



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 109 OF 2018

FIRST COMMUNITY BANK LIMITED.....PLAINTIFF

VERSUS

TALIB OMAR SAID.....RESPONDENT

RULING

1. By an amended Notice of Motion dated 25.5.2020, the Applicant seeks the following orders from the court:-

a. Spent.

b. That the Court be pleased to set aside the orders issued on 15.3.2019 summarily rejecting the Appeal on account of the Appeal having been filed late and out of time without leave or certificate of delay.

c. That the Applicant herein be granted leave to file its Appeal out of time and/or that time for filing and serving the said Appeal be extended.

d. That the Applicant herein be granted leave to file and serve its Record of Appeal out of time and/or that time for filing and serving the said record of Appeal be extended.

e. That costs of this Application be costs in the cause.

2. The Notice of Motion is founded on seven grounds appearing on its face and supported by the Supporting Affidavit of **Claris Ogombo** who is the Applicant's legal officer. She avers that the Applicant being aggrieved by the Judgment delivered on 29.5.2018, it filed a Memorandum of Appeal on 29.6.2018, and sent a letter to the Executive Officer requesting to be supplied with typed proceedings.

3. She further avers that a Record of Appeal was not filed within the statutory timelines because the Applicant had not been supplied with typed proceedings, since the same became ready only on 12.9.2018, and the Applicant filed a Record of Appeal on 2.11.2018 while a Certificate of Delay was issued on 3.12.2019. Therefore, it is contended, the delay in filing the Record of Appeal was inadvertent and not deliberate and the Respondent will not be prejudiced in any way if leave is granted and lastly that it is in the interest of Justice that leave to file the Record of Appeal out of time be granted since rejecting the Appeal will unceremoniously oust the Applicant from the seat of Justice.

4. The Respondent opposed that motion vide Replying Affidavit sworn on 10/1/2019, on broad grounds that; the Appeal is devised to draw out litigation, delay Justice and abuse of the Court process with chances of success; the same is defective for reason that it is supported by an Affidavit that is sworn by Claris Ogombo, a stranger to the suit with no resolution annexed authorizing her to swear the affidavit; that having filed the Appeal on 29/6/2018, no step was taken to prosecute and/or set it down for directions as required by law and the Appellant slept on its rights for eighteen months and the Appellant has not explained to the honourable Court why it took twelve months to file a Record of Appeal. Consequently, the Appellant's delay is inordinate.

5. By consent, the parties on 12/5/2020 agreed to canvass with the application by way of written submission. The Applicant's submissions were filed on 26/5/2020, while the Respondent's submissions were filed on 16/6/2020. I have considered the application, the Supporting affidavits, the Affidavit in Reply and rival submissions including the various cases cited and I see the issues that emerge for determination by the court as:

1. Whether the supporting affidavit is defective and incompetent for want of capacity by the deponent;

2. Whether Applicant's Memorandum of Appeal to be admitted out of time.

3. Whether the Record of Appeal was filed out of time

1. Whether the supporting affidavit is defective and incompetent for want of capacity by the deponent

6. The Respondent has argued that **Claris Ogombo** is a stranger to the proceedings and she did not have capacity to swear the affidavit because the Applicant herein is First Community Bank and that being such third party, **Claris Ogombo** needed to prove her appointment as a legal officer to the Applicant.

7. The Applicant did not file a further affidavit to respond to the averments in the Replying Affidavit nor did it file any submissions in reply on the issue. The attack on the competence of the supporting affidavit was thus not challenged by the Applicant. Nevertheless, it is the court's duty to interrogate the issues raised by the Respondent to establish whether or not they are legally plausible and whether the said affidavit is incurably defective.

8. In **Kamlesh M.A. Pattni – Vs – Nasir Ibrahim Ali & 2 Others CA 354/2004**, the Court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel Paul Muite held inter alia:

“... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information...”

