



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 91 OF 2019**

**JUMAA MWARUA KAPHUTSU..... APPELLANT/ RESPONDENT**

**VERSUS**

**PALLET LOGISTICS LIMITED.....RESPONDENT/APPLICANT**

**(Being an appeal against the Judgment delivered on 1.10.2019 by Hon. Adalo, (Senior Resident Magistrate) in SRMCC No. 332 of 2018 – Mariakani )**

**CORAM: Hon. Justice R. Nyakundi**

**Wachenje Mariga Advocates for the Appellant**

**Okello Kinyanjui Advocates for the respondent**

**JUDGMENT**

The applicant through his counsel **Okello Kinyanjui & Co. Advocates** filed two applications for court orders in this matter. In the first application dated 10.12.2019 filed in court on 16.12.2019, the applicant seeks the following orders:

- (1). That this Honorable Court be pleased to strike out the Memorandum of Appeal filed therein.**
- (2). That this Honorable Court be pleased to dismiss the appeal filed herein and**
- (3). That costs of this application and appeal be provided for.**

In support of the application are the following grounds:

- (a). That the appellant filed the plaint in the trial court on 26.9.2018.**
- (b). That the same was heard on merit and Judgment was delivered on 1.10.2019 dismissing the plaintiff's suit with orders for each party to bear their own costs.**
- (c). That on 8.11.2019, the appellant served a Memorandum of Appeal filed on 1.11.2019 upon the respondent outside the time stipulated in Law.**
- (d). That Section 79 (G) of the Civil Procedure Act provides for the filing of the Memorandum of Appeal within 30 days from the date of Judgment.**
- (e). That the appellant has not sought leave to file the said memorandum of appeal out of time.**
- (f). That no reason, sufficient or not for the delay in lodging the appeal has been presented before the court.**
- (g). That the appellant is seeking to move the Honorable Court to exercise appellate jurisdiction by filing an appeal out of time without seeking leave.**

In addition, legal counsel **Ms. Jessica Wambui Chege** filed supplementary affidavit the reasons on the body of the motion in support of the application dated 16.12.2019.

Secondly, the applicant followed the above application with yet another motion dated 16.1.2020 filed in court the same day and the orders sought were as follows:

- (1). That the Honorable Court be pleased to set aside the exparte order issued on 20.12.2019.**
- (2). That the Court be pleased to grant the prayers sought in the first motion dated 10.12.2019 filed on 16.12.2019 as prayed the applicant relied on the grounds.**

Substantive lay similar with those particularized in the notice of motion dated 10.12.2019, save for the following:

- (1). That the application which granted extension of time to the respondent was not argued interpartes.**
- (2). That the application which granted leave to the respondent to file the appeal out of time was reactionary to compromise the intended reliefs in the applicant's motion of 10.12.2019.**
- (3). That all in all the applicant never demonstrated to the court sufficient reasons why the appeal had to be filed out of time.**

It was also followed with an affidavit sevor by **Jessica Wambui Chege**.

The respondent rejoinder was from the replying affidavit of **David Wachenje** dated 23.1.2020, in which he deposed as follows:

- (a). That the copy of Judgment being subject matter of the appeal was obtained on 24.10.2019 and on crafting the memorandum of appeal, dispensing it to the High Court registry there was an overreach of anybody from the stipulated time in Section 79 (G) of the Civil Procedure Act.**
- (b). That by virtue of an application filed on 18.12.2019 the court exercised discretion to extend time keeping with the provisions of Section 3A and 3B of the Civil Procedure Rules.**
- (c). That the appellant is not guilty of laches to be denied an opportunity to ventilate the issues raised in the memorandum of appeal.**
- (d). That the appellant has no intention of denying the respondent the fruits of his Judgment.**

On behalf of the applicant and respondent both counsels filed written submissions on legal perspectives highlighting principles in various case law to persuade this court to grant the orders or decline the same depending on the weighty of each party's case.

However, before I do that a brief chronology is relevant. The first event of relevant was when the registry referred the matter to chambers for directions pursuant to Order 79 (B) of the Civil Procedure Act. That occasioned for the appeal to be admitted with an accompanying order of the record of appeal to be served upon the respondent.

On 19.12.2019, the appellant properly filed a motion under a certificate of urgency, premised on Order 51, Rule 1 of the Civil Procedure Rules Section 1A, 1B, 3A and 79 (G) of the Civil Procedure Act, seeking leave of the court to deem the appeal filed and admitted by the court as having been duly filed within time.

