



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. 608 OF 2012
AFROFREIGHT FORWARDERS LTD.....APPLICANT
VERSUS
TALLY NOFAR & AYAL DRIED FLOWERS LTD.....RESPONDENT
RULING

The Applicant herein, Afro Freight Forwarders Ltd, is seeking to be allowed to file its appeal from the subordinate court's judgment in CMCC 221 of 1998, out of time. The application is premised on the ground that the Applicant wishes to appeal against the judgment delivered on 30th March, 2012 of which the judgment and proceedings were availed on 23rd August, 2012. The application is supported by the affidavit of Kabaru Ndegwa sworn on 30th October, 2012. He avers that the proceedings and the judgment were ready for collection on 23rd August, 2012 but the decree was issued on 21/9/2012. He attempted to file the appeal on 4th September, 2012 but he was advised at the registry to first obtain leave to file the appeal out of time. He managed to extract the certificate of delay from the lower court on 25th October, 2012. The Applicant claims that they have a good appeal which should be heard on merit. He also claims that the Respondent will not be prejudiced by the filing of the appeal out of time.

The application was prosecuted by way of written submissions. The Applicant submitted that Section 79G of the Civil Procedure empowers the court to enlarge the time for filing an appeal provided the appellant satisfied the court that he had a good and sufficient cause for not filing the appeal in time. The Applicant referred to the case of **Jerusha Wairimu Vs Josphat Mburu Mondoithi, Civil Appeal Nai 303 of 2005.** The Applicant submitted that the court has unfettered discretion to extend the time and doing so is guided by the consideration of the length of the delay; whether the delay is sufficiently explained, whether the proposed appeal is arguable and whether the Respondent will be prejudiced by the extension of time.

The Applicant also argued that it has all along been diligent in presenting the proposed appeal. That the Applicant has a serious appeal which should be heard on its merit and that the Respondent will not be prejudiced by the delay.

The Respondent on the other hand, submitted that the delay in filling the memorandum of appeal within the stipulated time is unexplained. That there is inordinate delay in filing the appeal and the Court and the Respondent should not be condemned for it. The Respondent also submitted that it is settled practice that issuance of a decree is not dependent on the proceedings and judgment. The decree could have been signed and sealed by the subordinate court, had the Plaintiff pursued the same. The certificate of delay relates to the proceedings and judgment and does not explain the delay in procuring the decree appealed against. The Respondent argued also that the Applicant had 67 days from the date when the certificate of

delay was issued the date of filing this application, which delay has not been properly explained.

The Respondent also submitted that the application is in total disregard of the Rules of Civil Procedure and an abuse of the court process which means the litigation may never come to an end.

The overriding objective of the Civil Procedure Act in the court's view is to ensure that justice is done to all parties within the shortest possible time. The Applicant has a right of appeal which right should be pursued within the law and whereas the Respondent has a right to an end in litigation, the two rights should lead to an outcome that justice is not only done but is seen to be done.

Whether or not the order for extension of time should be granted lies entirely in discretion of the court. A court will allow the extension of time to prefer an appeal where the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time. **Section 79 G** states:

“79G. 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 good and sufficient cause for not filing the appeal in time.”

The above provision being mandatory, an appeal from a subordinate court to the High Court should be filed within 30 days from the date of the decree or order appealed against, and may be admitted out of time only where there is good and sufficient cause for not filing the appeal in time.

In the instant application judgment was delivered on 30th March 2012, and the decree was issued on 21st September, 2012. The certificate of delay availed by the Applicant was issued 16th October 2012 and the current application seeking extension was filed on 30th October 2012. In the view and finding of the court, the facts show laxity on the part of the Applicant. The decree marked KN2 is was from consent judgment adopted by the court on the 17th January 2012 on the principle sum due to the Plaintiff. The parties agreed to proceed to determine the issue of interest due, which was decided on 30th April 2012. Mr. Kaburu during the submissions admitted that they were paid the principle sum and they were appealing against interest and costs. The Applicant did not therefore timely extract the order or decree against which they wished to appeal.

The court of appeal in **Kyuma Vs Kyema (1988) KLR 185 in upholding** the High Court's judgment, stated at page 187:

“The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order...This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of section 79G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the “decree or order of the court”. As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court, but also a certificate of delay.....

..... The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a

certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were “the proceedings and judgment”.(Emphasis mine).

In this case before the court, it is clear the Applicant did not apply for the order or decree. The decree attached relates to the consent judgment which the Applicant is not appealing against. The delay in this case has not therefore, been satisfactorily explained and the court is not persuaded that it is in the interest of justice to exercise its discretion in favour of the Applicant to extend the period to appeal.

The court accordingly finds that application has no merit and it is hereby dismissed with costs. Orders accordingly.

Dated and Delivered at Nairobi this 16th day of July, 2015.

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D A ONYANCHA

JUDGE