



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 22 OF 2018

ATAKA, KIMORI & OKOTH ADVOCATES.....APPLICANT/ADVOCATE

AND

SURESTEP SYSTEMS AND SOLUTIONS LTD.....RESPONDENT/CLIENT

RULING

The Application

1. Ataka, Kimori & Okoth Advocates (hereinafter “the Advocate”), were instructed by Surestep Systems and Solutions Ltd (hereinafter “the Client”) to represent it in a number of judicial review applications before this Court. This Court on 24th July 2019 delivered a ruling on an application filed by the Advocate, in which *inter alia*, judgment was entered for the said Advocate against the Client for taxed costs of KShs. 438,958/=. The Client has now filed an application by way of a Notice of Motion dated 14th August 2019 seeking orders for leave to appeal against the ruling and decree of this Court delivered on 24th July 2019, and that the costs of the application be in the cause.

2. The grounds for the application are that at the time the said ruling was delivered in open court, the Client’s advocate on record was not present in Court and hence unable to make an oral application for leave to appeal. Further, that the Client is dissatisfied with the said ruling and intends to lodge an appeal that has a reasonable chance of success, and the Advocate has extracted the Decree which was issued on 1st August 2019 and served upon the Client on 5th August 2019. Lastly, that there has been no delay in bringing this application.

3. The application is supported by an affidavit sworn on 14th August 2019 by Jasper Lubeto, the Client’s advocate on record, who reiterated the above grounds, and stated that it is in the interests of justice and fairness that leave to appeal be granted.

4. The Advocate responded to the said application by way of a replying affidavit sworn on 20th August 2019 by Sheila Kaburu, an advocate in its firm. She stated that the Application is incompetent as it has been filed out of time since the Client failed to seek leave to appeal within 14 days from the date of the ruling as mandated by section 75 of the Civil Procedure Act and Order 43 Rule 3 of the Civil Procedure Rules. Therefore, that the period within which the Client ought to have filed the application lapsed on 7th August, 2019. In addition, that the Client was aware of the decision of the court on the same day it was delivered as the Advocate personally called the counsel for the Client and informed him of the decision of the Court, and also notified him of the ruling by a letter dated 5th August, 2019. The Advocate attached a copy of the letter dated 5th August, 2019.

5. According to the Advocate, the Client has not explained the delay in filing the present application and has not demonstrated that the appeal has a reasonable chance of success to warrant the orders sought.

The Determination

6. This Court directed that the instant application be canvassed by way of submissions. TLO Law Associates for the Client filed submissions on 1st October 2019, while the Advocate filed submissions dated 28th October 2019.

7. The Client submitted that Order 43(1)(3) anticipates that leave to appeal be sought within 14 days after an order is given and is a derivative of section 75 of the Civil Procedure Act, allows for appeals against orders made by this Court. Further that the spirit behind both section 75 of the Civil Procedure Act and Order 43(1)(3) of the Civil Procedure Rules, 2010 is to promote the ends of justice and access to justice as dictated by Articles 159(2)(a) and 48 of the Constitution. This is to the extent that appeals allow a party seek a second opinion within the context of judicial adjudication.

8. On the mandatory language employed in Order 43(1)(3), the Client relied on the decision in **Republic vs Council of Legal Education &**

another ex parte Sabiha Kassamia & Another (2018) eKLR to submit that the word “shall” operates both in mandatory terms and in directory terms. That it is mandatory that one must obtain leave of the court for purposes of appealing an order; but it is directory as to the timelines for one to do so. Therefore, that the 14 days is a statutorily determined time for directional purposes, and if an application for leave is filed outside the 14-day period it finds a cure in Article 159 of the Constitution which bars procedural technicalities from distracting parties in their quest for justice. The decision by the Court of Appeal in **Abdirahman Abdi vs Safi Petroleum Products Ltd & 6 Others, (2011) Eklr** was cited for this argument.

