REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 32 OF 2019

CHARLES KIMENYI.....PLAINTIFF

VERSUS

BIDCO AFRICA.....1ST DEFENDANT

MAINA GATHARA T/A PRESHAMA FEEDS.....2ND DEFENDANT

RULING

1. On 17th April, 2019, the applicant took out a motion on notice dated the same day seeking leave of the court to file an appeal out of time. The judgment and decree sought to be appealed against was delivered on 15th August, 2018 in Kajiado CMCC No. 24 of 2017. At the time, the applicant says he was represented by the firm of Patrick Rono & Co. Advocates. The application is based on the grounds on the face of the motion and depositions in an affidavit by the applicant sworn on the same day of the motion, 17th April 2017.

2. The applicant deposes that the court dismissed his suit against the respondent with costs on 18th August, 2018; that the case was heard on 7th March, 2018 and fixed for submissions on 11th April, 2018; that on that day, the case was set for a further mention on 25th April, 2018 and on the appointed day, judgment was reserved for 13th June, 2018 after confirming that parties had filed submissions.

3. It is the applicant's further deposition that on 13th June, 2018 his then advocates were informed that the judgment was not ready and that it would be delivered on 15th August, 2018. He states that his advocates informed him that when their representative attended court on 18th August, 2018, they were informed that the judgment was not ready and that it would be delivered on notice but no notice was served.

4. According to the applicant, on 22nd November, 2018, his advocates discovered that judgment had actually been delivered on 15th August, 2018; that on the same day, 22nd November 2018, his advocates requested for copies of proceedings and judgment and that they obtained proceedings and judgment on 15th March, 2019, long after time for lodging an appeal had lapsed.

5. The applicant states that he is aggrieved by the judgment and would like to appeal and urges the court to grant him leave to appeal out of time. He contends that the delay to file the appeal was not occasioned by his mistake and that the delay is not, in any case, inordinate.

6. The respondent filed a replying affidavit by Joseph Gachagua, its legal officer, sworn on 28th June 2019 and filed on 3rd July, 2019. Mr. Gachagua deposes that counsel for the applicant is not properly on record since no leave was granted to them to come on record this being a post judgment application as required under Order 9 Rule 9 of the Civil Procedure Rules; that when the matter came up for judgment on 13th June, 2018, it was deferred to 15th August, 2018; that the applicant is guilty of laches since they knew about the judgment on 22nd November, 2018 but filed the application on 17th April, 2019. He deposed that although the court has power to enlarge time, it should be exercised by looking at the matter holistically; whether the intended appeal is arguable with chances of success and that the discretion should be exercised judiciously.

7. He contends that the delay in filing the appeal is inordinate; that it has not been explained; that the intended appeal is not arguable and that the court evaluated evidence before dismissing the applicant's suit.

8. Miss Opiyo, learned counsel for the applicant, moved the motion and urged this court to allow the motion and grant leave to the applicant to appeal out of time. Counsel submitted that the judgment was to be delivered on 13th June, 2018 but was not ready; that it was deferred to 15th August, 2018 but on that day a representative was told that it would be delivered on notice. No such notice was served.

9. Counsel submits that on 22nd November 2015 they learnt that judgment was actually delivered on 15th August 2018; That by 22nd November, 2018 time for filing an appeal had already lapsed; that a request for proceedings and judgment was made; that proceedings were obtained on 18th March, 2019 and the present application filed on 17th April, 2019. Counsel argues that they have good reasons why the

application should be allowed.

10. Miss Oele, learned counsel for the respondent, submits that the present advocates are not properly on record since leave was not granted to come on record this being a post judgment application; that judgment having been delivered on 15th August, 2018, and counsel became aware on 22nd November, 2018, they only filed the application for leave 5 months later. In counsel's view, the filing of the application was an afterthought and was not intended to aid the cause of justice. She further argues that the grounds of appeal do not reveal an arguable appeal and that the respondents will be greatly prejudiced if leave is granted.

Determination

11. I have considered the application, the response and submissions by counsel for both parties. The applicant seeks leave of this court to file an appeal out of time. The judgment, against which the appeal is to be lodged, was delivered on 15th August, 2018. The applicant states that they were not aware that judgment was been delivered on 15th August, 2018 since their representative was informed that it was not ready and that it would be delivered on notice. They state that they only leant on 22nd November, 2018 that judgment had actually been delivered on 15th August, 2018.

12. The applicant contends that they took immediate steps and requested for proceedings and that proceedings were received on 13th March, 2019 and they filed the application on 17th April, 2019. It is the applicant's case that he has a desire to challenge the decision of the trial court; that he has an arguable appeal; that the delay is not inordinate and that in any case he should not bear the blame for the delay.

