REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 41 OF 2012

E.K WACHIRA & SONS K LTD ……………… APPLICANT

-VERSUS-

KAGONDU & MUKUNYA ADVOCATES...... RESPONDENT

RULING

1. The applicant **E.K Wachira & Sons (K) Ltd**, brought the application dated **13th March, 2012** seeking leave to file an appeal out of time. The intended appeal is against the judgment of the Honourable Chairman of the Business Premises Rent Tribunal issued in Nyeri BPRT case No. 39 of 2007 delivered on 9th September, 2009.

2.The application is premised on the grounds that the judgment was delivered without notice to the parties or their advocates; that the applicant got to know of the judgment in September 2010; that after the applicant got to know about the judgment, it immediately applied forcertified proceedings and judgment in order to appreciate the tribunal’s reasons fordismissing its reference.

3. Pointing out that it received typed proceedings and judgment on 13th March, 2012 and 22nd October, 2010 respectively, the applicant contends that the delay in filing the appeal was caused by good and sufficient cause.

4.Arguing that the application has been brought without unreasonable delay and that no prejudice will be occasioned on the applicant if the application is allowed, the applicant has deposed that this court has power to enlarge time within which it ought to have filed an appeal against the judgment herein.

5. In opposition to the application, the respondent filed the grounds of opposition dated **30th April, 2012** and replying affidavit he swore on **5th October, 2012** in which he contends that the delay in filing the appeal is inordinate; that the applicant’s failure to learn about the judgment sought to be appealed was caused by lack of diligence on its part or on the part of its advocate. The respondent further contends that the reference which is the subject of the appeal has been overtaken by events (replaced by another reference); that the respondent has ever since left the suit premises and that the applicant has no sustainable claim against it. The application is said to be misconceived and a clear abuse of the process of the court.

6. The respondent contends that allowing the application will be prejudicial to it in that, it will incur costs in defending the appeal yet it is no longer interested in the suit premises.

7. In response to the issues raised in the respondent's replying affidavit, the applicant filed the affidavit sworn by its Managing Director on 17th October, 2012 in which he explains that the 2nd reference is in respect of a different tenancy and that the appeal is for determination of the rent the respondent ought to have paid for the period it was in occupation of the suit premises.

8. The application was disposed of by way of written submissions.

<u>Submissions for the applicant:-</u>

9. On behalf of the applicant, reference is made to the case of **<u>Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 others</u>** **<u>Supreme Court Application No.16 of 2014</u>** and submitted that the applicant has met all conditions for grant of the order sought.

10. Concerning the delay in filing the application, it is submitted that the delay is attributable to the fact that no notice of delivery of judgment was given to the applicant. The application is said to have been brought immediately after the applicant obtained typed proceedings and judgment.The Intended appeal is also said to be arguable because the Tribunal should have ordered for independent valuation instead of dismissing the reference.

11. Concerning the contention that the respondent will be prejudiced since he is no longer a tenant of the applicant, it is submitted that the period in respect of which the intended appeal is premised, the respondent was a tenant in the suit premises.

<u>Submissions by the respondent:</u>

12. On behalf of the respondent, it submitted that the delay of 2 and ½ years is inordinate and inexcusable. It is pointed out that the applicant ought to have filed its appeal by 9th October, 2009.

13. It is submitted that the applicant has not met the conditions for grant of the orders sought, which are:-

a) bringing the application without unreasonable delay;

b) giving cogent reason for delay;

c) Demonstrating that allowing the intended appeal will not be prejudicial; and

d) Demonstrating that the intended appeal is arguable.

14. On the issue of delay, it is reiterated that the delay of 2 and ½ years is in ordinate and inexcusable;

15. Concerning the reasons given for the delay, it is submitted that no cogent reason for the delay was given as it was clear to the parties that judgment would be delivered in the next session of the Tribunal.

16. It is submitted that from the calendar of the Tribunal and its practice, it was possible to know what next session meant; that the applicant ignored or failed to attend or check with the Tribunal within the time ordered by the Tribunal.

17. On whether allowing the application will be prejudicial to the respondent, it is submitted that it will because the respondent who is no longer a tenant of the applicant will incur costs in defending the appeal while it has no interest to protect in the suit property.

18. As to whether the intended appeal is an arguable appeal, it is submitted that the intended appeal cannot be arguable as the parties to the reference had failed to assess rent to be paid pursuant to the notice to increase rent. The valuation reports filed did not conform to the regulations applicable under Cap 301.

