



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Appeal 22 of 2012

WARUNGU HOLDINGS

LIMITED.....APPELLANT

VERSUS

1. RASHMI PATEL T/A POST GLOBAL SERVICES

2. JONES MUSA IDD T/A YOTE YAWEZEKANA FLORIST

3. SALOON

EMERALDS.....RESPONDENTS

RULING

1. The application before me is a Notice of Motion dated 27th February, 2012 by the Appellant/Applicant. It seeks the enlargement of time to enable the Appellant file its appeal out of time. It is brought under Sections 1A, 1B, and 3A of Civil Procedure Act and Order 50 Rules B and Order 51 Rule 1 of Civil Procedure Rules. The ruling sought to be appealed against was delivered on 16th December, 2011 by the Chairperson of the Business Premises Rent Tribunal in cases Numbers 161, 162, 168 and 169 of 2011.
2. The grounds in support of the application are that the Business Premises Rent Tribunal's (BPRT's) ruling was delivered without reasons; that the proceedings were received on 27th January, 2012 together with the ruling; that the time for filing the appeal lapsed on 1st February, 2012, and that the Respondent will not suffer any prejudice in the event that time is enlarged. The application is supported by the annexed affidavit of Wanyonyi Chebukati.
3. The application is opposed by the Respondents. They rely on the Replying Affidavit of Rashmi Patel, one of the Respondents, deponed on 26th April 2012. The Respondents accuse the Applicant of having misled the BPRT as a result of which the appeal is untenable. They allege that the Applicant as landlord issued rental increase notices. When these were objected to and formally resisted in the BPRT the Applicant withdrew the same, after tenants had filed valuation reports. All the costs then incurred were thrown away because the Applicant claimed not to be the entity that had issued the notices.
4. The Respondents argue that the re-issued tenancy notice by Warungu Holdings Limited after withdrawal of the notices by Warungu Holdings, an allegedly non-existent entity, is a ruse to enable the Applicant escape their liability to pay costs to the Respondents for the withdrawn BPRT suit.
5. I have carefully considered the parties' submissions and the documents submitted in support and against parties' case.

6. The Chairperson of the BPRT in his Ruling stayed the Respondents proceedings in Tribunal Cases 161, 167, 168 and 169 of 2011 between the Warungu Holdings Limited and the Respondents herein, until the tenants were paid costs in the prior cases emanating from alteration of tenancies in BPRT Numbers 37, 38, 39 and 40 of 2011 in respect of Warungu Holdings and the Respondents herein.

7. The application made herein is for extension of time to file the appeal under Order 50 Rule 6. That Rule, on its plain wording, grants the court power as follows:

“... to enlarge time upon such terms (if any) such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

8. The BPRT Ruling was delivered on 15th December, 2011. The last day for filing an appeal thereon was 15th January, 2012. There was a one month delay in receiving certified copies of proceedings and ruling. Although there is no certificate showing the time taken to procure the proceedings, I do not consider the delay was so great as to cause prejudice to the Respondents.

9. The Applicant relies on Leo Sila Mutiso vs Rose C.A NBI Number 255 of 1997 where the court held that the considerations to be taken into account in granting extension of time are:

- **the reason of the delay**
- **the chances of the appeal succeeding**
- **the prejudice to the Applicant**

10. In its submissions, the Applicant also submits that the overriding objectives can be relied upon to enlarge time. On this, the Applicant relied on the Court of Appeal decision in **Daima Bank Limited (inliquidation) vs Prof. David Musyimi Ndeti**. [2010] e KLR, where the court relied on that principle. The court held that it must act justly and fairly, as far as practicable. I agree with these principles, and favour extension of time.

11. I have, however, also noted that what is appealed against is the BPRT Chairman's decision to link for further progression of BPRT cases 161, 162, 168, and 169 of 2011 with the payment of costs in BPRT cases 37, 38, 39 and 40 of 2011. In both sets of cases the counsel on record was M/S Omondi Waweru, for Warungu Holdings, and latterly for Warungu Holdings Limited. It was that firm that acted for Warungu Holdings when the tenancy alteration notice was withdrawn. They acted when a new tenancy alteration notice for Warungu Holdings Limited was issued. The Respondents incurred certain costs in the first suit which was withdrawn.

12. In my view, the counsel who acted are not entitled to pretend that there is no connection between the two suits which were before the tribunal. As such, without going to the merits of the appeal and so as to ensure fairness to all parties, I will invoke the inherent powers, of this court under Section 3A and the overriding objective under Sections 1A and 1B of the Civil Procedure Act and the provisions of Order 50 Rule 5 to enlarge time.

“...Upon such terms as the justice of the case may require...”

13. I am also mindful of the Court of Appeal's holding in **Mwangi vs Kenya Airways Ltd [2003] KLR 486 page 489-490** where the court stated that the length of delay, reason for delay, chances of appeal succeeding and degree of prejudice to Respondent are not the only or exhaustive considerations for grant of extension of time. The Court added that:

“... as long as the discretion is exercised judicially, a judge would be perfectly entitled consider any other factor outside those listed so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of the single judge...”

14. In this case, the justice of of the situation persuades me to allow the extension of time for filing the appeal on the following conditions:

1. The Memorandum of appeal dated 15th February, 2012 and filed on the same date by the applicant shall be deemed to be properly on record upon fulfillment of the following:

a) The Appellant or its counsel shall file in court the amounts of costs payable to the Respondents in tribunal cases Numbers 37, 38, 39 and 40 of 2011, pending taxation, thereof.

b) Such amounts shall be deemed to be a security for costs in the appeal in relation to the disputed tenancy notices in respect of the tenancies occupied by the Respondents on Mombasa Block XX/280.

2. The appeal herein shall not proceed until full compliance with the above orders or further directions of the court.

Orders accordingly.

Dated, Signed and delivered this 12th day of September 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)