



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 73 OF 2015

STEPHEN OWINO.....APPELLANT/APPLICANT

-VERSUS-

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

POWER ENGINEERING INTERNATIONAL LIMITED.....INTERESTED PARTY

RULING

1. This ruling is precipitated by the Notice of Motion dated 3rd July, 2020 filed by the appellant/applicant and supported by the grounds set out on its face and the facts stated in the affidavit of advocate J.A. Oriema Okoth. The applicant is seeking the substantive orders for leave to appeal out of time against the judgment delivered by this court on 10th December, 2019; for leave to file the notice of appeal and to apply for the proceedings out of time; and that the notice of appeal be deemed as being properly filed upon grant of the preceding orders.
2. Advocate James Nyiha has sworn a replying affidavit on behalf of the respondent and in reply to the Motion.
3. Pursuant to the orders made by this court on 15th July, 2020 the parties filed and exchanged written submissions on the application. From the record, the interested party did not file any documents in respect to the Motion.
4. I have considered the grounds presented on the face of the Motion; the facts deponed in the respective affidavits supporting and opposing it; and the rival submissions together with the authorities cited.
5. A brief background of the matter is that a dispute emanated amongst the parties, with the interested party lodging a complaint against the applicant before the respondent. Upon hearing the parties, the respondent convicted the applicant on various counts of breach of trust and dishonourable conduct, and further ordered the applicant to pay to the interested party a sum of Kshs.1,539,948.88, among other reliefs sought.
6. Being aggrieved by the decision of the respondent, the applicant moved this court by way of an appeal, essentially arguing that there did not exist any contractual or fiduciary relationship between the applicant and the interested party. Upon hearing the parties, this court dismissed the appeal with costs to the respondent and the interested party.
7. The applicant is now before this court seeking for leave to appeal against this court's decision out of time and for extension of time for filing the notice of appeal. Under Section 7 of the Appellate Jurisdiction Act the High Court is given the discretion to extend the time required to either give notice of intention to appeal to the Court of Appeal or to grant leave to appeal out of time.
8. The principles to be applied in considering the subject of extension of time were considered by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** cited in the submissions of both the applicant and respondent. I will address them hereunder.
9. The first and second principles have to do with the extent of delay in filing the appeal and whether the explanation behind such delay is reasonable, and can be answered by looking at the record.
10. Noting that the intended appeal lies with the Court of Appeal, Rule 75(2) of the Court of Appeal Rules dictates that a notice of appeal should be filed within 14 days of the judgment or order being appealed against.
11. In the present instance, upon establishing that the judgment sought to be challenged was delivered on 10th December, 2019 the applicant

ought to have filed his notice of appeal within 14 days from that date. From my perusal of the record, the notice of appeal was filed on 6th July, 2020.

12. Going by the record, the instant Motion was brought close to seven (7) months from the date of delivery of the judgment, which delay the respondent terms as being inordinate. In my view, however, while I note the presence of a delay, I think such delay cannot be said to be inordinate.

13. Concerning the reasons/explanation for the delay, the applicant's advocate J.A. Oriema Okoth states in his affidavit that the advocate who had conduct of the matter left the country and left the file in the hands of a pupil to attend court for delivery of the judgment but that the said pupil neither attended court as instructed nor informed the advocate or any other person in the office. That both the advocate having conduct of the matter and the pupil left the law firm soon thereafter and that the applicant's advocates were only able to secure a copy of the judgment on 29th January, 2020. That by the time the applicant instructed his advocates to lodge an appeal against the judgment, time had lapsed and many offices had experienced closure as a result of the global Covid-19 pandemic. This was echoed in the applicant's submissions.

14. In reply, advocate James Nyiha for the respondent states *inter alia*, that the reasons given are insufficient and remain unsupported by evidence. He goes on to state that going by the explanation, it is clear that the applicant's advocates did not exercise diligence in following up on the judgment.

15. It is not in dispute that the advocate who had conduct of the matter at the time on behalf of the applicant was at all material times aware of the date of delivery of judgment and from the explanation given, this is a clear case of omission was on the part of the advocate. Upon taking into consideration the legal principle that the mistake of an advocate should not be visited upon the client, I find that it would be an injustice for the applicant to be punished as a result. In the circumstances, I will accept the explanation given by the applicant for the delay.

16. The principle touching on whether the appeal is arguable cannot be determined by this court since it is the preserve of the Court of Appeal.

17. In addressing the final principle on prejudice, the applicant on the one hand is of the view that the respondent does not stand to be prejudiced if the orders sought are granted, whereas the respondent on the other hand contends that prejudice will result if the orders sought are granted since the interested party incurred huge expenses and is entitled to enjoy the fruits of its judgment.

18. Notwithstanding the fact that the judgment was in favour of the interested party, who would therefore be lawfully entitled to enjoy the fruits of its judgment, there is nothing to indicate that any prejudice suffered cannot be compensated by way of costs. In view of the foregoing, I am convinced that my discretion will be properly exercised in enlarging the time required for lodging an appeal.

19. In the end, the Motion dated 3rd July, 2020 is found to be meritorious and it is allowed as prayed. Consequently:

a) The applicant be and is granted leave to appeal against the judgment delivered on 10th December, 2019 and to file the notice of appeal out of time.

b) The notice of appeal filed on 6th July, 2020 be and is hereby deemed as properly filed, subject to payment of any requisite fees.

c) The applicant shall ensure to serve copies of the filed notice of appeal upon the respondent and the interested party within 10 days from today.

d) In the circumstances of this case, each party should bear its own costs of the Motion.

Dated, signed and delivered at NAIROBI this 6th day of May, 2021

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

No appearance for the Appellant/Applicant

Mr. Banji for the Respondent

No appearance for the Interested Party