Thereafter, the court did not specifically enlarge time but retained the case management directions coming up for 21.1.2020. On 16.1.2020, the respondent moved the court by way of a notice of motion accompanied with an affidavit asking the court to set aside the exparte orders of 19.12.2019. That is the position both parties find themselves, which concerns I so humbly submit to deal with appropriately.

### **Analysis and Determination**

From the chronology events I distill the following issues as central to the interlocutory contest between the applicant and the respondent.

- (1). Was the memorandum of appeal dated 25.10.2019 filed in court on 1.11.2019 and served upon the respondent made without leave of the court.**
- (2). Whether the court in issuing directions to admit an appeal in terms of Section 79 (B) of the Civil Procedure Act was seized of an appeal as known in Law.**
- (3). Whether the notice of motion by the applicant dated 19.12.2019 when first made permission of the court was granted with regard to enlargement of time within which to do so the act of filing the intended appeal.**
- (4). Whether the two application by the applicant dated 10.12.2019 and 16.1.2020 ought to be allowed.**
- (5). Whether the application for leave to file an appeal out of time ought to be considered and granted by this court.**

I am afraid that the sequence of my determination may not necessary follow step by step the above issues as formulated for the simple reasons of intersectional of materials within these proceedings and consequential applications.

#### **Issue No. 1**

The fundamental provision for all appeals as to the time of lodging an appeal from the decision of the subordinate court is provided for under Section 79 (G) of the Civil Procedure Act which states:

**“Every appeal from the 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 he had a good and sufficient cause for not filing the appeal in time.”**

According to these provisions time starts to run immediately after the decision of the trial court except time reasonably spent for the court to prepare and certify the impugned order or decree should be excluded in the computation of time. From these words the Registrar of the court has to obtain a certificate of delay for purposes of compliant with Section 79 (G) of the Act. If compliance of thirty (30) days is not achieved as originally provided for in the Act, the application for extension of time shall be made for the relief to enlarge time under the proviso of Section 79 (G). In **Leo Sila Mutiso v Rose Wangare Mwangi Civil Application No. 225 of 1997 UR** the court adopted a four stage approach to the question of whether leave should be granted or refused as observed from the following passage:

**“It is now well settled that the decision whether or not to extent 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. 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.”**

Subsequent to **Leo Mutiso (supra)** case the Supreme Court in **Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others {2014} eKLR** spiced the **Leo decision** and profoundly set out the following hallmark principles to enable the courts exercise discretion to extend time or decline an application to file an appeal out of time:

- (1). 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.**
- (2). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**
- (3). Whether the court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis.**
- (4). Whether there is a reasonable reason for the delay which ought to be explained.**
- (5). Whether there would be any prejudice for the delay by the respondents if the extension was granted.**
- (6). Whether the application had been brought without undue delay and**
- (7). Whether in certain cases like election petitions, public interest ought to be a consideration for extending time.**

In my view to this all the court of equity exercising jurisdiction to enlarge time should also consider the interest of justice as a criteria sufficient enough to grant or refuse the relief under the proviso in Section 79 (G) of the Act. A review of the record in the instant case establishes that impugned Judgment was delivered on 1.10.2019. If the appellant intended to appeal within the stipulated thirty (30) days, he had upto midnight of the 31.10.2019 time which to file the appeal.

However, for reasons explained by **Mr. David Wachenje** in his affidavit the memorandum of appeal though signed on 25.10.2019, it got to be formally registered in the High Court registry on 1.11.2019. Thus recital is made purely to recognize the sort of special character between the applicant contestation and the appellant position as deserving of consideration by this court to exercise discretion to grant leave for extension of time. As a matter of Law the memorandum dated 1.11.2019 was filed out of time and without leave of the court. It is also to be observed that when this court under my hand and seal of the court on procedural directions admitted the appeal and ordered the record of appeal to be served upon the respondent there was no appeal in existence. The admission order relied upon to prosecute the current motions apparently came into existence in one or another by an error on the face of the record. Why do I say so? One of the unusual features that contends lack of an appeal is no doubt, in the current record, the appellants appeal was to be formally receipted in the High Court registry on 6.2.2020. Therefore, indeed the competency of the appeal made to be admitted earlier than 6.2.2020 was an apparent error not capable of receiving any protection of the Law. The court could not have admitted an appeal which in the first instance was yet to be filed by the appellant.