9. The Client reiterated that this application is not too late in the day, and the reasons availed are both reasonable and excusable bearing in mind that the timeline ran during the court vacation period. The Client cited the decisions in **Mwangi vs Kenya Airways Ltd (2003) KLR 486** and **Republic vs Speaker of Nairobi City County Assembly & Another ex parte Evans Kidero, (2017) eKLR**, on the factors that the Court should consider in exercise of its discretion to extend time, and submitted that it had satisfied the conditions laid down therein. Counsel for the Client consequently invited the Court to exercise its discretion and its inherent powers conferred under section 3A of the Civil Procedure Act to secure the ends of justice, and the decision in **Republic vs Kenya Revenue Authority ex-Parte Stanley Mombo Amuti (2018) eKLR** was cited in this respect.

10. The Advocate on the other hand submitted that it is not in dispute that the Ruling which is the subject of this application is not appealable as of right, as it is not among those listed under Order 43 Rule 1 (1) of the Civil Procedure Rules, 2010. Further, that section 75 of the Civil Procedure Act and Order 43 Rule 1 (3) require a party seeking leave to appeal to do so orally at the time an order is made, or within fourteen (14) days from the date of the Ruling. That it is uncontroverted that the present application for leave to Appeal was filed on 14th August, 2019, at which time the mandatory period prescribed by statute had already lapsed. The Advocate submitted that the Client’s application is consequently incompetent for being filed out of time.

11. The Advocate further submitted that the only recourse available to the Client was to seek orders for the enlargement of time as held in **Raja Material Supplies vs Lamech Mbaka Mutegi & Another [2018] eKLR**, but that the Client have not sought the said order in their application, and its attempt to seek orders for extension of time to seek leave to appeal through their submissions dated 1st October, 2019 is therefore mischievous. In any event, that the Client has not laid a basis for extension of time, and no good reason has been provided for the delay to file the application, within the parameters set by the Court in **Republic vs Kenya Revenue Authority Ex-Parte Stanely Mombo Amuti [2018] eKLR**. The Advocate also reiterated that the Client was aware of the Ruling well before the mandatory statutory period to make an application for leave to appeal had lapsed, and due to negligence and inaction chose not to seek leave of the court.

12. According to the Advocate, Article 159 of the Constitution is not designed to overthrow the Civil Procedure Rules, and it cited the decision in **Fredrick Mwangi Nyaga vs Garam Investments & Another [2013] eKLR** wherein it was stated that the Rules are designed to facilitate justice. Furthermore, that the provisions of Order 43(1)(3) of the Rules are stated in mandatory terms, and reliance was placed on the decisions in **Northwood Agencies vs Raj Devani & Another [2019] eKLR**, **Raja Material Supplies vs Lamech Mbaka Mutegi & Another [2018] eKLR** and **Republic vs Council of Legal Education & another Ex Parte Sabiha Kassamia & Another [2018] e KLR** for this position. Consequently, that the submissions of the Client that Order 43(1)(3) operates in both mandatory and directory terms are not founded in law, are misleading and should not be relied on.

13. Lastly, the Advocate submitted that the Client has further failed to demonstrate that the appeal has a probable chance to succeed if the application is granted. The decision in **British American Insurance Co. Ltd vs Francis Mburu Gichume [2017] eKLR** was cited for the holding that an applicant needs to demonstrate to the Court that the proposed appeal is not a frivolous. The Advocates concluded by submitting that they will be extremely prejudiced if the application is granted, as the same is only designed to delay the conclusion of the matter and deny it of the fruits of its judgement.

14. I have considered the pleadings and submissions made by the Client and Advocate. The applicable law with regards to leave to appeal is section 75(1) of the Civil Procedure Act which provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

“(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

(a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) An order on an award stated in the form of a special case;

(c) An order modifying or correcting an award;

(d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) An order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) An order under section 64;

(g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) Any order made under rules from which an appeal is expressly allowed by rules.”

15. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders made under the said Rules in respect of which appeals would lie as of

right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under section 75 of the Civil Procedure Act and Order 43(1) of the Civil Procedure Rules, leave to appeal must be obtained before such an appeal can be preferred. The procedure for obtaining leave is provided under Order 43(3) which states as follows:-

“(3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

16. The order that is sought to be appealed from in the present application was in the ruling made on 24th July 2019 pursuant to the provisions of section 51 of the Advocates Act on taxation of bills of costs, and is therefore not among the orders from which appeals lie as of right under section 75 of the Civil Procedure Act. It is also notable that the Respondent has filed for leave to appeal outside the fourteen (14) days limit provided by Order 43(3) of the Civil Procedure Rules, as the ruling that is appealed from was delivered on 24th July 2019, and the instant application was filed on 14th August 2019.

17. It is therefore the correct legal position, as argued by the Advocate, that the Client ought to have sought extension of time within which to apply for leave, concurrently with the application for leave to appeal. Parties have in this regard made submissions on the requirement to file an application for leave within 14 days is mandatory or not, and whether this is an oversight and deficiency that can be cured by this Court pursuant to Article 159(2) of the Constitution, which obliges the Courts not give undue regard to procedural technicalities and to dispense substantive justice.

18. The Supreme Court pronounced itself as follows in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others** (2014) eKLR as regards the filing of an appeal out of time without extension of time:

“... counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court”

19. I am also guided in this respect by the Court of Appeal’s decision in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others**, CA 290 of 2012, which held as follows on the applicability of Article 159(2)(b):

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1 B of the Civil Procedure Act Cap 221 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.”

20. It is therefore evident that the mandatory requirement is with respect to request for, and the granting of leave and extension of time before the filing of an appeal, where such leave or extension is required. This was the effect of the decisions in **Northwood Agencies vs Raj Devani & Another** (2019) eKLR, and **Raja Material Supplies vs Lamech Mbaka Mutegi & Another** (2018) eKLR that were relied on by the Advocate. In addition, courts are given powers under Order 50 Rule 6 of the Civil Procedure Rules to extend time for any matters for which time has been fixed under the Rules, therefore, a requirement that an application for leave to appeal be filed within fourteen days cannot be interpreted to be mandatory.

21. It is notable in the present application that the Client has not yet filed its appeal, and the only oversight by the Client was the failure to include a prayer for extension of time in its application for leave to appeal. But for that oversight, the Client has properly moved this Court for leave before he can lodge its appeal, and has not lodged any appeal without such leave or extension of time. These circumstances therefore distinguishes the present application, and the Client’s oversight is one that this Court can cure in exercise of its duty under Article 159(2)(b) of the Constitution and section 1A and 1B of the Civil Procedure Act to dispense substantive justice without undue regard to procedural technicalities, and to ensure the just, expeditious, proportionate and affordable resolution of the civil disputes. It is also notable that this Court has inherent powers under section 3A of the Civil Procedure Act to such orders as may be necessary for the ends of justice.

22. As regards the issue of the extension of time for leave to file an appeal, it is also notable that the period of delay in bringing the application is about seven days, which is not inordinate delay in the circumstances. The Court of Appeal held in this respect in **Mwangi vs Kenya Airways Ltd [supra]** that the factors to taken into account when considering prayers for extension of time to appeal include **the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.**

23. Additionally, this Court cannot deny the Client his right to pursue an appeal and to access justice without good reason. The reasons given as regard the timelines within which an application for leave can be made and the nature of those timelines have been addressed by this Court in the Client's favour. The Client is therefore likely to suffer more substantial prejudice in this regard than the Advocate. This is for the reason that no other orders are being sought from this Court other than leave to file an appeal out of time, and there are no substantial effects of granting the said leave, other than permitting the Client to exercise its right of appeal.

24. Lastly, it is notable that the arguability of the Client's appeal is not a matter for this Court's determination. This Court has already pronounced itself on the merits of the Client's case, and cannot reopen or review its decision. The argument as to whether or not the Client has an arguable appeal is therefore one that can only be raised and determined by the appellate Court, which was the circumstance obtaining in **British American Insurance Co. Ltd vs Francis Mburu Gichume (supra)**.

25. I consequently allow the Applicant/Client's Notice of Motion dated 14th August 2019 to the extent of the following orders:

I. The Applicant/Client is granted leave to appeal out of time against the ruling and decree of this Court delivered on 24th July 2019.

II. The Applicant/Client shall file and serve its Notice of Appeal within 14 days of the date of this ruling.

III. The Applicant/Client shall meet the costs of the Notice of Motion dated 14th August 2019.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF DECEMBER 2019.

P. NYAMWEYA

JUDGE