



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO. 84 OF 2020**

**WEST KENYA SUGAR CO. LTD.....APPELLANT/RESPONDENT**

**VERSUS**

**JACKSON MASIKA WAFULA & ELIZABETH APONDI (Suing on behalf of the  
Estate of STEPHEN MASIKA OTIENO).....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent/Applicants herein, moved the court by way of a notice of motion dated 12<sup>th</sup> August, 2021 under sections 79G and 95 of the Civil Procedure Act and Rule 3 of the High Court (Practice and Procedural) Rules and other enabling provisions of law seeking the following reliefs:

- i. Spent;**
- ii. Spent;**
- iii. That the Applicant be granted leave to cross-appeal out of time;**
- iv. That costs of this application be provided for.**

2. The application was premised on the following grounds:

- i. THAT the Appellant preferred this appeal against the Judgement of Hon. C.M WATTIMAH (SRM) which was delivered on 9<sup>th</sup> July, 2020.**
- ii. THAT the directions are yet to be taken out as to how the appeal is to be disposed of.**
- iii. THAT the counter appeal is limited to the finding of the court on quantum and will enable this court make a just and fair finding.**
- iv. THAT the Respondent/Appellant will not suffer any prejudice if the orders sought are granted.**
- v. THAT Section 95 of the Civil Procedure Act gives this court unfettered discretion to grant the Applicant/Respondent the orders sought.**
- vi. THAT the orders sought herein are necessary and in the interest of justice.**
- vii. THAT the Respondent/Applicants stand to suffer irreparably if the application to file his cross appeal out of time is not allowed.**

3. Vide a replying affidavit filed on **7<sup>th</sup> September, 2021** counsel for the Appellant/Respondent opposed the application on the grounds that the Respondent/Applicants were well aware of the appeal and still did not act on the same for a period of one (1) year, and that no reasons have been advanced as to why the cross appeal was not preferred against the judgement in time.

4. Section 79G of the Civil Procedure Act provides that:

**“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.”**

5. This court is not aware of a procedure for filing of a cross-appeal in this court as opposed to the Court of Appeal. This court is however well versed with the provisions of **Order 42 Rule 32** of the Civil Procedure Rules which makes reference to a cross-appeal but in a negative manner as follows:

**“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”**

6. Directions were taken to the effect that the application be disposed of by way of written submissions and that timelines thereof were duly given. However, the Respondent/Applicant did not comply and has to date not filed submissions. It is only the submissions by the Appellant/Respondent that are on record.

7. It is trite law that an order for extension of the time to file an appeal is discretionary. Such discretion must however be exercised judiciously. The factors to be considered in an application such as the present one, were set out by the Court of Appeal in **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** as follows:

**“For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.”**

8. As stated hereinabove, a party seeking extension of time is expected to give an explanation for failing to file his/her appeal within time. In this appeal, the Respondent/Applicant filed the cross-appeal way after the lapse of 30 days from the date of judgment. Time begun to run as from the date of service of the memorandum of appeal i.e., from **22<sup>nd</sup> July, 2020**. By the time of filing the cross-appeal, more than one (1) year had lapsed from the date of service. The Respondent/Applicants seek leave to file the cross appeal out of time but did not provide a reason for the delay.

9. Extension of time is an equitable remedy and a party seeking extension of time must demonstrate, by laying basis to the satisfaction of the court, that he is deserving of the same. The court must not be moved by affinity. Where an Applicant has no valid excuse for delay in filing a cross appeal, as the Respondent/Applicants in the present case, the court must dismiss the application. This was the holding in the case of **Daphne Parry vs. Murray Alexander Carson [1963] EA 546**, where the Court stated:

**“Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”**

10. After the judgment was delivered on **9<sup>th</sup> July, 2020**, the Respondent/Applicants took no action until **12<sup>th</sup> August, 2021**. The Respondent/Appellants simply claim that the orders sought are necessary and inherent to justice, and that delay was not inordinate. This conduct is emblematic of a party who is not interested in pursuing the intended cross-appeal or the Appellant/Respondent’s appeal. In any event, upon the presentation of an appeal the appellate court is bound to reassess the evidence and subject it to a fresh analysis and arrive at its own independent conclusion. The grounds put forth in the proposed cross appeal can be easily and properly argued in the present appeal and hence I find there is no need to separate it in the form of a cross appeal.

11. It is emphasized that the prayers sought by the Respondent/Applicants herein are discretionary in nature and that the conduct of a party is key in determining whether the court will exercise its discretion in his favour. The Court of Appeal stated as much in the case of **Ferruz Omar Mahendan & 4 others v Ahmed Mohamed Honey [2016] eKLR**:

**“Of course, in the exercise of discretion, the court looks at the conduct of the parties in the proceedings. If the conduct of a party is appalling as in this case, the court will rightly refuse to exercise its discretion in his favour.”**

12. It is my humble view that conduct of the Respondent/Applicants makes them unworthy of the orders sought and I decline to exercise my discretion in their favour.

13. In light of the foregoing, the Application dated **12<sup>th</sup> August, 2021** lacks merit and the same is hereby dismissed with no order as to costs. The parties are hereby directed to set down the appeal for hearing on priority basis.

It is so Ordered.

**DATED AND DELIVERED AT BUNGOMA 14<sup>TH</sup> THIS DAY OF DECEMBER, 2021.**

**D. Kemei**

**Judge**

**In the presence of:**

Onkangi for Onyinkwa for Appellant/Respondent

Wamalwa R. for Namasi for Respondent/ Applicant

Wilkister Court Assistant