Nairobi Beaty World Limited v Sime Darby Oils Professionals SDN.BHD (Civil Miscellaneous Application E014 of 2024) [2024] KEHC 11658 (KLR) (Civ) (24 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11658 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL MISCELLANEOUS APPLICATION E014 OF 2024

AN ONGERI, J

SEPTEMBER 24, 2024

BETWEEN

NAIROBI BEATY WORLD LIMITED ..... APPLICANT

AND

SIME DARBY OILS PROFESSIONALS SDN.BHD ..... RESPONDENT

RULING

1. The application dated 9/1/2024 is coming for consideration in this ruling.
2. The applicant is seeking for the following prayers;
    i. That this application be certified as extremely urgent and to be heard at the earliest instance on a priority basis.
    ii. That this honourable court be pleased to grant the applicant leave to appeal out of time against the ruling delivered by the Assistant Registrar of Trade marks on the 9th day of April, 2021; and
    iii. That the annexed appeal be deemed as duly filed.
    iv. That the costs of this application be dispensed with.
3. The application is supported by the affidavit of Abdirahman A. Hassan sworn on 9/1/2024 as follows;
    i. That the delay in filing the appeal was not intentional but was caused by the Applicant's previous advocates who filed an appeal via memorandum of appeal as opposed to a notice of motion application.
    ii. That the previous advocate on record failed to update the applicant that he had been directed to file a proper appeal within 10 days.

iii. That the applicant was not able to reach the previous advocate despite numerous calls.

iv. That the intended appeal is meritorious and arguable and should the orders sought not be granted the appeal will be rendered nugatory.

v. That the question of the rightful ownership of the trademark is extremely weighty for reasons that the applicant's business continues to be prejudiced, occasioning a strain on his livelihood and that of his employees.

vi. That had the previous advocate been vigilant the appeal would have been filed on time.

4. The respondents filed a replying affidavit opposing the application in which they stated that this application was only prompted by the infringement action lodged by the respondent in its CCOMM NO. E604 of 2023 on 7/12/2023.

5. The applicant submitted that on the surface it may appear that the period of delay should be considered from 9/4/2021 when the ruling of the Assistant Registrar of trademarks was delivered.

6. However, the applicant had filed an appeal and on 24/1/2023, the court directed that the appeal was defective in form and a proper appeal should be filed within 10 days.

7. That, the failure to comply with directions was due to uncontrollable circumstances that call for compassion.

8. The applicant further submitted that the intended appeal holds great significance than it may appear. That employees have been kept out of work and directors kept out of business on the basis that the applicant's products are counterfeit.

9. Further, that the applicant's advocates on record has been undergoing severe, medically draining series of cancer setbacks and it was not easy to get him to depose the affidavit which is now filed and served.

10. The respondents on their part submitted that on 24/1/2023, the Hon Justice C. Meoli pronounced herself on the applicant's motion declining the prayers sought and gave the applicant 10 days from the date of the ruling to lodge a proper appeal.

11. That the applicant refused to heed the court's directive and instead lodged a Notice of Appeal to the Court of Appeal which was also dismissed for being defective.

12. The respondent said that the issue regarding the sickness of applicant's previous advocate is being raised for the first time during the submissions and the same is not supported by evidence.

13. Further that the period within which the appeal was to be filed has long lapsed and the applicant was not keen on filing a proper appeal.

14. The sole issue for determination is whether the applicant should be granted leave to appeal out of time.

15. I find that the applicant was granted an opportunity to file a proper appeal but failed to do so.

16. This court has a wide discretion to grant a party leave to appeal out of time. However, the said discretion should be exercised judicially upon certain principles.

17. In the case of Thuita Mwangi v Kenya Airways Ltd [2003] eKLR, the Court of Appeal held that;

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary".

18. In the case of Leo Sila Mutiso v. Hellen Wangari Mwangi [1999] 2 EA 231 the Court set out the principles that guide this Court in such an application seeking extension of time as follows;

> " 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 granted."

19. I find that the reasons advanced for the failure to comply with the timelines were delays occasioned by the mistakes or omissions of the applicant's Advocate and no fault has been attributed to the applicant.

20. In the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR, the Court of appeal held that;

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

21. It is not in the interest of justice to punish a party for the mistakes or omissions of his Advocate.

22. In the case of Mwai V Murai No. 4 (1982) KLR Madan JA said as follows;

> " A mistake is a mistake, it is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by Senior Counsel though in the case of Junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake . The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

23. Again in the case of Philip Kelpto Chemwoto & Another V Augustine Kubende (1986) KLR 492, the Court of Appeal was categorical that;

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits"..... I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purposes of deciding the rights of the parties and not for the purpose of imposing discipline".

24. The respondent has not stated what prejudice they would suffer if the application is granted.

25. Article 159 (2) (d) of *the constitution* states that justice should be dispensed without undue regard to procedural technicalities.

26. In the case of Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR, the Supreme court stated as follows;

> " In the Law Society case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus:
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> "Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis".

27. I find that this case is appropriate for the application of Article 159 (2) (d) of *the constitution* in favor of the applicant.

28. The application dated 9/1/2024 is allowed for reasons that it has not been shown that the Respondent will suffer any prejudice that cannot be compensated by an award of costs.

29. The applicant is granted an extension of 10 days to file the intended appeal.

30. However, the applicant to pay the costs of the application to the respondents assessed at Kshs.20,000=.

31. This file is accordingly marked as closed.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent