



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 499 OF 2015**

**NATION MEDIA GROUP. ... 1<sup>ST</sup> APPELLANT/APPLICANT**

**AGGREY MUTAMBO. .... 2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**WILLIAM KIMUTAI B. KEITANY. .... RESPONDENT**

**R U L I N G**

The ruling herein relates to two applications one dated 4<sup>th</sup> November, 2015 the other dated 20<sup>th</sup> November, 2015 and a preliminary objection dated 14<sup>th</sup> March, 2016.

The application dated 4<sup>th</sup> November, 2015 seeks the following orders: -

1. That, this honourable court be pleased to enlarge time for the Appellants to file the Memorandum of Appeal herein.
2. That the Memorandum of Appeal filed herein be deemed as properly filed and served.
3. That costs of this application be provided for.

It is premised on the grounds in the body of the same and is supported by the annexed affidavit of Sekou Owino sworn on 4<sup>th</sup> November, 2015. The facts in support of the application are that an interlocutory judgment against the Appellants/Applicants was obtained on the 9<sup>th</sup> September, 2013. Counsel for the Applicants filed an application seeking to set aside the interlocutory judgment on the 25<sup>th</sup> August, 2014 but it was dismissed on the 4<sup>th</sup> day of March, 2015.

That on the 6<sup>th</sup> March, 2015 the Appellants requested for certified copies of the proceedings and ruling for purposes of appeal, which according to them caused the delay in filing the appeal as they were supplied on the 29<sup>th</sup> April, 2015.

That, upon receipt of the proceedings, the clerk filed them in the incorrect file and she did not see them until the 15<sup>th</sup> October, 2015. That the appeal raises arguable issues and it is in the interest of justice that the Memorandum of appeal be deemed as properly filed. They further aver that no prejudice will be occasioned to the Respondent, which cannot be compensated for with costs and that the Appellants are willing to abide by any conditions that this Honourable court may deem fit to impose

The Respondent has opposed the application by way of a replying affidavit sworn by William Kimutai B.

Kietany on the 20<sup>th</sup> November, 2015. He avers that the application is frivolous, vexatious and has been brought in bad faith as against the Respondent. That the Applicants are trying to delay the determination of Nairobi, CMCC No. 3525 of 2013 and it is clear that there was unreasonable and inexcusable delay in filing the memorandum of appeal, which delay has not been explained.

That the appellant's attempts at filing an appeal 7 (Seven) months after the expiry of the period provided for filing the same is inexcusable and this honourable court should not condone the indolence on the part of the appellant. That the explanation for inaction resulting to inordinate delay in filing the appeal on the part of the Appellant's Advocate, is unreasonable, unconvincing and untenable in that it was not convincing that the clerk to the appellant's Advocates could have misfiled the typed copies of the proceedings and the ruling from 29<sup>th</sup> April, 2015 up to 15<sup>th</sup> October, 2015 which is a whole eight months from the date of the ruling.

That, even if it were true that the Appellant's advocates' firm stumbled upon the typed copies of the proceedings and ruling on the 15<sup>th</sup> October, 2015, no explanation has been given why the memorandum of appeal was filed in court on the 28<sup>th</sup> October, 2015 in view of the fact that the Appellant's had already instructed their advocates to file an appeal. That the matter has already proceed for purposes of assessment of damages and its awaiting judgment and in the premises the Respondent stands to suffer great prejudice if the orders sought herein are granted.

It is further averred that contrary to the deponent's assertion that the Applicants have an arguable appeal, they have no such an arguable appeal in that they were served with summons to enter appearance on the 7<sup>th</sup> August 2013 and service was effected upon and acknowledged personally by the deponent.

The second application dated the 20<sup>th</sup> November, 2015 has been brought under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and it seeks for orders that:

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**1. Spent**

**2. That there be a stay of any further proceedings in Milimani CMCC No. 3525 of 2013 pending the hearing and determination of this application inter partes.**

**3. That there be a stay of any further proceedings in Milimani CMCC No. 3525 of 2013 pending the hearing and determination of the Appellant/applicant's Notice of Motion application herein dated 4<sup>th</sup> November, 2015.**

**4. That, there be a stay of any further proceedings in Milimani CMCC No. 3525 of 2013 pending the hearing and determination of the appeal herein.**

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

It is premised on the grounds set out in the body of the same and it's supported by the annexed affidavit of Anastacia Kioko Mululu sworn on 20<sup>th</sup> November, 2015. The facts in support of the application are that, the applicants firm of advocates M/S Archer & Wilcock filed an application to set aside interlocutory judgment dated 21<sup>st</sup> August, 2014 which application was dismissed on 4<sup>th</sup> March, 2015. The Appellant instructed the said firm to appeal against the ruling but there was a delay in filing the appeal as the proceedings were obtained late and the Applicants Counsel's clerk placed them in the incorrect file and it was not until 15<sup>th</sup> October, 2015 when the deponent saw them.

