REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 420 OF 2011

KENYA POWERS & LIGHTING COMPANY LIMITED……….............…..APPLICANT

-VERSUS-

KHAN NASSIR RUSTAM.............…RESPONDENT

RULING

1. The application before me is a Notice of Motion by the Applicant dated 31st May, 2011 under Order 50 Rule 6 of the Civil Procedure Act. It seeks that the court do extend time for filing the Applicant's application against the judgment and decree of Honourable R. Kirui in CMCC 2490 of 2003.

2. The grounds for the application are *inter alia* that:

- The judgment was delivered on 20th April, 2011 in the absence of the parties' counsel, and the Applicant only got to know of the judgment from the Respondent by its counsel's letter of 18th May, 2011.
- The Applicant's efforts to trace the court file thereafter were unsuccessful.
- The delay in filing the appeal was not intentional, but was occasioned by circumstances beyond the control of the Applicant.
- The Applicant has an appeal with a high probability of success.

3. The application is supported by the affidavit of Owiti Owuor, a legal officer of the Applicant and is opposed by the Respondent, by Replying Affidavit. The key ground is that the application ought to have been made to the subordinate court in the first instance.

4. Parties filed written submissions to dispose off the application. The Applicant submitted that Section 79 G of the Civil Procedure Act provides for appeals within thirty days, but that an appeal may be admitted out of time; the relevant court file was missing from the court registry; and that the Applicant managed to get a handwritten copy of the Honourable Magistrates judgment which it annexed to its affidavit.

The Applicant argues that the subordinate trial court does not have jurisdiction to allow an application for extension of time. Further, that the Respondent stands to suffer prejudice if the application is allowed.

5. The Applicant relied on HCC Misc. 26 of 2004 **Chesumot Ltd vs Richard Kipkurui Maritim** [2006] e KLR where the court said:

***"The delay of sixteen days in filing the appeal is not such that this court can say the Applicant was indolent. Notwithstanding the reasons that caused the Applicant to delay in the filing its appeal, once it made the decision to file the appeal the Applicant timeously moved to court and sough extension of time to file the appeal out of time*."**

6. The Respondent's submissions are that the Applicant has shifted blame for disappearance of the court file to an undisclosed third party. It had also failed to disclose to the court what steps it took (if at all) to trace the court file, for instance any letter it wrote seeking facilitation to file its appeal.

The Respondent relies on **Fakir Mohamed Vs Jospeh Mugambi & Two others** in **Civil Application Number 332/2001 Nyeri** [2005] e KLR. Counsels cites the Court of Appeal as stating as follows:

"The exercise of this discretion under Rule 4 has followed a well beaten path since the structure of** "sufficient reason**" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors that the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding of the application is granted, the degree of prejudice to the Respondent if the application is granted. The effect of delay of public administration, the importance of compliance with time limits, the resources of the parties…"

Although the quotation relates to the Court of Appeal Rules, the quotation is instructive for illuminating the scope of factors to consider in such application for extension of time.

7. Upon considering the parties submissions in this matter, the first issue is **whether the application should have been filed with subordinate trial court.**

The provision of Section 79G which was invoked in this application provides 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 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 an sufficient cause for not filing the appeal in time."

8. From the above provision, it is clear that appeals are to be made to the High court within the specified timeframe. It is that court to which the appeal is made that would be involved in determining **whether or not such appeal is within time.** Further, in determining that timeframe, a lower court's certification of the time for preparation and delivery of the decree is considered in reckoning the time for exclusion where there is delay. Finally, it is also clear that it is the court to which the appeal is made and which determines whether it is within time, that may also admit the appeal out of time. That is, clearly, the High Court.

I hold that this is the position on the first issue, and the High Court is the court to which such application is made.

9. The next issue is **whether the Applicant has satisfied the court it had "sufficient"cause for not filing the appeal in time, resulting in a proper application for extension of time under Order 50 Rule 6.** That order empowers the court which is determining the application to enlarge time **provided** that the costs of such application is borne by the party so as applying. In determining whether there was

“sufficient cause” for the Applicant to delay in filing the appeal I have considered the following:

- The judgment of the subordinate court was delivered on 20th April, 2011 in the absence of the parties’ counsel. That crucial fact is stated in the judgment itself.

- The Respondent’s letter exhibit **“OA1”** notifying the Appellant of the judgment is dated 18th May, 2011, although it is stamped received by the Appellant’s counsel on 18th May, 2011, only two days before the lapse of the time for filing appeals.

Even assuming the court file was traceable, if the Appellant’s counsel had to notify the Appellant of the judgment and take instructions to appeal, the appeal would, in any event, have been out of time.

10. The Appellant filed its application on 2nd June 2011, within fifteen (15) days of receiving notification of the judgment. I am satisfied that there was no indolence on the part of the Appellant and that the delay was for only fifteen days as in the **Chesumot** case. The explanation for delay, although not supported by any written documentation, that the file could not be immediately traced, is sufficient cause for delay in the circumstances of this case. Indeed in the case of **Savings & Loan vs Kisumu County Counsil [196] LLR** 4207 the Court of Appeal held that leave to serve a notice of appeal can be granted even if the delay is due to the advocate’s mistake and the delay is small and there is an arguable appeal.

11. In this regard, I have also taken into account that the Applicant has attached its memorandum of appeal together with the judgment of the lower court which I have perused, and that in granting the application, no prejudice will be suffered by the Respondent.

12. Given all the foregoing, I allow the application and hereby direct that the Applicant do file the appeal within fourteen (14) days from the date hereof.

The Applicant shall carry the costs of the application.

Dated, signed and delivered this 26th day of June 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:
1.Judge: Hon. R.M. Mwongo

2.Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a) ……………………………………………………………………………….
b) ……………………………………………………………………………….
c) ……………………………………………………………………………….
d)……………………………………………………………………………….