



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL APPEAL NO. 29 OF 2018

HELLEN KAY HARTLEY.....APPELLANT

VERSUS

ADVENTURE ADRENALIN AFRICA LIMITED.....RESPONDENT

RULING

1. Before me for consideration is the Notice of Motion dated 5th February 2019 brought under Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Section 1A, 3A and 79G of the Civil Procedure Act, Order 42 Rule 32 of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution of Kenya, 2010 and all other enabling provisions of the law. It seeks the following orders:

- 1. That time be and is hereby extended to allow the Appellant herein to file and serve an Appeal out of time.**
- 2. That the Record of Appeal dated 11th December 2018 filed on 13th December 2018 be deemed to have been filed and served on time.**
- 3. Pursuant to prayer 1 and 2 above and for case management purposes, the Appeal herein be and is hereby consolidated with Civil Appeal No.28; Hellen Kay Hartley –v- Adventure Adrenalin Africa Limited dated 11th December 2018 and filed on 13th December 2018.**
- 4. Pursuant to prayer 3 above, the consolidated appeals be heard and determined together.**
- 5. That the costs of this Application be provided for.**

2. The Application is based on the grounds set out therein and supported by the affidavit of Adams K. B. Muthama sworn on 5th February, 2019. It is the Applicant's contention that the business Premises Rent Tribunal delivered its ruling on the Appellant/Applicant's notice of Preliminary Objection dated 22nd May 2017 on 10th November 2017. That in the interests of saving valuable judicial time and consequential costs, the Applicant, rather than approach the court on an Interlocutory Appeal, elected to first have the Reference heard and determined on its merits and thereafter lodge and substantive appeal if necessary. The Reference was ultimately heard and determined by the Tribunal on 16th November 2018 by which date the time limited for filing the appeal in respect of the Tribunal's ruling on the Applicant's Preliminary Objection had lapsed. The Applicant adds that the intended appeal is merited as it raises arguable points relating to the common law principle of freedom of contract which ought to be heard and determined by this court.

3. The Application is opposed by the Respondent through a Replying Affidavit sworn by Anjali Dayaramani on 5th March 2019. It is the Respondent's case *inter alia*, that the Applicant did not contest the clear findings of the Tribunal relating to the jurisdiction either by way of review, setting aside or an appeal, and instead participated in the hearing which culminated in the judgment delivered by the Tribunal on 16th November, 2018. That Memorandum of Appeal was duly filed on 13th December 2018, a period of more than one year since the delivery of the ruling by the Tribunal on 10th November, 2017. The Respondent argues that no good, sufficient or plausible reason has been given why no appeal was filed on time and/or of the delay in filing the same. The Respondent contends that the appeal filed is fatally defective, bad in law and has no merits whatsoever, and that the prayer for consolidation with **HCCA No. 2 8 of 2018** is misplaced and a non-starter as an order for consolidation cannot be granted where there is a non-existent appeal.

4. Ms. Gitari, Counsel for the Applicant submitted that this court has discretion to allow the application and relied on the case of **APA Insurance Limited –v- Michael Kinyanjui Mutwiri (2016) eKLR** which had cited the Court of Appeal decision in **Mwangi-v- Kenya Airways Ltd** where the Court of Appeal listed four matters which the court ought to take into account in deciding whether or not to grant

extension of time to appeal, namely:

i. The length of the delay

ii. The reason for the delay,

iii. Possibly the chances of appeal succeeding if the application is granted; and

iv. The degree of prejudice to the respondent if the application is granted. Ms. Gitari submitted that if the Application is allowed, the Respondent will not be prejudiced as it is in occupation of the suit premises by virtue of the orders of the Tribunal. She also relied on the case of Gerald M'Limbine –v- Joseph Kangangi (2009)eKLR and Asma Ali Mohamed –v- Fatime Mwinyi Juma (2014)eKLR.

5. Mr. Mwaniki, Counsel for the Respondent submitted that the delay of one year one month is inordinate and has not been explained. He added that the appeal has no basis and relied on the case of **Michael Ngondi Karani –v- James Muchiri Nyaga (2015)eKLR** and **E.K.Wachira & Sons Ltd –v- Kagundu & Mukunya Advocates (2015)eKLR**. It was his submission that the Respondent is being prejudiced as it is being made to incur costs.