That the Respondent proceeded with the formal proof on the 4<sup>th</sup> day of November, 2015 and by the time the application herein was filed, the matter had been scheduled for mention on 4<sup>th</sup> December, 2015 to confirm filing of submissions. It is for that reason that the Applicants filed this application. It is further averred that the Respondent's means are unknown and if a final judgment is delivered and the decretal

sum paid to him, the Applicants will not be able to recover the same and they will suffer substantial loss. They have urged the court to allow the application as the mistake of an advocate must not be visited upon the client.

In a replying affidavit sworn by Brian Omondi Ondego and filed in court on 1<sup>st</sup> December, 2015, he avers that, the Applicants have failed to demonstrate the legal principles that warrant the exercise of the court's discretion to stay proceedings in Nairobi CMCCC No. 3525 of 2013 in that, they have not demonstrated that they have an arguable appeal.

That, in any case, the Applicants do not have an arguable appeal in that the legal officer of the 1<sup>st</sup> Applicant one Sekou Owino has admitted to have been served with the summons to enter appearance on the 7<sup>th</sup> August, 2013 but he mistakenly made the assumption that there was enough time before the court resumed from vacation within which to enter appearance and file defence, which cannot be true as he is an advocate of 19 years standing.

That the Appellants/applicants have failed to demonstrate that the delay in filing the intended appeal was reasonable, understandable and excusable in the circumstances. That they have also failed to demonstrate that unless the order of stay of proceedings is granted, the appeal will be rendered nugatory as there is no appeal on record, the same having been filed out of time and no leave has been granted yet. That the Respondent stands to suffer great prejudice if the court grants orders staying proceedings as the matter has already proceeded for formal proof and the Respondent is waiting for his judgment.

In a supplementary affidavit sworn by Brian Omondi Ondego on 14<sup>th</sup> March, 2016 and filed in court on 31<sup>st</sup> March, 2016, he has annexed the Applicant's application and supporting affidavit dated 21<sup>st</sup> August, 2014 together with the relevant affidavits relied upon in the subordinate court. He averred that the said documents would assist the court especially on the question whether the applicants have an arguable appeal. According to the Respondent, the Applicant admitted liability for defamation in paragraph 10 of the Respondent's replying affidavit dated 9<sup>th</sup> September, 2014 in which the Applicants admitted there was an **'error'** which had been corrected, and proceeded to offer **"apologies"** and for that reason, the applicants have no arguable appeal since they have no defence in Nairobi CMCC No. 3525 of 2013. He has asked the court not to exercise its discretion in favour of the applicants.

With regard to the preliminary objection, the learned counsels agreed to rely on their respective submissions filed herein. I have read and considered the application, the affidavits on record, the written and oral submissions made by the counsels for both parties as well as the authorities cited. I wish to start with the application dated 20<sup>th</sup> November, 2015 seeking stay of proceedings and in considering the same, I would like to borrow from the wisdom of Ringera J, in the case of **Global Tours and Travel Limited**; Nairobi High Court Winding Up cause No. 43 of 2000.

***"As I understand the law whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice..... the sole question is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one and scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously "emphasis added".***

In summary, the applicant must establish

- a. That he/she has a prima facie arguable appeal.
- b. That the application was filed expeditiously.

c. He has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

The same principles were well articulated by the Court of Appeal at Nairobi in Civil Application Nai 122/2015 (**Justice Philip K Tunoi & another Vs the JSC and 3 Others**) where the Court of Appeal stated: -

***“The principles to be applied by this court on consideration of application under Rule 5(2) (b) of this court Rules are now fairly well stated by many decisions that have been pronounced by this court. This court in deciding such an application exercises unfettered powers but those powers cannot be exercised capriciously or upon the whims of the judge. The court has to be satisfied that the intended appeal, or appeal, if already filed, is arguable, which is the same as saying that it is not frivolous. The court must in addition, be satisfied that should the appeal, or intended appeal, as the case may be succeed, the success would be rendered nugatory should the court refuse to grant the application, see for enunciation of these principles, Republic Vs Kenya Anti-Corruption Commission & 2 Others (2009) KLR 3 where it was stated by this court that: -***

***“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5(2) (b) of the Rules are now well served. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or the intended appeal is not frivolous, that is to say that it is an arguable appeal. Secondly, the court must also be persuaded that, were it to dismiss the application for stay and later the appeal or the intended appeal succeeds, the result or the success would be rendered nugatory. In order that the Applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. See also the courts decisions in the cases of Reliance Bank Limited Vs Norlake Investments Ltd (2002) IEA 227 and Githunguri Vs Jimba Credit Corporation Ltd & Others (No. 2) 1988; KLR 828; WARDPA Holdings Ltd & Others Vs Emmanuel Waweru Mathai & HFCK (Civil Appeal No. 72 of 2011 (unreported).”***

