



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 90 OF 2014

KENYA POWER & LIGHTING CO. LTD..... APPELLANT

VERSUS

PETER LANGI MWASI.....RESPONDENT

RULING

1. The application before me is dated 6th February, 2017. It has been brought under the provisions of Sections 79G and 95 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. It seeks the following orders:-

- (i) That the applicant be granted leave to appeal against the whole Judgment of the Hon. Mr. Ekhubi Senior Resident Magistrate, delivered on 11th June, 2014 at Mombasa;
- (ii) That the Notice of Appeal and Memorandum of appeal annexed hereto be deemed as duly filed and served; and
- (iii) That costs of this application be provided for.

2. The application is anchored on the grounds in support of it and on the affidavit of the respondent/applicant sworn on 6th February, 2017. Counsel for the appellant/respondent filed his grounds of opposition on 23rd February, 2017. The applicant's Counsel filed his written submissions on 12th October, 2017 and the respondent's Counsel filed his on 29th January, 2018.

3. At the time of highlighting of submissions, Mr. Tarus, Learned Counsel for the applicant informed the court that he was relying on the grounds on the face of the application and the detailed affidavit of the applicant which explains the reasons for the delay in filing the cross-appeal and the annexures thereto. He also relied on the provisions of Sections 79G and 95 of the Civil Procedure Act.

4. He cited the case **Mitchell vs News Group Newspapers Ltd** [2013] EWCA CIV 1537 and paragraph I-503 of the Halsbury's Laws of England on the objectives of the Civil Procedure law which is equivalent to Section 3A of the Kenya Civil Procedure Act. In his view, the respondent would not be prejudiced if the orders sought are granted. He urged the court to give heed to the overriding objectives of the Civil Procedure Act.

5. Mr. Tarus further indicated that the submissions by the respondent's Counsel did not disclose if they would suffer prejudice if the cross-appeal is allowed to be filed out of time.

6. Mr. Busieka, Learned Counsel for the respondent in opposing the application relied on the respondent's grounds of opposition filed on 23rd February, 2017. He submitted that the granting of the orders sought is discretionary and the applicant has admitted that there has been inordinate delay in the filing of a cross-appeal. He stated that delay must be explained to the satisfaction of the court, but the delay herein has not been explained.

7. It was submitted for the respondent that the appeal was filed on 8th July, 2014 and the application herein was filed on 9th February, 2017, yet there was no submission made that there was a mistake by the applicant's Counsel or misapprehension of the law.

8. Mr. Busieka argued that discretion cannot be exercised in favour of an applicant who goes to sleep. He relied on the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla and 2 Others**, Civil Application No. 35 of 2014 where the Court of Appeal set out the principles for consideration in granting of the orders sought as in this case. Counsel submitted that the respondent is likely to be prejudiced as many years have gone down the drain since it filed its appeal and the applicant is now dragging it backwards.

ANALYSIS AND DETERMINATION

The issue for determination is if good and sufficient cause has been shown for grant of leave to file a cross- appeal out of time.

9. The affidavit sworn by the applicant on 6th February, 2017 in paragraph 2 states that the applicant is aware that the Judgment herein was delivered on 11th June, 2014 apportioning liability equally and an award of Kshs. 850,000/= in general damages was made.

10. The applicant in paragraphs 3 and 4 of the said affidavit states that after he learnt that the respondent had filed an appeal he went home and resurfaced in the January, 2017. He then instructed his Advocates to file a cross-appeal.

11. The applicant further deposes in his affidavit that since the respondent is still trying to obtain typed proceedings there will be no prejudice that will be vested on it. He also deposes that the delay occasioned herein is not intentional, inordinate as to be inexcusable. He attached a draft memorandum of appeal to his affidavit and prayed for the same to be deemed as properly filed.

12. The Civil Procedure Act does not set timelines for the filing of a cross-appeal but since the same is an appeal from the rival party, it is expected that a cross-appeal must be filed within reasonable time of the filing of the main appeal. Order 42 rule 32 of the Civil Procure Rules makes reference to a cross-appeal. The said provisions state as follows:-

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made or to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross- appeal.” (emphasis added).

13. The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time.

14. The appellant however took no action for over 2 years and 5 months before filing the present application. The Supreme Court of Kenya in the case of **Nicholas Kiptoo arap Korir Salat vs IEBC and 7 others** [2014] eKLR, laid down the following principles for extension of time for filing appeals:-

“(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 extension of time has the burden of laying a basis to the satisfaction of the court;

(iii) Whether the court should exercise discretion to extend time is a consideration to be made on a case to case basis;

(iv) Where there is a reasonable cause for the delay. The delay should be expressed to the satisfaction of the court;

(v) Whether there will be any prejudice suffered by the respondents, if extension is granted;

(vi) Whether the application has been brought without undue delay and;

(vii) Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.”

15. Mr. Tarus cited the provisions of the Civil Practice Directions of England as captured in the case of **Mitchell vs News Group Newspapers Ltd** (supra) to support his application. It is worth noting that not all the Civil Practice Directions of England are in *pari materia* with the Kenya Civil Procedure rules. In view of Kenya’s elaborate and robust Civil Procedure Rules, this court is not inclined to apply the Civil practice directions of England in instances where the Judicature Act or any other law has not provided that the laws and practice directions of England would apply.

16. In the case cited by Counsel for the respondent of **Shah Hemraj Bharmal & Bros vs Santosh Kumari w/o J.N. Bhola**, Civil Appeal No. 19 of 1960 the Court of Appeal held that:-

“1. It is incumbent upon a party who desires to lodge a cross-appeal to make an application within reasonable time;

2. If a party delays in filing an application for extension of time and there is no question or mistake on the legal adviser as is the case here, but inordinate delay and no sufficient reason has been shown thus the application must be refused.”

17. The applicant undoubtedly fell into a deep slumber after he learnt of the appeal filed by the respondent herein. He has been indolent and this court cannot exercise its discretion in his favour. The prejudice to be occasioned to the respondent is that for 2 years and 5 months, it has been under the impression that the applicant was satisfied with the decision rendered by the lower court and that the only live issue between it and the applicant is the appeal it filed on 8th July, 2014. The applicant has failed to show good and sufficient cause for this court to exercise its discretion in his favour.

18. The result hereof is that the application dated 6th February, 2017 is hereby dismissed. Costs are awarded to the appellant/respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 11th day of May, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Tarus for the applicant/respondent

V. Otieno for the appellant/respondent

Mr. Oliver Musundi - Court Assistant