



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NYERI

Misc Civil Appli 88 of 2008

LEOPARD ROCK MICO LTD. ....APPLICANT

VERSUS

ELECTRICAL SERVICES LTD.....DEFENDANT

R U L I N G

The applicant, **Leopard Rock Mico Ltd**, has made an application seeking extension of time within which to file an appeal against the decision of the Chief Magistrate's Court, Nyeri delivered on 22<sup>nd</sup> June, 2007. The application is expressed to be brought under *section 79G, 95, 3A* and *section 63 (e)* of the Civil Procedure Act and *Order 50 Rule 1, XLIX Rule 5, XLI Rule 4 (1) (2)* of the Civil Procedure Rules. The grounds in support of the application are stated in the body of the application as well as the supporting affidavit sworn by **Michel Dechauffour**, a director of the applicant company. In the main, the applicant contends that he could not file the appeal timeously because on the date the judgment of the subordinate court was delivered, he was not in court and he had not been given any prior notice that it would be delivered on that day.

**Mr. Mahan**, for the respondent concedes that much and cannot possibly controvert this assertion that the applicant was not notified of the date of the judgment. His only misgiving is that the applicant was not being candid with the court. As far as the respondent was concerned, way back as 24<sup>th</sup> February, 2007, the applicant was aware of the proceedings for it applied for the same. It did so again on 10<sup>th</sup> August, 2007 and 31<sup>st</sup> October, 2007. It was not therefore correct as the applicant had deponed that it only came to know of the judgment when its goods were proclaimed. The applicant took no steps in the matter whatsoever from 22<sup>nd</sup> June, 2007 when judgment was delivered. The delay is thus inordinate and unexplained.

On its part, the applicant besides lack of information regarding the date of judgment, it also makes through **Mr. Liko**, learned counsel unsubstantiated claims of collusion in this matter between the respondent's counsel and one **Nganga Advocates** who apparently was acting for the applicant without instructions.

This court has unfettered discretion to allow an application for extension time. However in doing so the court must be satisfied that the applicant has not been indolent. The court will also consider the length of delay and also reasons for the delay. The court may also wish to consider whether the intended appeal is arguable. See generally, **Halsbury's Laws of England 4<sup>th</sup> Edition volume 37, Chesumot Limited V Richard Kipkurui Maritim Hc.Misc.Civ.Appl.No.26 of 2004** (Kericho- unreported), **Joseph Owotsi Walwanga V Kenya Commercial Bank & Anor C.A. No.Nai.371 of 1999, Joseph Kilingi V Housing Finance Co. (k) Ltd & Anor. C.A. No.Nai 127 of 2001**(unreported) E.T.C. It must however always be understood that the court has unfettered discretion in application of these nature but as it has been stated before this discretion like any other judicial discretion must be exercised on sound reason and not caprice. The exercise of discretion must not be arbitrary or oppressive.

In the instant application, the delay in filing the appeal is about a year. The explanation is that the

applicant was not aware of the existence of the judgment. That cannot be possibly be true going by the record. It cannot be true that the applicant only became aware of judgment when its items were proclaimed on 21<sup>st</sup> February, 2008. Going by its letters dated 10<sup>th</sup> August, 2007 and 31<sup>st</sup> October, 2007, respectively, the applicant must be taken to have known of the existence of the judgment. Further as deposed to by **Harmesh Kumar, Mahan and Mr. Nganga** in an affidavits dated 25<sup>th</sup> April, 2008 and filed in the chief Magistrate's court on 25<sup>th</sup> April, 2008, respectively it is abundantly clear that the said **Nganga** never purported to act for the applicant. It behoves parties who seek the exercise of this court's discretion not to fall short of candour. It is quite apparent to me that the applicant is guilty for lack of candour, which fact alones would disentitle it to the orders sought. Even if I was to assume that the applicant was not aware of the judgment, and that it was got unawares when its goods were proclaimed, one would have expected that a diligent litigant would take the necessary steps to establish the current position of the case. In the instant, case it does not require a rocket scientists to establish that the applicant had just been lax and had not shown any enthusiasm to secure its, position in the suit. One would have expected that being diligent and having a lawyer acting for it in the matter, it could be constantly kept abreast of the progress in the matter. I do not believe that a litigant would merely instruct a lawyer in the matter and sit back expecting miracles. There is therefore inordinate and unexplained delay in prosecuting the matter. Instead of just writing letters to the subordinate court, one would have expected a diligent lawyer to do a little more; walk to the registry and call for the file to appraise one of the progress in the matter. This was not the case here. The court of appeal once said in the case of **Kenya Commercial Finance Company Limited V Mulji Lalji Pindona, Civil Application No.Nai.187 of 1997.**

**“.....It is upto the respondent to satisfy us that despite his due diligence in the matter, the High Court had failed to provide the said proceedings to him, and he, although still interested to file the intended appeal, is unable to do so for no fault of his own. We are far from satisfied that the respondent has shown proper diligence that this court has come to expect of those who seriously pursue their right to appeal. There is a certain limit upto when a successful party can be expected to wait and be deprived of the immediate, fruits of the judgment in his favour.....”**

These propositions apply with equal force to the circumstances obtaining in this case. It was the duty of the applicant to move with speed and alacrity to put in motion the necessary measures that would have resulted in the filing of the appeal without undue delay if it seriously contemplated filing such an appeal. I am far from being convinced that the applicant has so acted. It chose a laid back position in the matter to its detriment. The delay of almost a year plus in filing an appeal is such that this court can say that the applicant has been indolent.

I have looked at the draft memorandum of appeal annexed to the application. However though the intended appeal does not appear to be frivolous, it should not be forgotten that the applicant for reasons best known to it opted not to pursue its defence in the lower court. This fact alone may not hold the applicant in good stead in the appeal.

For all the foregoing reasons I find the application unmerited and is accordingly dismissed with costs to the respondent.

***Dated and delivered at Nyeri this 9<sup>th</sup> day of October, 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**