



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 278 OF 2010

KENYA INDUSTRIAL ESTATE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MAKATIAT LIMITED.....1ST DEFENDANT/RESPONDENT

HOSEA KIPLAGAT.....2ND DEFENDANT/RESPONDENT

HELLEN KIMOI KIPLAGAT.....3RD DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 3rd July 2020 wherein the Applicant/Plaintiff seeks the following orders: -

1. Spent.

2. That this Honourable court stays the proceedings in Milimani Commercial and Tax Division Civil Case No. 278 of 2010 pending the hearing and determination of this application.

3. That the applicant seeks leave to file an appeal out of time in the Court of Appeal.

4. That this Honourable court be pleased to extend/enlarge time within which to file and serve a Notice of Appeal out of the prescribed time.

5. That the plaintiff's/applicant's draft Notice of Appeal annexed herein be deemed properly filed and served upon payment of court filing fees.

6. That cost of this application be in the cause.

2. The application is supported by the affidavit of the applicant's Acting Manager Legal Services **Ms Charity Ndeke** and is premised on the following main grounds: -

a) That judgment in this matter was delivered on 8th May, 2019 in favour of the defendants'/respondent herein.

b) That the time within which a party can appeal as of right has such lapsed and the applicant seeks enlargement of such leave period.

c) That the delay was due to unavailability of certified copies of judgment and proceedings requested from the lower court.

d) That premised on the aforesaid inadvertent delay, the plaintiff/applicant did not have sufficient time to lodge their Notice of Appeal in compliance with relevant Court of Appeal Rules.

e) That the delay in filing and serving the Notice of Appeal was not at all intentional on the part of the plaintiff/applicant or advocates.

f) That the delay is not inordinate.

g) That there is a high and probable likelihood that execution may issue at any time if the orders sought herein are not granted.

h) That the plaintiff/applicant have an arguable appeal that raises triable issues thus the need to allow the determination of the intended appeal on merit.

3. The respondents opposed the application through the replying affidavit of the 1st defendant's Managing Director **Mr. Hosea Kiplagat** who avers that the plaintiff was duly notified of the delivery of the judgement and that the same was read on 8th May 2019 in the presence of the plaintiff's advocate. He states that certified copies of the judgment was subsequently supplied by the court on 3rd June 2019 and observes that the delay in filing the appeal is inordinate unreasonable.

4. It is the respondents' case that the decree herein is a money decree in respect to costs payable to them in which case the appeal will not be rendered nugatory if the said costs are paid.

5. Parties canvassed the application by way of written submissions. The applicant conceded that the Notice of Appeal was not filed within the prescribed period and that the time to file the appeal had lapsed thus necessitating the filing of this application.

6. The applicant attributed the delay in filing the appeal to the mistake by the advocate who handled the matter for failing to advise them in good time. It was submitted that this is a matter of public importance owing to the fact that the money advanced to the defendants is tax payers money which they sought to recover.

7. The plaintiff submitted that the delay in filing the Notice of Appeal was not inordinate. For this argument, the applicant cited the decision in **Sundowner Lodge Limited vs Kenya Tourism Development Corporation [2019] eKLR** where the Supreme Court observed that a delay of 4 months is not inordinate.

8. That applicant submitted that no prejudice will be caused to the respondents if the extension of time is granted and that the appeal has high chances of success.

9. The respondents reiterated the contents of their replying affidavit and submitted that the applicant is not entitled to the orders sought in the application.

10. I have considered the application, the response tendered by the respondent and the parties' submissions, I find that the main issue for determination is whether the applicant has made out a case for the granting of the orders sought.

Stay of proceedings.

11. The applicant sought orders for stay of proceedings pending the hearing and determination of the appeal. It is however instructive to note that judgment was rendered in the case by Kasango J. on 8th May 2019. This court is therefore at a loss as to what other proceedings are still pending before this court so as to warrant the granting of the prayer for stay of proceedings pending appeal. It is my finding that the prayer for stay of proceedings is misplaced in the circumstances of this case.

Leave to appeal out of time.

12. The applicant also sought leave to appeal out of time and the enlargement of the time within which to file and serve the Notice of Appeal.

13. On the period of delay in seeking the Courts intervention, the parameter I find appropriate to apply in determining as to whether the applicant has satisfied this prerequisite is that set out in the case of **George Mwendu Muthoni vs Mama Day Nursery and Primary School, Nyeri CA No. 4 of 2014, (UR)**, where extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months.

14. As I have already stated in this ruling, judgment was delivered on 8th May 2019 and the instant application filed more than one year later in July 2020. The applicant attributed the delay in filing the Notice of Appeal to the mistake by their advocate in failing to advise them on time.

15. Courts have taken the general position that the mistake by an advocate should not be visited on their clients. There are however instances where the client cannot escape responsibility and heap all the blame on the advocate. Courts have also held that clients must also be held to account to demonstrate the role they played in following up on their cases at every given time.

16. In **Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**, the Court of Appeal held that in determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled *vis-a-viz* the prejudice to be visited on the opposing party. Our take is that the respondent stood to suffer no prejudice by the claim proceeding on merit. None has been alleged or inferred. On the other hand, the appellant was locked out of the seat of justice and possibly penalized in damages for a claim it maintains has a good defence to.

17. The appellant has also argued that mistakes of counsel should not be visited on an innocent litigant. In the **Tana case** (supra) the Court observed as follows;

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

18. In the present case, I note that the applicant is not your ordinary litigant as it describes itself as a state corporation registered under the Companies Act. I note that the applicant was the initiator of the suit in which case, it should have been vigilant and more aware of the outcome of the case than the defendants.

19. I find that it is expected that a state corporation, with an active, well-functioning legal department manned by a Manager of Legal Services should have kept abreast with the goings on of the court case so as to take any appropriate steps to file the Notice of Appeal in good time. For this reason, I am not persuaded that the reason for the delay in filing the appeal, as explained by the applicant’s deponent, is plausible.

20. My take is that even though the power to extend time within which to file pleadings is discretionary in nature, such power should be exercised judicially and in the most deserving cases. Be that as it may and my above findings notwithstanding, this court takes cognizance of the fact that the right to appeal is a fundamental right recognized under the Constitution under the right to a fair trial. For this reason, I will reluctantly grant the applicant leave to appeal out of time and extend the time within which the applicant should file and serve the Notice of Appeal

21. Consequently, I direct the applicant to file and serve the Notice of Appeal within 14 days from the date of this ruling.

22. I grant the costs of the application to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 15th day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Onyango for Defendant /Respondent

Mr. Omagwa for the Applicant.

No appearance for the Respondent.

Court Assistant: Sylvia.