



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING UP CAUSE NO. 1 OF 2010

IN THE MATTER OF KILINDINI WAREHOUSES (KENYA) LIMITED

OMAR SALEH SAID.....PETITIONER

-versus-

KILINDINI WAREHOUSES (KENYA)

LIMITED 1ST RESPONDENT

AWADH SALEH SAID.....2ND RESPONDENT

RULING

Introduction

1. On 5th May 2014, the 1st Respondent/Applicant filed a Notice of Motion Application dated 3rd May 2014 (“**the Application**”) in which it seeks extension of time for filing and serving the Notice of Appeal against the Ruling of Mwongo, J. delivered on 11th April 2014 (hereinafter “**the subject Ruling**”). The Application also seeks an order that the Notice of Appeal dated 28th April 2014 and filed on the same date be deemed as properly filed and served within time.

The 1st Respondent/Applicant's Arguments

2. The Application is supported by the Affidavit of AWADH SALEH SAID sworn on 5th May 2014. The Applicant also filed its Written Submissions on 9th July 2014. The Applicant's case is that in the month of December 2012, it instructed the firm of Nyamu & Nyamu Advocates to take over the conduct of this case on its behalf from the firm of Anjarwalla & Khanna Advocates. That Nyamu & Nyamu Advocates failed to file a notice of change of advocates and were therefore not notified when the subject ruling was delivered.
3. That it was not until 23rd April 2014 when the firm of Anjarwalla & Khanna notified the Applicant of the subject ruling but the Applicant was not able to immediately seek independent opinion from its advocate who was out of the country. That the Applicant was given an opinion on Saturday 26th April 2014 when the advocate returned to the country hence the Notice of Appeal was filed on Monday 28th April 2014.
4. The Applicant submitted that there was no unreasonable delay in filing the Notice of Appeal as the

same was lodged only one (1) day late. The Applicant also submitted that the Application was filed without unreasonable delay and the delay was excusable. Further, that no delay would be caused to the Petitioner if the orders sought are granted.

2nd Respondent's Submissions

5. I did not see any reply by the 2nd Respondent in the Court file. However, there is in the court's record Written Submissions filed by the 2nd Respondent on 28th July 2014. The position taken by the 2nd Respondent was not diametrically different from that of the Applicant. The 2nd Respondent submitted that the delay in filing the Notice of Appeal is not inordinate to be inexcusable. That the court has unfettered discretion to allow an application for extension of time within which to lodge an appeal or to deem a Notice of Appeal as duly filed.
6. The 2nd Respondent submitted that the Applicant has an arguable appeal since neither the Petitioner nor the Interested Party are share holders or contributors in the company sought to be wound up. The 2nd Respondent urged the court to allow the Application.

The Interested Party's Submissions

7. In response to the Application, BARIKA MOHAMED SHERMAN, the Interested Party filed Grounds of Opposition on 23rd June 2014. The Interested Party also filed Written Submissions on 23rd July 2014.
8. The Interested Party opposed the Application on the ground that the court cannot grant an order to extend the time within which to file the Notice of Appeal because the same is already filed. The Interested Party's position is that contrary to the allegations made, the Applicant was represented at delivery of the subject Ruling.
9. The Interested Party further contended that the Affidavit in support of the Application is incompetent for failure to disclose sources of the deponent's information. The Interested Party therefore urged the court to dismiss the Application with costs because the same has failed to satisfy the requirements and criteria set down by the law for the grant of the order sought.

The Issues for Determination

10. The Petitioner did not file any response to the Application. On 30th July 2014 when the Application came up for hearing, the Petitioner's Counsel indicated that he had instructed his clerk to file the Petitioner's Replying Affidavit. There was none in the court file so the court directed that since the Petitioner had not filed a Replying Affidavit, he could not oppose the Application nor file written submissions.
11. In my view the main issue for this court's determination is whether the High Court has jurisdiction to extend the time within which to give a notice of intention to appeal in a case where a Notice of Appeal is already filed out of time.

Analysis

12. **Section 7** of the Appellate Jurisdiction Act provides as follows:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

13. That section gives this court the jurisdiction to extend the time for giving notice of intention to appeal from judgment of the High Court. The only question is whether this court can extend the time for filing a Notice of Appeal after the Notice of Appeal has already been filed out of time.
14. Under Rule 74 (1) and ((2) of the Court of Appeal Rules, the Notice of Appeal should be lodged with the Registrar within 14 days of the judgment. There is no dispute that the Notice of Appeal herein was filed after expiry of 14 days from the date the subject ruling was delivered.
15. This Court dealt with a similar issue of whether the High Court can extend the time within which to lodge a Notice of Appeal after the Notice of Appeal has already been lodged out of time in the case of **Cosmas Mutiso Muema v. Kenya Road Transporters Limited & Another, Mombasa High Court Civil Case No. 285 of 2006 [2014] eKLR** and stated that:

“Indeed a closer look at Section 7 of the Appellant jurisdiction shows that the High Court is merely given the power to extend time to give notice of intention to appeal. That Section does not give the High Court any further power relating to an appeal to the Court of Appeal.

It is Rule 4 of the Court of Appeal Rules that gives the Court of Appeal general power to extend time limited under those Rules. That Rule provides-

'The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.'

It is Rule 74 of those Rules, as stated before, that limits the period within which a Notice of Appeal should be filed. That Notice should be filed within fourteen (14) days of the date of the decision being appealed from. If the Notice is filed out of the period provided by that Rule it is only the Court of Appeal which can extend the time of filing the Notice. The Plaintiff in my view was right to say that once the Defendant filed the Notice of Appeal out of its time, it removed itself from the ambits of the High Court. The filing of that Notice outstayed the jurisdiction of the High Court. That is the specific position of the law, and that being so the overriding principle in the Civil Procedure Act cannot be applicable.” (emphasis added)

16. I wish to add no more to the above finding. It is clear that once the Applicant has lodged a Notice of Appeal out of the stipulated time, the jurisdiction of the High Court to extend the time of filing of the Notice is ousted. The Application is therefore dismissed with costs.

DATED and DELIVERED at MOMBASA this 9TH day of OCTOBER, 2014.

MARY KASANGO

JUDGE