13. The respondent has opposed the application. It contends that the application has been made with inordinate delay; that the intended appeal is not arguable and that the appeal is an afterthought. In their view, the intended appeal will cause them prejudice.

14. The law allows this court to enlarge time within which to file an appeal. Section 79(G) of the Civil Procedure Act provides:

> ***"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."***

15. Similarly, section 95 of the Act provides:

> ***Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.***

16. The two provisions confirm that this court has wide discretion to enlarge time within which an appeal is to be lodged. However, like any other discretion, discretion to enlarge time to file appeal should be exercised judiciously.

17. The applicant wants to exercise a legal right to appeal. He argues that the judgment was delivered on a date they had been informed that it was not ready and that they would be notified once ready. As it turned out, it was actually delivered on the same day and in their absence. They only came to know about it on 22nd November, 2018.They promptly applied for proceedings and copy of the judgement on the same day. Although proceedings were obtained on 13th March, 2019, this application was filed by a different a firm of advocates from the one on record at the time the judgment was delivered and who sought and obtained proceedings.

18. The fundamental issue here is whether this court should exercise its discretion and enlarge time in favour of the applicant. Before I deal with this issue, there is a preliminary question raised by the respondent that the applicant's counsel is not properly on record.

19. Order 9 rule 9 of the Civil Procedure Rules requires an advocate who intends to come on record after judgment and decree to seek leave of the court. The rule provides as follows:

> ***"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—***
>
> ***(a) upon an application with notice to all the parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."***

20. The application is normally made in the file in which the judgment and decree was made. That file is not before this court. The respondent has not demonstrated to this court that the applicant did not do so. The applicant has not on his part argued that his new advocate obtained leave to act for him. That notwithstanding, is it a substantive argument that should disentitle a party representation by an advocate of his choice? What was the mischief intended to be caused by that rule?

21. In my view, the rule was aimed at protecting advocates from clients who would wish to run away without discharging their obligations

to pay advocates' fees after acting for them but not to present him/her from taking over conduct of the matter. If that were to be the case, is there another way that eventuality can be ameliorated? I think yes. An aggrieved advocate still has an option to file his advocate–client bill of costs for taxation if the former client decides to run away. In that case, it cannot then be that failure to obtain leave should really disentitle the applicant representation before this court this being a new matter. That objection is unsustainable. it is dismissed.

22. Turning to the main issue in this application, the respondent has contended that the application has been filed after an inordinate delay; that it is an afterthought and that there is no arguable appeal. Admittedly, the impugned judgment was delivered on 15th August, 2018. The applicant says that his advocates were not aware when it was delivered. He also states that they learnt about the judgment on 22nd November, 2018 and immediately applied for proceedings and copy of the judgment. The respondent has not disputed this fact.

23. Further, the applicant states that they obtained proceedings and judgment on 13th March, 2019 and filed the application on 17th April, 2019. These facts are also not disputed. There is obviously nothing the applicant could do between 22nd November, 2018 and 13th March, 2019 when they obtained proceedings. The judgment was delivered in their absence and, therefore, no blame can be placed on them between 15th August 2018 and 22nd November, 2018. Similarly, no blame can be placed on the applicant given that they immediately sought proceedings on learning that judgment had been delivered. It was only after deliveryof proceedings that the applicant should be required to account for.

24. As already pointed out, the advocate who filed this application was not on record when proceedings were obtained. It has not been explained when they were instructed but even if they had on record, between 13th March, 2019 when proceedings were obtained and 17th April, 2019 when the application was filed is about one month. One month, in my respectful view, cannot in all estimation be termed in ordinate delay.

25. The respondent has also argued that the intended appeal is not arguable. The applicant is exercising his statutory right of appeal. In this regard, the court has to bear in mind the principles in sections 1A and 1B of the Civil procedure Act and the oxygen principle when interpreting sections of the Act and the rules made thereunder.

26. As the Court of Appeal observed in ***E. Muriu Kamau & Another v. National Bank of Kenya Ltd*.,** CA No. 258 of 2009 (UR180/2009): [2009] eKLR:

> ***"The court including this court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing."***

27. This court must also bear in mind the right of access to justice guaranteed in Article 48 as well as the principle articulated in Article 159(2) (a) requiring courts to administer substantiate justice devoid of procedural technicalities.

28. Having considered the application, the response and submissions made on behalf of the parties; considering the constitution and the law and guided by precedent, I am satisfied that the applicant is entitled to the orders he craves for. Consequently, the application dated 17th April 2019 is allowed as follows:

a) The applicant is granted leave to file appeal out of time.

b) Memorandum of appeal be filed and served within 14 days.

c) Costs of the application to abide by the result of the intended appeal.

Dated Signed and Delivered at Kajiado this 1st Day of November 2019.

E C MWITA

JUDGE