REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CIVIL APPL. NO. 586 OF 2009

MANSONHART (K) LTD. .....APPLICANT

VERSUS

CHARLES WAINAINA .....RESPONDENT

R U L I N G

The application by the applicant/appellant is dated 8th October 2009 and is brought under Section 3, 3A and 79G of the Civil Procedure Act seeking leave to appeal out of time. The grounds for the application are basically that the judgment of the lower court was delivered and the taxation of the plaintiff's bill of costs was taxed without notice to the defendant/applicant. Further, time had since lapsed when the applicant became aware of an imminent execution against itself.

The grounds are supported by the facts contained in the supporting affidavit, dated 8th October, 2009 deponed by the applicant's learned counsel **Mr. Chemwok**, who reiterated the grounds in his submissions and contended that upon learning of the court's judgment, the applicant moved fast and requested for the necessary proceedings from the lower court which proceedings were delayed by the court and a certificate issued to that effect. Further, the entire decretal amount was deposited in court by the applicant.

Mr. Chemwok went on to submit that the respondent would not be prejudiced by the hearing of the appeal and that the delay in filing the same was occasioned by the advocate for the respondent who effected service through an unused postal address. Further the applicant cannot be held guilty of laches as he moved with speed but was delayed by the lack of proceedings from the lower court.

The respondent through the learned counsel, **Mr. Mbugua**, opposed the application on the basis of the grounds of objection dated the 23rd November, 2010. In his submissions, Mr. Mbugua took issue with the manner in which the application was filed and contended that it was filed under the wrong provisions of the law i.e under Section 3, 3A and 79G of the Civil Procedure Act instead of Section 89 of the Civil Procedure Act and Order 50 of the Civil Procedure Rules. Consequently the application does not conform with the set procedure. Mr. Mbugua further contended that the application was filed belatedly as the lower court case was filed in 1998 and judgment thereof was delivered on 11th January, 2010.

After delivery of the judgment the applicant failed to file the appeal within 30 days. Later the assessment of costs was done after the bill was duly served upon the applicant.

Mr. Mbugua submitted that service could not be effected through the registered office of the applicant's advocate as it had ceased to operate without the respondent's knowledge. Consequently the respondent was forced to serve by way of registered post. While urging this court to dismiss the application with costs, Mr. Mbugua submitted that a successful litigant ought not be denied the fruits of his judgment.

The rival submissions by both the applicant and the respondent have been considered by this court. In an application of this nature, the guiding principles were set out by the Court of Appeal in the case of **Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi C/App. No. 251 of 1997 (Nbi)** which stated therein that;-

"It is now well settled that the decision whether or not to extend the 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 grant."

In this case, the judgment sought to be appealed against was delivered on 2nd February, 2009. Thereafter the applicant had a thirty (30) days period to file an appeal but did not do so.

The judgment was not delivered on 11th January, 2010 as submitted by the learned counsel for the respondent. What was delivered on 11th January, 2010 was a ruling dismissing the applicant's application for stay of execution pending appeal.

The present application was filed herein on 9th October, 2009. This would reflect a delay of about nine (9) months in having the appeal filed since the date of judgment on 2nd February, 2009.

The explanation given for the delay is that the applicant was not notified of the judgment date of the 2nd February, 2009 whereas judgment was initially set for 27th October, 2008 but was adjourned. Further, the applicant became aware of the judgment after receipt of a proclamation for auctioneers. It was then that the applicant's counsel applied for the lower court proceedings which were delayed by the court and a certificate of delay issued to that effect.

The said certificate (annexture marked "MKC 1" in the further affidavit dated 1st March 2010) shows that the proceedings were applied for on 22nd July, 2009, a period of about six (6) months after the delivery of judgment. Clearly, the delay in filing the appeal was inordinate and the explanation given is not satisfactory. Indeed the applicant is guity of laches and for that reason would not be entitled to the exercise of discretion in its favour. Be that as it may, the respondent argued herein that the application is incompetent in so far as it was brought under the wrong provisions of the law. However it may be noted that the incompetence alluded to relates to form or procedure and may therefore not be fatal.

In the case of **Prabhudas & Co. Ltd. Vs. Standard Bank Ltd. (1968) EA. 679,** it was made clear that matters of procedure are not normally of a fraudamental nature. Therefore the fact that the wrong provisions of the law under which an application is brought are cited is a mere irregularity and does not render the application incurably defective unless it goes to the jurisdiction of the court **(see Gatiba Kiarie Vs. Pius Kimani Muhia C/App. No. 235 of 2008 (C/A NBI).** Indeed Order 51 rule 10(2) of the Civil Procedure Rules 2010 provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

On substance, the present application lacks merit. It must and is hereby dismissed with costs.

J.R. KARANJA

JUDGE

(Read and signed this 3rd day of February, 2011

in the presence of Mr. Chemwok for applicant)