



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APP NO. 272 OF 2018

APEX STEEL LIMITED.....PROPOSED APPELLANT

VERSUS

JOSEPH OKONGO KIUNGA.....PROPOSED RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 10th May, 2018 under the provisions of sections 79G, 95 and 3A of the Civil Procedure Act, Order 22 Rule 22, Order 50 Rule 5 and Order 51 of the Civil Procedure Rules 2010. The applicant seeks orders that:-

1....spent

2..spent

3. That the Proposed Appellant be granted leave to appeal out of time against the judgment on quantum of the Hon. Peter Muholi Senior Resident Magistrate delivered on 28th February, 2018 in Milimani CMCC No. 3342 of 2011 Joseph Okongwo Kiunga Vs. Apex Steel Limited.

4. That the Memorandum of Appeal annexed hereto be deemed as duly file and served.

5. That the costs of this application be provided for.

2. The Application is based on the grounds on the face of the application and on the supporting affidavit of GEORGE MAHUGU. He depones that he was the Advocate in conduct of this matter in the lower court and that upon delivery of the judgment on 28th February, 2018, there was an error apparent of the face of the judgment which was rectified on 28th March, 2018 and that it was not until 4th May, 2018 that the Client instructed the Advocate to file an appeal against the judgment. The Applicant avers that they have an arguable Appeal with high chances of success and that the Plaintiff will not suffer prejudice if the orders are granted. It is further deponed that the Applicant is willing to abide by any reasonable conditions that may be imposed by the Court.

3. The Proposed Respondent did not file a response to the application.

4. I have read and considered the application. The relevant provisions of law applicable in an application for extension of time is section 79G of the Civil Procedure Act and Order 50 Rules 4 and 6 of the Civil Procedure Rules.

5. **Section 79G of the Civil Procedure Act** provides for the timelines for filing an appeal where it states that , “*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 a good and sufficient cause for not filing the appeal in time.*”

6. Order 50 Rule 4 of the Civil Procedure Rules provides that *Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.*

7. **Order 50 Rule 6 of the Civil Procedure Rules** provide that

”Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

8. The law is trite that extension of time to file an appeal is a discretionary power which the court ought to exercise judiciously and in accordance with the law. The law provides that appeals from subordinate courts to the High court should be so lodged within 30 days. The only consideration for accepting an appeal out of time is where the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

9. It has been explained by the Applicant that the reason for the delay in filing the Appeal in time is because instructions to file the Appeal were not provided to the Applicant’s Advocates until 4th May, 2018. It is not denied that the Applicant became aware of the judgment in time but what emerges is that the delay is attributable to the Applicant’s Insurance Company’s laxity.

10. The Supreme Court’s Decision in **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR** laid down the guidelines for extension of time to file an appeal out of time where it was held that , *“As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:*

1. *“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.*

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

(a) 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

(b) a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;

(c) whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;

(d) where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

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

(f) whether the application has been brought without undue delay; and

(g) whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].”

11. The requirement of an applicant to give a satisfactory explanation for delay in filing of appeal in time cannot be over emphasized. The Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015) eKLR** also held that *“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”*

12. I find the explanation given by the Applicant not convincing but in the broad interest of justice, the court will allow prayers 3 and 4 of the application.

13. The Applicant has also sought a stay of execution though he has moved the court under the wrong provisions of the law. An application for stay pending appeal should be brought under **Order 42 Rule 6. Order 42 Rule 6 of the Civil Procedure Rules** which provides the conditions for granting an order of stay of execution pending appeal which are; that the application has been made without unreasonable delay; that security for due performance of the order or decree has been given and that substantial loss may result to the Applicant unless the order for stay is made. The Applicant has not established the substantial loss that it would suffer if the decree is not stayed. It has neither been pleaded nor established that the Respondent would not be in a position to refund the decretal sum in the event of a successful appeal. No security has been offered and the application was filed after unreasonable delay of more than 2 months from the date of the judgment. The court therefore disallows prayer 2 of the application and in any event, the applicant has sought an order for stay pending the hearing and determination of the application.

No orders are made on costs of the application.

Dated, Signed and Delivered at Nairobi this 20th day of September 2018

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L. NJUGUNA

JUDGE

In the presence of:

.....*For the Plaintiff*

.....*For the defendant*