



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 214 OF 2017**

**KENYA PORTS AUTHORITY.....APPELLANT**

**VERSUS**

**CEMTEC ENGINEERING LIMITED.....RESPONDENT**

**R U L I N G**

1. There are before court for determination three Application as follows:-

- **By the Appellant dated 9/11/2017 for stay pending Appeal.**
- **By the Appellant dated 24/11/2017 seeking extension of time to file appeal and to deem the memorandum of Appeal filed on 13/10/2017 duly filed.**
- **By the Respondent dated 20/11/2017 seeking the striking out of the Appeal and dis-charge of the orders of stay for reasons that the appeal was filed out of time and seeks to upset a non-existent judgment dated 15/9/2017.**

2. On the 4/12/2017, the parties agreed by consent that the three be heard together by way of written submissions and that the application for extension of time be dealt with first.

3. Having read the file I propose to handle the three application together but will seek to determine the application for extension of time first because if the court finds it merited and extends time then there would be little need to delve into that for striking out and only then can the court consider the Application for stay pending Appeal. Conversely, if the application fails, the Appeal shall be a candidate for striking out and there would be no basis to consider an application for stay pending Appeal.

4. On the flip side if the Application succeeds, and time is extended then it would only be necessary to consider if there is justification for stay pending Appeal as the application for striking out will have been subsumed in the decision to extend time. In that scheme of things I propose to treat the application for striking out together with the Replying Affidavit of Kennedy Mwangi as responses and opposition to the Application for extension of time.

**Application Dated 24<sup>th</sup> November 2017 seeking Extension of time**

5. In seeking to have time extended and to have the Appeal deemed duly filed, the Applicant/Appellant aver that having retained the current counsel, it took the counsel a while to get the handwritten ruling and when they laid their hands on the ruling, the date at its end appeared to read 15/9/2017. Based on such fact the counsel proceeded and filed the Appeal on the 15/10/2017. Out of such belief, the Appellant contends that it shall only be just to extend time and allow him exercise his right of Appeal and be heard by presenting his case before the court. The Application was supported by the Affidavit of Mr. Khagram Advocate which reiterates the facts and reasons and exhibits a letter of instruction dated 27.9.2017, a notice from the Court of Appeal calling the counsel to attend to an election petition no. 5 of 2017, in Malindi, the handwritten

ruling and a letter dated 30/6/2014 forwarding the tender contract, subject of the litigation.

6. There is also an Affidavit by one Mr. Stephen Kyandih, the Senior Principal Counsel of the Appellant which confirms having given instructions on the 27/9/2017 and repeats that its failure to lodge the appeal by the 13/10/2017 was not out of indolence but a genuine mistake of facts regarding the date of ruling.

7. As an opposition to that application the Respondent filed a Replying Affidavit by Mr. Kennedy Mwangi, the Managing Director of the Respondent. That affidavit asserts that the Appellant is not deserving the equitable orders for stay and extension of time because no reason was offered for delay and that the Appellant lacks candour in dealing with the court but deliberately attempting to delay the determination of the matter.

8. The deponent points the fact that the instructions were given on 26/9/2017 and that the letter of 27/9/2017 was just but a follow up and further that the Appellants could not have been misled on the date of ruling because the Respondent's former advocates had sent two letters to the Appellant dated 12/9/2017 and 22/9/2017.

9. There are indeed the two letters received by the Respondent's head of litigation on the 14th and 25th September respectively. Those letters confirm that judgment was entered on the 5/9/2017 and not 15/9/2017 and that the letter of instruction underscored lack of time to file the appeal. On the allegations that there was an illegality in the contract leading to the suit, the deponent dispels such allegations, even though they may be not relevant to this litigation, as the works actually commenced in time and the contract provided for an extension of some 365 days after expiry of the agreed time.

10. The Application dated 24/11/2017 which I have opted to treat as an opposition to the application for extension of time on its part seeks to have the Appeal struck out on two broad grounds;

**a) That it was filed outside time without leave.**

**b) The memorandum of Appeal seeks to challenge a non-existent decision made on the 15/9/2017.**

11. Parties filed submissions on the applications pursuant to the court orders of 7/2/2018. The appellant's submissions are dated 8/3/2018 and filed the same day together with list of authorities cited while those by the Respondent are dated 12/4/2018 and filed on 13/4/2018 also with cited authorities. I have had the benefit to read not only the record of the application and the opposition thereafter but also the written submissions and the highlights.

12. Having done so, I consider the only issue that must be considered and determined is whether the Appellant/Applicant has demonstrated to merit deserving of the court's unfettered discretion to extend time to file an Appeal out of time, that places an obligation of one giving reason for delay and an explanation for the length of delay.

13. Here, it is not disputed that the Appellant instructed the present counsel on or about the 26th or 27th September 2017 to file the Appeal, and the Appeal was filed someone 18 to 19 days later on the 15/10/2018. The explanation given is that upon getting instructions, counsel having not been on record, sought to peruse the handwritten ruling and was only able to get same by the 2/10/2018.