In her submissions, counsel for the Applicants told the court that there is an arguable appeal and went on to state that the grounds are sufficient to show that indeed the Applicants have an arguable appeal. The court notes with a lot of concern that save for that general statement, counsel did not make any effort to satisfy the court that the Applicants have an arguable appeal. In the decision by the Court of Appeal in Nairobi 122 of 2015 (supra), the Court of Appeal was very categorical that the applicant ***“needs to satisfy the court”*** that the appeal is arguable. This court is not privy to the proceedings that took place between the parties herein, which culminated to the filing of the two applications. As rightly submitted by the counsel for the Respondent, it was very necessary for the Applicants to annex the proceedings and the ruling by the lower court as it is only by perusing the same that this Honourable court would be in a position to make a finding on whether the intended appeal is arguable or not. From where I sit, as I write this ruling, I am unable to make that finding as no material was availed to me by the Applicants.

On the second ground, it is also unfortunate that the Applicants did not persuade the court that were it to dismiss the application for stay and later the appeal succeeds, the appeal shall be rendered nugatory and in any event, going by the decision by the Court of Appeal (supra), in order that the applicant may succeed, he must demonstrate both limbs and demonstrating one limb would not avail him the orders sought if he failed to demonstrate the other limb.

In line with the principle of stare-decisis, this court is bound by the decision of the Court Appeal and in view thereof, the finding by this court is that the application dated 20<sup>th</sup> November, 2015 has no merits.

With regard to the application dated 4<sup>th</sup> November, 2015. It is clear from the material before the court that interlocutory judgment in CMCC No. 3525 of 2013 was obtained way back on 9<sup>th</sup> September, 2013. An application seeking to set aside the said judgment was filed on 25<sup>th</sup> August, 2014 and the same was

dismissed on 4<sup>th</sup> March, 2015. The application herein was filed on 4<sup>th</sup> November, 2015 which is a period of eight (8) months from the date of delivery of the ruling that dismissed the application. The reasons given for the delay is that the counsel for the Applicants needed to analyze the ruling and prepare the memorandum of appeal and that the proceedings were supplied late on 29<sup>th</sup> April, 2015 and were placed in the incorrect file by their court clerk until 15<sup>th</sup> October, 2015.

The principles to be considered in an application for leave to enlarge time to file appeal out of time were considered by the Supreme Court in application No 16 of 2014 (**Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 Others** which are: -

- 1. 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.***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.***
- 3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***
- 5. Whether there will be any prejudice suffered by the Respondent, if the extension is granted.***
- 6. Whether the application has been brought without undue delay; and***
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

As I have already pointed out the application was brought eight months after the dismissal of the application seeking to set aside interlocutory judgment. As submitted by counsel for the Respondent, there is no reason why the Applicant's counsel did not file an application for extension of time together with the Memorandum of Appeal on 28<sup>th</sup> October, 2015. Secondly, it took the applicant's counsel more than two weeks to file the application herein after they realized the error by their clerk.

The counsel for the Applicants avers that she had to wait to be supplied with the typed copies of the proceedings for perusal for her to prepare the Memorandum of appeal. My take on this is that, it was not necessary for her to wait until the proceedings were typed and certified.

If indeed, she was interested in appealing on time, she could have applied for handwritten copies which could have served the same purpose. Am persuaded by the submissions by the learned counsel for the Respondent that the delay was unreasonable and that the same has not been explained to the satisfaction of the court. In fact, there was undue delay in bringing the application herein.

I also wish to state that the Defendant and his advocates have handled this matter in a rather casual manner since the summons to enter appearance and the plaint were served upon him. It is important for the parties to always appreciate that all the parties to a suit are entitled to justice in equal measure. While the Plaintiff is entitled to have his/her case disposed off quickly and without undue delay, the Defendant should not delay the case unnecessarily. A delay of eight months in bringing the applications herein is unacceptable.

In the upshot, the application dated 20<sup>th</sup> November, 2015 has no merits and it's also dismissed with costs.

Finally, on the preliminary objection, the court finds that there is no legal requirement that the ruling and the order appealed against must be annexed to an application for stay of proceedings or leave to appeal

out of time. It is only in an application for review that, such a requirement is mandatory. As the court has already pointed out elsewhere in this ruling, the importance of annexing the ruling and/or the proceedings of the lower court was to help the court in determining whether the appeal is arguable or not but it is not a legal requirement per se. Having said that, this court does not hesitate to find that the preliminary objection has no merits and is hereby dismissed with costs.

**Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of February, 2017.**

.....

**L NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Appellants.***

..... ***for the Respondent.***