As elaborated in Section 79 (B) of the Act:

**“Before an appeal from a subordinate court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree, or order appealed against, he may notwithstanding Section 79 (c), reject the appeal summarily.”**

There is no dispute that the onerous task of the court under Section 79 (B) is to afford an opportunity to review the evidence and the

impugned Judgment or order *ex parte* in chambers to satisfy itself that there is an arguable ground or grounds of appeal having a realistic prospect of success before an appeal is admitted or summarily rejected or as the case may be.

The strength of the record is capable of proof that before the 19.12.2019, there was no appeal but a memorandum of appeal intimating the grievances and likelihood of the success of the appeal.

In practice, the memorandum has never been a basis to engage Section 79 (B) of the Civil Procedure Act. It would appear therefore that a bonafide mistake occurred in which a non-existence appeal was admitted accompanied with directions of the record of appeal to be served and mistakenly further pretrial conference scheduled on 21.1.2020. In line with this approach, the appropriate remedy will be the legal position in **Ranige v Jivraj {1965} EA 700 (K)**, the court said:

**“A court will of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when Judgment was given or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order, which it would have made had the matter been brought to its attention.”**

In respect of the purported orders of 19.12.2020, to entertain an application to extend time to enable an appeal be filed as implored by the applicant, the language of the extracted order is very clear.

The question to extend time was never dealt with, but instead, the court made reference to an earlier scheduled date of 21.1.2020 to deal with the pre-appeal admission order without leave of the court.

The object of including the head of terms of the case management directions of 21.1.2020 was to ensure that interlocutory applications for leave to appeal out of time was conclusively dealt in conjunction with the application dated 10.12.2019 to strike out the memorandum of appeal. To construe the motion with the requirements of order 42 of the Civil Procedure Rules there was no appeal on record to be struck out. By the 16.12.2019 there was no substantive appeal filed by the applicant save for the memorandum of appeal.

Counsel for the applicant submitted and relied on the various cited authorities and interpretation of the Civil Procedure Provisions on appeal urging this court to strike out the appeal. To some extent I agree he has a point to be digested to deter against non-compliance with the timelines set out in the Act and the rules. It is also equally important to mention **“that justice is what lawyers should do and justice is what Judges should render, Law is nothing but a set of tools, admittedly complex and intellectually engaging, but we should not get so caught up in the intellectual interest of Law that we forget that Law in itself cannot solve human problems.”**. (See where on the **Connection between Law and Justice by Anthony D’Amato 26 V. C. Davis L. Review 527 – 582 {1992 – 93}** )

Whether one is looking at a dispute from the lens of a statute or ethos and principles of Constitution one feature of justice is fairness to the parties.

The onslaught by the Learned counsel for the applicant was for this court to move and exercise discretion to strike out the appeal for being fatally defective, known to be filed without leave and processing it out of the timeline laid down in the Act. It seems reasonable to go by that submissions, but I believe the principles of justice do not apply restrictive structure when it comes to the duty of the court to act fairly. The problem with the present case is that the applicant has won the first round of the dispute. The respondent is desirous taking the battle of the claim for a rematch to the High Court and by these applications neither side is willing to back down. The key to whether the appeal should be strike out is based on well settled principles in Law.

As a student of comparative Law one of the determinant factor is clearly expressed in **Denton & Others v TH White Limited & Another {2014} (EWCA)**. **The English Court of Appeal** opined that:

**“It is inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage.”**

The courts have consistently spoken to this issue on striking out pleadings or defences or any other material filed in support of the court process. The Court of Appeal in **Co-operative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999** held *inter alia*:

**“Striking out a pleading is a draconian act, what may only be resorted to, in plain cases, whether or not a case is plain, is a matter of fact a court may duly strike out pleadings where they disclose no substance of a cause of action or defence and are incurable by amendment.”**

In this matter, the available pertinent information is that all steps and procedures were taken by legal counsel for the appellant to comply with the rules on filing of appeals as stipulated in Section 79 (G) of the Civil Procedure Act. There is no doubt that the flaws for non-compliance are of a nature that can be excused by this court in exercise of discretion not to lock out the appellant in pursuing the appeal. I do find the relief to strike out an appeal to be rendered fatally defective. On the stated grounds does the court have the jurisdiction to make it right this time being an application for extension of time to file an appeal out of time.

From the outset the proviso to Section 79 (G) of the Act and the stance expounded by the courts in **Sila Mutiso (supra)** and **Nicholas Kiptoo Salat case (supra)** provides the anchor for the discretion of the court to extend time.