14. In computing the duration of delay to establish whether the same is unreasonable the time between 27/9/2018 and 15/10/2017 must be reckoned with. In my calculation it comes to some 18 days to take steps. However, by the time instructions were given the counsel had just 7 days to act and it is disclosed that they did lay hands on the handwritten ruling on 2/10/2017. Taking into account the fact that 27th September 2017 was a Wednesday, I take notice and appreciate that it took the Appellant just two working days, 28th and 29th to lay hands on the ruling. That to me is far from reluctance or indolence.

15. Having laid hands on the ruling, the counsel says that he got the wrong impression that the same was delivered on the 15/9/2018 and was thus content to file the Appeal on the 15/10/2017. I have myself looked at that ruling in its handwritten form and it is not very off the mark to read 15th as the date signed down there.

16. I am therefore prepared to accept that one would be misled and that the Appellants counsel was indeed misled that the

ruling was indeed dated 15th September 2017. That to me is an acceptable explanation which leads me to find that the Appellants deserves the courts discretion to extend time.

17. The additional reason, I am prepared to exercise my discretion in favour of the Appellant, is the facts that courts in this country have now adopted the broad and less defeatist approach that there should be hesitation at terminating proceedings prior to parties being heard on the merits of their disputes and instead to strive, wherever the justice of the case demands, to ignore and excuse inadvertent and excusable lapses in order to afford parties their day in court if that be seen to serve the interests of substantial justice. This is the principle I get for the decision in *Nicholas Kiptoo Arap Korir Salat vs I.E.B.C. and Others [2013] ek* when the Court of Appeal, Ouko, JA, said, in the leading judgment:-

**“A ruling in favour of sustaining the appeal will therefore be in line with the overriding objective principle because if the appeal is struck out on account of incompetence, the striking out order will not finally determine the issues in controversy as between the parties, it will simply restore the parties to the pre-appeal stage before the alleged offending notice of appeal was filed. The net effect of this restoration will be that the appellant will be at liberty to reinitiate the appellate process afresh, premised on a form D compliant notice of appeal. Such an action is likely to lead to a delay in the disposal of the real issues in controversy as between the appellant and the respondent. There will also be considerable costs to be borne by both parties both for these proceedings and the proceedings to be reinitiated. This will also result in the clogging of the justice system as the reinitiated appeal will have to be re-presented to this same Court based on the same set of facts and as soon as it is presented it will start competing for time for disposal”.**

18. In the context of this appeal, if time not be extended; the Appellant, a public body, will leave the court with that feeling that it has been denied access to justice so as to urge his complainant against the trial court’s decision that struck out its defence. That will not serve the course of substantial justice and the image a judicial system guided by the robust constitution guaranteeing access to justice like ours. But in any event nothing will stop the applicant from starting afresh by an application to extend time or just going to the Court of Appeal. In that event judicial time shall not have been used efficiently.

19. On the flip side, to allow the appeal will not deprive or prejudice the Respondent in any way beyond the delayed realization of the sums adjudged by the trial court. That delay however cannot be equated with the difficulty and hardship to be visited upon the appellant by terminating the Appeal before hearing. Additionally, the delay will effectively be assuaged by interest if the Respondent succeeds in this appeal or at the court below after trial.

20. Having come to the foregoing conclusion does not necessarily mean that the Appellant is being given the extension as of right. NO. The extension is being granted for I consider that the Appellant has shown a good and sufficient case for not filling the appeal within time. I do therefore extend time and deem the appeal duly filed in time.

#### **Application for stay pending Appeal dated 9<sup>th</sup> November 2017**

21. Broadly put, the Appellant seeks stay on the basis that its appeal has good prospects of success, that the decree is for a substantial sum and should it be paid, recovery from the respondents may not be possible thus the appeal may be rendered nugatory and that the Appellant is prepared to give appropriate security for the due performance of the decree should the appeal fail. To that fear, the difficulty to recover the decretal sum should the appeal succeed, the respondent has not given an answer or rebuttal. The law as I understand it is that the appellant having expressed the fear it was for the respondent to allay such fears by stating its ability to refund. Having not done so, I hold the view that the appellants fears are not idle and that it need to be taken into account in considering the prayer for stay. In the decision in *Kenya Shell Ltd vs Kibiru [1956] KLR 410*. The Court of Appeal pointed out that if an applicant alleges difficulties in recovery of decretal sum it rests on the respondent to show that he would be able to effect a refund.

22. The upshot is that the time is extended and the Memorandum of Appeal dated 13/10/2017 and filed on 15/10/2017

deemed duly filed. For that reason, the Application to strike out the Appeal fails and is dismissed.

23. On stay I grant stay to safeguard and preserve the substitution of the appeal but on terms that the Appellant deposits into a joint interest bearing account, in the names of the advocates for the parties, the full decretal sum within 30 days from today. In default, the stay hereby granted shall lapse and the Respondent shall be at liberty to execute.

24. Since there was a default by the Appellant which is not denied albeit excusable, and notwithstanding the success in having time extended, the costs of the applications for extension of time and striking out are awarded to the Respondent and assessed in the sum of Kshs.15,000/= to be paid within 30 days from today.

25. The costs of the Application for stay shall be costs in the Appeal.

26. It is so ordered.

**Dated and delivered at Mombasa this 4th day of June 2018.**

**P.J.O. OTIENO**

**JUDGE**