9. Just like Paul Muite was never a party to the suit but counsel for the client, I take the view that Claris Ogombo had the right to swear an affidavit on behalf of her employer based on facts known to her as of personal knowledge of received from sources she could disclose. The deponent introduces herself as a legal officer of the applicant, a corporate, which can only depone to facts by its officers. In general there is no Rule which forbids an Advocate from swearing an affidavit on behalf of his client. In other words, the mere fact that an advocate swore an affidavit does not render it incurably defective. Consequently, I find and hold that the instant Application is not defective on the alleged grounds.

2) Whether Applicant's Appeal ought to be admitted out of time.

10. 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.

11. In this case, calculating the thirty days from 29/5/2018, excluding the date of judgement and including the last day, 30 days lapsed on 28/6/2018. Accordingly, when filed, the Memorandum of Appeal was filed out of the 30 days stipulated by **Section 79G of the Civil Procedure Act**. The court record does not show that any leave of court was sought and obtained to enlarge time within which the Appeal ought to have been filed hence the Court on the 15/3/2019 summarily rejected this instant Appeal. The Applicant now seeks to set aside the said orders issued on the 15/3/2019. The Respondent on its part argues that the Applicant Record of Appeal was filed irregularly out of time without leave of the Court and as a result, the same ought to be struck out.

12. **Section 79G of the Civil Procedure Act** requires that before the Court enlarges the time for appealing the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time. The factors and principles to be taken into account in an Application for extension of time have been settled by the Supreme Court in **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others**, [2014] eKLR. In that matter the Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion:

- i. 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;**
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- vi. Whether the Application has been brought without undue delay;**
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

13. Extension of time to file an Appeal out of time and/or have an already filed Appeal admitted out of time is at the discretion of this Court

based on the explanation offered for the delay in filing the Memorandum of Appeal.

14. In this matter the only reason given by the applicant for not taking action within the prescribed time is that of inadvertence with a rider that in the interest of Justice it ought to be granted leave to file the Appeal out of time.

15. In *Phillip Chemwolo & Another Vs Augustine Kubende [1982-1988] KAR at 1040*, Apaloo J (as he then was), citing with approval *Nyeri CA 18/2013 Richard Ncharpi vs IEBC*, the Court of Appeal in the latter case stated:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. 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 it often said exists for the purpose of deciding rights of parties and not the purpose of imposing discipline.”

16. In the instant case while noting that the delay was barely two days I find and hold that it is an excusable mistake to have filed the Memorandum of Appeal late. Despite that delay of two days, I find that the interests of justice would still be served to the parties by enlarging time and admitting the already filed Memorandum of Appeal as duly filed so that the issues which are raised in the Memorandum of Appeal be ventilated or canvassed on the merits at an appropriate hearing. The Respondent, in my humble view, has not demonstrated any prejudice that has been or is likely to be occasioned to him if the enlargement of time is granted. Indeed, there is more prejudice in the Applicant being denied its right to have its dispute determined as compared to the prejudice the Respondent would suffer for the delay in the conclusion of the Appeal herein.

17. On the issue of the Record of Appeal being filed on 2/11/2018, which in the Respondent’s view was out of time, I find that this Court was yet to give direction on the filling of the Record of Appeal. Nevertheless, it is noteworthy that there is no statutory provision that prescribes the timelines to be adhered to when filling a Record of Appeal to the High Court. Consequently, I find and hold that the Respondent’s position on the filing of a Record of Appeal is misguided

18. The upshot of the foregoing is that the Application is allowed in terms of prayer 2. The Memorandum of Appeal filed on 29/6/2018 is deemed to be properly on record. Since a Record of Appeal has been filed, I direct that the parties exchange written submission within 30 days from today and thereafter fix a mention date at the registry thereafter for direction by the court.

19. The costs of the Application herein shall abide the outcome of the appeal.

Dated, signed and delivered at Mombasa this 2nd day of October 2020

P.J.O. OTIENO

JUDGE