Having so stated the principles the court is also asked to resort into an inquiry on sufficient cause in **Attorney General v Tanzania Ports Authority & Another CA NO. 87 of 2016** – The court defined sufficient cause as follows:

**“What amounts to good cause includes whether, the application has been brought promptly, absence of any invalid explanation, for delay and negligence on the part of the applicant.”**

An applicant is entitled to proceed under this procedure in a situation where he or she must demonstrate sufficient good cause in this case, time for preparation and to obtain a copy of the Judgment is of particular importance that it cannot just be wished away.

From the sequence of events undertaken by the applicant he embarked in a correspondence with the trial court, to pursue the proceedings or copy of the decree or the order. Shortly, thereafter on 1.11.2019 a memorandum of appeal was already filed as evidence in pursuit of the appeal. The delay complained of by the applicant in his notice of motion was certainly a day. Whereas, I agree that it was outside the thirty (30) day limitation period under Section 79 (G) of the Act. The delay was not inordinate or unreasonable.

The applicant has accounted for the time since the delivery of Judgment to the date of filing Memorandum of Appeal out of time. The explanation is sufficient to bring his case within the proviso of Section 79 (G) of the Act.

In relation with the appellants appeal, now that the court has the advantage of the record without making definitive findings, the ability and existence of an arguable appeal looked at in the light of Section 76 (ii), 78 (i) and 79 (B) of the Civil Procedure Act establishes certain aspects for the court’s jurisdiction.

I remark that this not the time to scrutinize the merits of the appeal to answer this question. I have the advantage of the draft Memorandum of Appeal and the purported record of appeal by the intended appellant, be that as it may be there are attached pleadings, evidence and Judgment of the trial court. On the whole, the subject matter of the appeal raises some serious issues of facts and Law which this court might interrogate at an opportune time.

By agreeing with the applicant/respondent counsel, would be explicitly going against the dicta in **D. T. Dobie & Company Ltd v Muchina {1982} KLR** where **Madan JA** stated:

**“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the court itself is not usually fully informed so as to deal with merits without discovery, without any evidence tested by cross-examination in the penury way.”**

It is a well-considered principle on appeal, the oral arguments, by the appellant and respondent, or admission of evidence has got to tested on the merits, notwithstanding that there is a valid Judgment.

Further, as a matter of common sense though not a conditional precedent, an admission of an appeal has to consider the prejudice test against the respondent.

In general, the Judge exercise discretion under Section 79 (G) and its proviso has to weigh the chances of occasioning prejudice as **Chadwick CJ in Arrow Nominees Inc v Blackledge {2001} BCC 591** in which he stated that:

**“Where a litigant conduct puts the fairness of the trial in jeopardy, where it is such that any Judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court, as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed bound to refuse to allow that litigant to take further part in the proceedings and to determine the proceedings against him. The reason, he explained, is that it is no part of the court’s function to proceed to trial if to do so would give rise to a substantive risk of in justice.”**

For purposes of this appeal the respondent may consider extension of time and by the court to allow the appellant prosecute the appeal would not only occasion undue expenditure of time and money. However due regard must also be accorded to the fair administration of justice and the right to access court under Article 48 of the Constitution by the appellant. In this case an appeal preferred by an appellant cannot be considered as conduct prejudicial to the administration of justice.

As much as foregoing, I agree with the applicant’s counsel that the memorandum of appeal, as followed with the record of appeal was filed without leave of the court it is premature to dismiss both of them without the appeal itself being heard.

There is in my view no reason why both the appeal and the memorandum should be struck out as submitted by the applicant counsel **Mr. Kinyanjui in Branco Arabe Espanal v Bank of Uganda {1999} 2 EA 22** the court stated the correct position that:

**“The administration of justice should normally require that the substance of all disputes should be investigated. On their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation namely the hearing and determination of disputes, should be fostered rather than hindered.”**

Accordingly, as it seems to me its quite evident that the applicant has failed to discharge the burden of proof in both motions dated 10.12.2019 and 16.1.2020 to satisfy the court to exercise discretion that the orders sought ought to be granted.

In the premises both motions stand dismissed and in their place I make the following orders:

- (1). That the Memorandum of appeal dated 1.11.2019 and the record of appeal dated 6.2.2020 be duly deemed as properly filed within time under Section 79 (G) of the Civil Procedure Act.
- (2). That both legal instruments which form the basis of the appeal be formally served upon the respondent within seven (7) days from today's date.
- (3). That the case management directions on the appeal be taken within fourteen (14) days from the date of service of the record of appeal.
- (4). The costs of this application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Ogeto for Okello Kinyanjui for the appellant