6. I have considered the Application together with the rival affidavits and the submissions made. There are two main issues for determination in this matter namely:

i. Whether the Applicant deserves to be granted leave to have her appeal filed out of time and the same deemed to be properly filed within the statutory period.

ii. Whether the order for consolidation should be granted as sought.

iii. What orders should this court make?

7. The motion is brought pursuant to the provisions of Section 79G of the Civil Procedure Act which states:

“79 G. 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 the 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 and sufficient cause for not filing the appeal in time.”

8. In my view the proviso to Section 79G of the Civil Procedure Act is that an appeal which is filed out of time can be validated by an application for leave to validate the appeal. In the case of **Gerald M'Limbine –v- Joseph Kangangi (supra)**, Emukule J interpreted that proviso thus and I concur with that holding:

“My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file an appeal and at the same time seeks the court’s leave to have such an appeal admitted out of the statutory period of time.”

9. Factors which courts consider in determine whether or not to allow an application for leave to file an appeal out of time have been discussed by the courts and these include; the length of delay; the chances of the appeal succeeding if the application is granted, and, the degree of prejudice to the respondent if the Application is granted. See the case of **Mwangi –v- Kenya Airways Ltd (supra); Court of Appeal Civil Application No.294 of 2013 (UR 214 of 2014); Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi, Civil Application**. These factors are of course not exhaustive and the court is free to exercise its discretion to extend time after considering all the relevant factors when deciding the matter before it. This was stated by **Waki JA in Fakir Mohamed –v- Joseph Mugambi & 2 Others (2005) eKLR**.

10. In this case, the Respondent had raised a Preliminary Objection challenging the jurisdiction of the Business Premises Rent Tribunal to hear and determine the Reference in **Tribunal Case No. 70 of 2017**. The Tribunal, after hearing the said preliminary objection dismissed the same vide its ruling delivered on 10th November 2017. The Applicant has explained that following the said ruling, and in interests of saving valuable judicial time and consequential costs, she elected to first have the Reference heard and determined on its merits and thereafter lodge a substantive appeal if necessary. The Reference was ultimately heard and determined by the Tribunal on 16th November, 2018. By then, the time limited for filing appeal in respect of the ruling on the Preliminary Objection had lapsed. The Applicant has since filed Appeal against the substantive decision of the Tribunal delivered on 16th November 2018 being **Mombasa ELC Appeal No.28 of 2018**.

11. The order for which leave is sought to appeal against was issued on 10th November, 2017 and this Application was filed on 12th February 2019 (some one year and three months later). The delay in my view was satisfactorily explained to the court by the Applicant. I accept the explanation given for the delay in filing the Appeal late as being logical and rational. Further, the delay in my view has not occasioned to the respondent any prejudice that cannot be compensated by an award of costs. Further, the Applicant has already complied and filed a Record of Appeal. It is for the above reasons that I hereby grant the applicant leave to file an appeal out of time and the appeal herein as filed is hereby deemed to be duly filed within the extended period.

12. On the issue of whether the appeal herein should be consolidated with **Mombasa ELC Appeal No. 28 of 2018**, it is not in dispute that

both appeals arise from the same subject matter, the parties in both cases are the same and the issues are essentially the same. In the case of **Stumblers & Another –v- Potgeiter (1970)EA 323**, it was held as follows:

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

13. It cannot therefore be disputed that the court has power to consolidate suits in appropriate cases. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. This is with a view to furthering the expeditious disposal of cases and to ensure proper case management.

14. Considering all the above, it is my view that this is a proper case for consolidation. Ultimately therefore, having considered the application dated 5th February 2019, I make the following orders:

- 1. The appeal herein is hereby admitted out of time and deemed to be duly filed and served within the stipulated statutory period.**
- 2. This case and Mombasa ELC Civil Appeal No. 28 of 2018 are hereby ordered consolidated for purposes of being heard and determined together.**
- 3. ELC Civil Appeal No. 28 of 2018 shall be the lead file for purposes of filing any further pleadings and recording of proceedings**
- 4. The Deputy Registrar is directed to call for submission of the lower court record for admissions of this appeal to hearing expeditiously.**
- 5. Costs of this application shall abide the outcome of the Appeal.**

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 9th day of July 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Gitari for Appellant

Thiaka holding brief for Mwaniko for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE