



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 184 OF 2017

COOPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

TROPHY AUCTIONEERS.....RESPONDENT

R U L I N G

1. The applicant has by a chamber Summons dated 27th June 2017, sought orders that:-

1. Spent

2. This Honourable court be pleased to extend the time to file an appeal against the Ruling and Orders of the Court (Hon. E. Mutunga) delivered on 14th June 2017 in Mombasa SRM Misc. Civil Application No. 233 of 2016.

3. The appeal herein as filed be admitted and be deemed to be duly filed within such extended time.

4. This Honourable Court be pleased to order a stay of execution or further proceedings emanating from the Ruling and Orders of the Court (Hon. E. Mutunga) in Mombasa SRM Misc. Civil Application No. 233 of 2016 delivered on 14th June 2017 pending the hearing and determination of this appeal.

5. This Honourable court be pleased to call, set aside in its entirety or vary the Ruling and Orders of the Court (Hon. E. Mutunga) in Mombasa SRM Misc. Application No. 233 of 2016 delivered on 14th June 2017.

6. The costs of this appeal be provided for”.

2. The grounds proffered to support that application and which are reiterated in the affidavit of **WELLINGTON LUMBO** are that the decision of the magistrate assessed the Respondents costs at **Kshs 581,287.60** by grave error in ignoring the available alternative remedies under rule 7 of the Auctioneers’ Rules; in wishing away the applicants objection that the respondent lacked capacity to charge storage charges which had been demanded by a third party as a storage yard owner; that the applicant stands to suffer irreparably a the costs are irrecoverable and amounts to unjust enrichment of the respondent whose financial ability to affect a refund if the appeal subsequently succeeds is doubtful. On delay to lodge the appeal timeously, the applicant states that after the ruling was delivered, the counsel rendered to it an opinion advising an appeal but the nod to appeal was not given till the 21.6.2019 owing to volume of work by which time the period of appeal had lapsed.

3. That application was opposed by the Respondent by a Replying Affidavit sworn by one Gladys K Mutisya, the Respondent, who took the position and view that she was indeed instructed by the applicant, which instructions he executed successfully leading to the debtor meeting his obligations to the applicant by payment of the debt in full but for three years the applicant did not bother to pay her fees. It is then asserted that the ruling was delivered in the presence of the counsel who made no reservations and that the intended appeal is an afterthought with no prospects of success and an abuse of the court process as no good reason had been advanced for the delay to lodge the appeal in time. It was then added that no possible substantial loss had been demonstrated by the applicant because the respondent was not a person of the straw yet the respondent was entitled to the fruits of litigation which included sums due to third party, the yard owner, as a creditor to the respondent.

4. The parties filed respective submissions which were the highlighted orally in court. For the applicant the submissions dated and filed on the 30th august 2017 underscored the fact that extension of time to appeal is not a right but rests with the discretion of the court to do justice. For that proposition a decision of this court in **Charles Githinji Muigwa vs Charles Kiiru Karanja (2016) eKLR** was cited and relied upon to urge that the court’s discretion be exercised in favour of the applicant. On explanation for failure to act in time, it was repeated that the legal department was busy with other work and that a delay of seven (7) days was not inordinate but should be deemed an excusable lapse.

5. Those submissions then graduated into the merits of the appeal itself by attacking a raft of portions of the trial court's decisions to be untenable. Those submissions equally relied on decided cases cited to court among them for the proposition that a court of law is duty bound to consider all materials presented to it and to make a decision on each and that failure to discharge that duty invites reversal on appeal. Reliance was placed on rule 7 of the Auctioneers' Rules to provide modes of recovery of auctioneer's fees before recourse is made to court action.

6. For the Respondent submissions were offered to the effect that the application was defective for being omnibus for which submissions the decision in *Rajput vs. Barclays Bank of Kenya Ltd and three Others* [2004] 2 KLR 393, was cited for the proposition that an omnibus application is a candidate for striking out. In the alternative the respondent contended and submitted that the court only need to consider the application for extension of time and only after it finds for the applicant then an appeal be filed and argued in its proper file.

7. I have had the benefit of considering all the papers filed including the oral submissions and the cases cited. I have also considered the extent of the orders sought and do not entertain any doubt that the application is indeed all encompassing and can easily pass for an omnibus application rendering same cumbersome for effective and proportionate just determination. I however appreciate that since the advent of overriding objectives of the court and the need for substantive determination of disputes dictates under the constitution, the court now strive to sustain disputes rather than strike out same on technicalities [1]. But even then there are basic norms and learning that must be observed to make judicial determinations cogent and fathomable. One of them is that the law must be complied with. In this case the law is that an appeal need to be lodged within a timeline and when none is so lodge leave is sought and granted before an appeal can be validly lodged for the consideration by the court. Consequently, I consider it wholly untidy and untenable that I am being called upon to extend time, deem the appeal duly filed and at the same time consider arguments on the appeal to be deemed properly filed before I so deem it. I am hesitant to handle the application in such an omnibus manner just I am hesitant to strike it out but for the sake of sustaining the dispute to have it heard on the merits I will deal with the application in so far it concerns extension of time only.

8. Whether to extend time to lodge an appeal out of time or not is a matter for the discretion of the court and not a right of the applicant who has had a chance to be heard at the trial [2]. That discretion is exercised upon reasons advanced and based on established legal principles. The legal principles are that the delay, which must not be inordinate, must be explained to the satisfaction of the court [3].

9. In the matter before me, the ruling sought to be challenged was given on the 14.6.2017, the instructions to appeal issued on the 21.6.2017 and the application filed on the 28.6.2017. Those dates are important to help the court determine whether the applicant is guilty of procrastination or if indeed it has acted with speed having had the time to take the requisite step lapsed. I do not hold the view that the delay here was inordinate.

10. On the explanation given for the delay and failure to act in time, I do not find the reason of volume of work to be entirely plausible. It points more towards negligence but I would nevertheless take it that a blunder has occurred and that alone should not be the reason to lock out a litigant from being heard on his dispute [4]. I do not consider the blunder to be such as capable of passing as a design to obstruct and delay justice.

Being so minded, I do extend time by a period of seven days for the applicant to lodge its appeal. Since no appeal is currently pending I decline to issue any stay just now until such an appeal shall have been filed.

11. For avoidance of doubt I have restrained and refrained from making a determination on stay and the merits of the appeal because I consider both premature but I should not be mistaken to have dismissed those prayers. Let a proper appeal be filed and those issued may then be dealt with therein.

12. On costs, the delay leading to and necessitating the application was the making of the applicant and in terms of the provisions of the proviso to Order 50 rule 6, the applicant shall pay the cost of this application to the Respondent in all events, this outcome notwithstanding.

Dated, signed and delivered at Mombasa on

this **8th** day of **March 2019**.

P.J.O. OTIENO

JUDGE

[1] Per Ouko JA in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR

[2] Per Supreme Court in *Nicholas Kiptoo Arap Korir Salat Vs Iebc and others* (2014)eKLR

[3][3] *Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others* [2018] eKLR

[4] *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR