Transhaul Logistics Ltd v Afristonex Importers Ltd (Application E816 of 2022) [2024] KEHC 1202 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1202 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

APPLICATION E816 OF 2022

FG MUGAMBI, J

FEBRUARY 9, 2024

BETWEEN

TRANSHAUL LOGISTICS LTD ..... APPLICANT

AND

AFRISTONEX IMPORTERS LTD ..... RESPONDENT

RULING

1. In a Notice of Motion dated 10th November 2022, Transhaul Logistics Ltd, the prospective appellant, sought to set aside the Court's judgment delivered on 24th June 2022 (the judgment) and for leave to file their appeal out of time.

2. The application is premised on the grounds on the face of the application and supported by the affidavit of Geoffrey Wambua sworn on 10th November, 2022.

3. The basis for this application is outlined in the application and the supporting affidavit of Geoffrey Wambua, sworn on November 10, 2022. The applicant asserts that the judgment was delivered on 24th June 2022 in the absence of the applicant's counsel who only became aware of it on August 2, 2022, and that a copy of the contested judgment was not obtained promptly. The applicant therefore justifies the delay in bringing the application, deeming it excusable.

4. The application is opposed by way of a replying affidavit sworn by Amar Muchhala, a director of the respondent, on 4th April, 2023. He asserts that Geoffrey Wambua is an improper party in the lawsuit, contending that he lacks the legal standing to bring the present application since the applicant is a separate legal entity and the said deponent was not an original party in the lower court's suit.

5. He further argues that the delay in filing the current application is unjustifiable as no evidence has been presented to illustrate the efforts made by counsel in obtaining the judgment after it was delivered.

6. In any case, the respondent argues that the application was drafted on November 10 and only filed on November 17, 2022, further illustrating the unjustifiable delay. The respondent equally argues that the intended appeal lacks merit and is not arguable and for these reasons the application should therefore be dismissed.

7. The application was canvassed by way of written submissions, with the applicant filing their submissions on 19th June 2023 and the respondent filing theirs on 27th June 2023.

Analysis

8. I have carefully considered the pleadings, evidence, written submissions as well as the authorities cited by the rival parties. Two issues arise for determination and that is:

   i. Whether the application dated 10th November 2022 is fatally defective on account of its supporting affidavit being incompetent for want of capacity by the deponent and

   ii. Whether the prayer for extension of time to file the appeal out of time is merited.

9. On the first issue, the record before me indicates that indeed the parties before the trial court were Transhaul Logistics Ltd And Afristonex Importers LTD, the same parties in the application. The supporting affidavit is sworn by a director of the applicant company. The applicant submits there was an inadvertent error in which his capacity as a director of the applicant company was erroneously omitted in paragraph 1 of the supporting affidavit.

10. I refer with concurrence to the observation of the Court in *Dominion Farm Limited V African Nature Stream & Another,* Kisumu HCCC No. 21 of 2006 where it was stated that:

> "Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice."

11. Additionally, I also refer and concur with the holding by Ringera, J (as he then was) in the case of *Microsoft Corporation V Mitsumi Computer Garage Ltd & Another,* Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460 that:

> "Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue."

12. On the basis of these judicial pronouncements I am satisfied that the omission by the applicant to indicate that he was swearing the affidavit as a director of the applicant was inadvertent. It is an error that does not go to the jurisdiction of the Court. The respondent has not shown what prejudice it stands to suffer, noting that the facts and parties to the suit are well known to both parties from the trial Court.

13. This is a proper case in my view to invoke article 159 (2)(d) of the *Constitution* of Kenya which requires the courts to administer justice without undue regard to technicalities of procedure. It is also a proper case to invoke section 3A of the *Civil Procedure Act* for the ends of justice. The applicant has sought to amend the affidavit and insert the word "director of". I find such amendment will cure the error in the affidavit and I proceed to allow the amendment by the applicant and to determine the application on merit.

14. Moving on to the second issue, the instant application is premised on Section 95 of the *Civil Procedure Act*, which provides thus:

> "Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

15. Also relevant is Section 79G of the *Civil Procedure Act* which 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 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."

16. Arising from these provisions, there are sufficient judicial pronouncements on the considerations to be considered in an application for extension of time. These considerations are well summarized by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V The Independent Electoral and Boundaries Commission & 7 Others*, [2014] eKLR where the Court stated that:

    i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

    ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

    iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

    iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

    v. Whether there will be any prejudice suffered by the respondents if the extension is granted;

    vi. Whether the application has been brought without undue delay;

    vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

    viii. The degree of prejudice to the respondent if the application is granted.

17. On the face of it, the impugned judgment indicates that it was delivered on 24th June 2022. The respondent does in fact acknowledge this, meaning that the window period for filing an appeal lapsed on 24th July, 2022. Although the applicant avers that its advocate was not present when the judgment was delivered, no evidence has been provided to support this assertion. Even if this were true, Counsel

for the applicant argues that the impugned judgment came to his attention on 2nd August, 2022 but does not explain how he learnt about it or what transpired in the period between 24th June 2022 and 2nd August 2022 when it came to his knowledge that the judgment had been delivered.

18. The applicant has attached copies of the letters addressed to the Chief Executive Officer dated 2nd August, 2022 and 6th September, 2022 both of them seeking certified copies of the judgment. The applicant does not account for the time in between and specifically there is no evidence of follow up after writing these letters although the applicant purports to have made numerous trips to the registry.

19. Moreover, the allegation that the file was missing hence aggravating the delay is also not supported by evidence neither is there evidence that the signed judgment was only delivered to the applicant at the end of September as alleged.

20. And then there is the further delay of almost 2 months after the judgment was allegedly delivered in September, up to 10th November 2022 when the Memorandum of Appeal is dated. The applicant does not deny that the Memorandum of Appeal was filed on 17th November 2022, a week after it was filed and served on the respondent in February 2023 another 3 months upon filing.

21. Notably, the applicant does not respond to these submissions raised by the respondent. The affidavit of service dated 17th April 2023 however confirms that even this application though dated 10th November 2022 was not served until 14th February 2023, and this is not withstanding that it was served on the previous Firm of Advocates on record for the respondents. The delay is inexcusable.

22. While I am therefore alive to the fact that the court ought not to shut its doors against litigants who seek legal redress as was held in Rhoda Wairimu Karanja & Another V Mary Wangui Karanja & Anor, [2014] eKLR, taking all these factors into account, I am not convinced that the applicant is deserving of the extension of time prayed for.

23. The chain of events in this case points to deliberate indolence by the applicant right from the point of obtaining the judgment, filing and serving the Memorandum of Appeal as well as filing and serving this application for extension of time. There were multiple delays in all of these processes.

24. It would be wrong for this Court to aid the applicant in its unexplained indolence. My reading of numerous judicial decisions is that indolence is not an excuse for expansion of time and unless a delay can be sufficiently explained, then such expansion of time should not be allowed. The delay in this case would prejudice the Constitutional rights of the respondent to have this dispute determined without delay, as interdicted by article 159 of the *Constitution*.

Determination

25. Having so found, the application dated 10th November 2022 is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 9TH DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE