



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CIVIL SUIT NO. 567 OF 1999

JUSTUS CHANIA LYUNGA PLAINTIFF

V E R S U S

STANDARD CHARTERED BANK (K) LTD DEFENDANT

RULING

1. The Defendant's application dated 28th February 2012 was for the review of the judgment delivered herein on 29th September 2011. That application was dismissed on 4th April 2013. The Defendants ought to have appealed against that dismissal within 14 days that is by 18th April 2013.
2. The Defendants have now approached this Court with their Notice of Motion dated 9th May 2013. It is brought under Section 7 of the Appellants Jurisdiction Act Cap 9 seeking an order that this Court does enlarge the time within which the Defendant may file its Notice of Appeal. Section 7 is in the following terms-

“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.”

3. The Defendant according to its legal officer was aggrieved by the ruling of 4th April 2013. That it is therefore keen to pursue its intended appeal. The reason the Defendant gave for the delay in filing the Notice of Appeal is set out in their legal officer's affidavit as follows-

“6. THAT the delay in filing our Notice of Appeal was

occasioned by the necessity to inform and consult the numerous authorities of the Defendant/Applicant both in Kenya and at the head office in England and having reviewed the impact the decision would have upon the Defendant/Applicant especially on its industrial relations, it was decided that there is a need to appeal.

7. ***THAT the impact of the decisions which have been made in this matter will occasion extensive loss by the Defendant/Applicant especially with respect of its relationship with its employees.***
8. ***THAT I am advised by the Defendant's/Applicant's Advocates on record which advice I verily believe to be true that the intended Appeal is meritorious and has a good chance of success in***

that the Court did not, amongst other things, consider that the jurisdiction to review a judgment is unfettered and that the judgment sought to be reviewed is on the face of it an absurdity and its effect is to unjustly enrich the Plaintiff/Respondent.”

4. The application was opposed by the Plaintiff. By his replying affidavit the Plaintiff stated that the Defendant took five months from the date when the judgment was read in this matter before filing their application for review of that judgment. Further that after the review application was dismissed the Defendant took 34 days to file the present application. The Plaintiff therefore deponed as follows-

“That I therefore do not accept that the present application has been brought without undue delay.”

5. Further the Plaintiff deponed that the Defendant ought to have known the impact of the judgment herein delivered on 29th September 2011. That since this case was not a test suit the Defendants the depositions that this judgment would adversely impact it is not understood.
6. One of the Defendants' authorities is the case **FAKIR MOHAMMED -VS- JOSEPH MUGAMBI & 2 OTHERS [2006]e KLR** where the Court of Appeal considering an application for the extension of time to file an appeal stated –

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

7. The Plaintiff relied also on various authorities which I have had occasion to review. In the case **LEOSILA MUTISO -VS- ROSE HELLEN WANGARI MWANGI C.APP. NO. NAI 251/1997 (U/R)** the Court stated-

“It is now settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this 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 the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

8. In my determination on whether the Defendant ought to be granted leave to file the Notice of Appeal out of time I am of the view that I should consider-

- The length of the delay
- The reason for the delay
- Prejudice on either party

9. On the length of time the Defendant delayed by 34 days in filing the present application the Notice of Appeal ought to have been filed by 18th April 2013. However, in my view the Court needs to look at the totality of the delay from the date the judgment was delivered. Judgment was delivered in favour of the Plaintiff on 29th September 2011. The Defendant did not file an appeal against it but instead filed an application dated 28th February 2012 seeking to review that judgment. That application was filed five months after the judgment was delivered. At this point I wish to state that I am in agreement with the submissions of the Plaintiff that the Defendant ought to have known the impact of that judgment from September 2011. It did not have to wait until the year 2013 when the review application was dismissed to seek instructions both locally and abroad.

10. In considering the reasons for the delay I find that the Defendant had a duty to place material

before the Court to enable the Court to exercise its discretion in extending time. Other than bear statement in their affidavit the Defendant did not attach any evidence of communication with their office both here and abroad. In any case, it does not escape my attention that the Defendant is a limited liability company registered in Kenya. As such, it is expected that the decisions regarding that Company are made by the Board of Directors based in Kenya.

11. Is there prejudice in any party? In considering this limb it is important to balance the parties rights. The Plaintiff filed this case in 1999. This was following his dismissal from the Defendants' employment in April 1992. The Plaintiff therefore has been out of the employment now for 21 years. This Court by its judgment of September 2011 found his dismissal to have been wrongful and awarded him damages. The Plaintiff in my view has a right to enjoy the fruits of his long awaited judgment. It is that right that I will balance with the Defendants' prayer for extension to file a Notice of Appeal. I will do so by repeating the words of the Plaintiffs learned Counsel which are in his submissions where he stated therein that litigation must come to an end. In this regard let me also refer to the holding of the case **REV. JOSEPH MUGO MUCHIRA -VS- NJERI ZAINABU JUMA & ANOTHER CIVIL APP. NO. NAI 326 OF 1995** where the Court of Appeal stated-

“Whilst rule 4 of the Rules of this Court gives me unfettered discretion (subject to requirements of fairness to both sides) to extend time, it does not give me power to grant such extension for the asking. The interests of the Respondent must also be considered ... It was incumbent upon the Applicant to move with speed and alacrity after its appeal was struck out. The 75 days period taken up in the application, in my view is inordinately long and disposes me towards not granting the application.”

12. The Defendant has failed to place before Court material to enable the

Court exercise its discretion in its favour and accordingly the delay of 20 days is inordinate and not explained. Further considering the fairness of both parties it is in my view best served by disallowing this application.

13. In the end the Notice of Motion dated 9th May 2013 is dismissed with

costs to the Plaintiff.

Dated and delivered at Mombasa this 31st day of October, 2013.

MARY KASANGO

JUDGE