal herein was therefore filed 11 days late.
18. In my view, the purpose of notice of appeal is to notify the concerned party or parties of one's intention to appeal. The purpose of time limitation on when the notice should be lodged and served is to curb uncertainty in the litigation process and to ensure that a party is able to face an appeal with more predictability or in case where no appeal is filed, to sit back and enjoy the fruits of litigation without anxiety.
19. That as it may be the argument of the Plaintiff finds favour with me. Indeed a closer look at Section 7 of the Appellant jurisdiction shows that the High Court is merely given the power to extend time to give notice of intention to appeal. That Section does not give the High Court any further power relating to an appeal to the Court of Appeal.
20. It is Rule 4 of the Court of Appeal Rules that gives the Court of Appeal general power to extend time limited under those Rules. That Rule provides-

**“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

21. It is Rule 74 of those Rules, as stated before, that limits the period within which a Notice of Appeal should be filed. That Notice should be filed within fourteen (14) days of the date of the decision being appealed from. If the Notice is filed out of the period provided by that Rule it is only the Court of Appeal which can extend the time of filing the Notice. The Plaintiff in my view was right to say that once the Defendant filed the Notice of Appeal out of its time, it removed itself from the ambits of the High Court. The filing of that Notice outstayed the jurisdiction of the High Court. That is the specific position of the law, and that being so the overriding principle in the Civil Procedure Act cannot be applicable.
22. It is for the above reasons that the Preliminary Objection dated 21<sup>st</sup> May 2014 succeeds with costs. Accordingly the Notice of Motion dated 17<sup>th</sup> April 2014 is struck out with costs to the Plaintiff.

**DATED and DELIVERED at MOMBASA this 26<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**