REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

MISC. APPLICATION NO. 450 OF 2011

AUGUSTINE KAMANDE KAMAU T/A MWAFRIKA SAFI AGENCIES ....APPLICANT

VERSUS

WANZA DRAPPERS LIMITED ....1ST RESPONDENT

P.J. KAKAD T/A PJ KAKADO & CO. ....2ND RESPONDENT

RULING

The facts behind this application are as follows:-

The lower court made a ruling on 30.10.2006 striking out from the pleadings, the 2nd Respondent's name as a Defendant in Nairobi RMCC No.7988 of 2005. Apparently both parties were absent at the time the Ruling was delivered.

The Applicant's advocate learnt of the ruling on or about 4.12.2006, a time which was outside the period prescribed for filing an appeal. This forced the advocate for the Applicant to file an application on 8.12.2006 seeking extension of time to file an appeal. The said application was filed before the lower court instead of it being before this court. The lower court however, on the 26/3/2007 proceeded to entertain the same and grant leave to appeal out of time upon the consent of both counsel.

The Applicant consequently filed a High Court Appeal No. 265 of 2007 which appeal eventually went to a hearing on 10.10.2011. It was then that the Advocate for the applicant learnt through a court direction, that the leave to appeal purportedly granted to it by the lower court on 26.3.2007, was null and void for lack of jurisdiction by that court and that the purported appeal was incurably defective and incompetent. Conceding to the above fact the applicant filed this application dated 10.10.2011, seeking leave to appeal out of time against the cited Ruling of the lower court dated 30.10.2006.

The grounds upon which this application is based are that:-

1. The intended appeal has merit and has high chances of success.
2. The delay to file this application arose out of the time engaged in the lower court's misconceived application for extention of time as well as in the processing of the filed incompetent appeal.

3. The mistake was that of the then advocate who mistakenly misunderstood the correct procedure and law, an issue and mistake upon which the applicant should not be let to suffer.

This application is vehemently opposed by the Respondent who particularly points out to the long delay undergone before the filing of this application.

I have carefully perused the record and considered the grounds upon which this application is based. There is no doubt that a long and prima facie, inordinate delay in filing this application took place after the lower court Ruling was delivered in late 2006. It is not disputed however that both parties in this matter engaged in the unnecessary application filed in the lower court. It cannot be denied either that the Applicant herein had inexplicably decided to seek leave to appeal out of time from the lower court. The principle of law involved appears to be very basic and if the applicant had doubt on it, the Civil Procedure Rules would easily have guided him had he considered to peruse the same.

The mistake made by the Applicant's advocate, therefore would appear inexcusable by this court. It does not escape the attention of this court, however, that not only the said advocate for the applicant was sucked into the blunder, but also the advocate for Defendants, as well as the lower court itself. Otherwise any of them would and should have pointed out the lack of jurisdiction of the lower during the hearing or in the Ruling.

Be that what it may, it is clear that the Respondent herein is now using the mistake committed by both parties and the lower court, to oppose this application. That notwithstanding, it is clear to me that the whole period of delay is explained adequately by the undisputed facts to the effect that the said misconceived application and appeal, took much of the relevant time of the delay.

Secondly, while it may not be certain that the intended appeal will succeed, it is clear however that it raises important issues of law of agency which would make the appeal worthwhile before this court.

Thirdly, it is clear to me that the mistake that led to the filing of the application before a wrong court was clearly that of the advocate who was then handling the matter. This accordingly, makes this case to be a proper and suitable case where the principle that the mistake of the advocate should not be allowed to do injustice to the client, to be fully applicable. As was stated by the Court of Appeal in the case of **National Bank of Kenya & 2 others Vs Kisumu Papermills Limited (2006) eKLR –**

"A mistake is a mistake. It is not less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A plunder on a point of law can be a mistake. The door of injustice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

This court is bound by the statement above. The mistake of law made by the Counsel then representing the Applicant and shared by the Respondent is nevertheless a mistake and in the circumstances of this case, is excusable in the interest of justice. The long period of delay is regretted but in the circumstances of this case, it will not be allowed to interfere with the interest of justice.

For the above reasons, this court is persuaded that this application has merit. It is allowed with the following orders:-

ORDER

1. Application is allowed with costs on condition that the Applicant pays costs of Kshs.27,500/- ordered by the lower court as a precondition of filing the intended appeal.
2. Appeal to be filed within 21 days.
3. In default of any of the (1) or (2) above, the leave granted to stand discharged automatically.

DATED and **DELIVERED** at Nairobi this **11th** day of **February, 2014.**

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D.A. ONYANCHA

JUDGE