Case law on factors which court consider in application for extenstion of time within which an appeal ought to have been filed:-

19. Factors which courts consider in determining whether or not to allow an application for leave to file an appeal out of time were succinctly captured by **Kihara J.A** in the case of **Teresiah v. Mwaniki Nakuru Court of Appeal Civil Application No. 294 of 2013 (UR 214 OF 2014)** thus:-

"The principles regarding applications for extension of time have followed a well beaten path. In **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. Nai. 55 o f 1997** the Court set out those principles in the following manner:

> **"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well-settled that in general, the matters which this Court takes into account on deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly, (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."**

20. These factors are of course, not exhaustive and the Court is free to exercise its discretion to extend time after considering all the relevant factors when deciding the matter before it. This was stated by **Waki, JA**. in **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)** thus:

> **"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors."**

21. Concerning the same issue **Nambuye J.A** in the case of **Catherine Njuguini Kanya & 2 others v Commercial Bank of Africa Limited [2015] eKLR** observed:-

> **"…the circumstances under which the full court would be entitled to interfere with the exercise of the discretionary powers by the single Judge are similar to those under which an appellate Court would be entitled to interfere with the exercise of a discretion by a trial Judge as specified by the Court of Appeal for Eastern Africa in *Mbogo & another versus Shah [1968] EA93* namely, that in arriving at the decision sought to be reversed, the single judge took into account some irrelevant factor or that he failed to take into account a relevant factor or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case , his decision is plainly wrong.**
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> **On matters of delay generally, reference was made to the decision in the case of *Diamond Trust of Kenya Limited versus Bidaly [1995-1996] 1EA45 (AK)* in which the court declined to exercise its discretion in favour of the applicant because (i) the application was made six years after the appeal had been made; (ii) this amounted to not only an in excusable but also an in ordinate delay; (iii) no explanation had been proffered for the entire period of the delay; (iv) the applicant had also shown a lack of diligence in applying for a certificate of delay; and, lastly**
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> **(v) the fact that no prejudice would be caused to the respondent by the extension of time sought by the applicant is not in itself a factor in the exercise of the court's discretion; (vi) nor is the fact that the respondent does not oppose the application a criteria; the decision in the case of *Mutiso versus Mwangi [1999] 2EA CAK* for the proposition that the decision**

whether or not to extend time is discretionary save that in deciding whether to grant an extension of time or not the court takes into account matters such as the length of the delay; second, reasons for the delay and third (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted; the decision in the case of *Charles Orwa versus Justus Munyinyi Macharias CA Nai 155 of 2002 (80/2002 UR),* wherein, *Okubasu, J* as he then, declined to exercise his jurisdiction in favour of the applicant because there was a delay of three years occasioned by the advocates' (on the record') failure to appeal instead of applying for review on the one part and the applicant's failure to make a follow up on the matter on the other part and also that the decree had already been executed. The decision in the case of *Migwani Family Helpers Project versus Hamidas Boutique CA Nai 219 of 1999 (UR)* in which A.B shah JA **(as he then was) declined to exercise his discretion in favour of the applicant because he was not satisfied that the 49 days delay on account of obtaining instructions was excusable, nor that the 33 days delay in lodging the application after obtaining instructions in the circumstances of that case had been reasonably explained. Lastly there is the case of *Njau Nyanjui Thito and Joel Mungai Nyanjui versus Lawrence Kimani Nyanjui and 7 others CA Nai 311 of 2007 (UR) 211/2007)* for the proposition that the list of factors that this Court takes into consideration when deciding either to grant or withhold the exercise of discretion set out in the case of *Mutiso versus Mwangi (supra)* is not exhaustive. Other factors can still be cited including, the importance of compliance, the conduct and resources of the parties particularly the applicant or whether the matter raises issues of public importance and when the court is exercising its discretion judicially it would be perfectly entitled to consider any other factors outside those listed in *Leo Sila Mutiso case (supra)* and lastly any attempt to limit the possible grounds for not granting an extension of time to those few listed in the *Leo Sila Mutiso's case (supra)* would amount to fettering the discretion allowed under rule 4(see also the decision in *Mwangi***

versus Kenya Airways Limited [2003] KLR 485)."

Analysis and determination:-

22. *The following facts are not in dispute:-*

a) That the respondent was a tenant of the applicant at the material time;

b) That the applicant filed a reference to the BPRT Nyeri seeking to alter the terms of the tenancy which existed between itself and the respondent;

c) That the respondent in particular sought to increase rent which the respondent was paying in respect of the suit premises from Kshs.14,000/= per month to Kshs. 36,000/=.

d) That the applicant's reference was dismissed by the tribunal.

23. Whereas the applicant contends that it delayed in lodging an appeal to the judgment of the BPRT because the judgment was delivered without notice to the parties, the proceedings annexed to the application do not support that contention. The tribunal had informed the parties to the dispute that judgment would be delivered in the next session.

24. As submitted by counsel for the respondent, reference to the next session could only mean one thing in the calendar of the Tribunal. In the circumstances of this case, I agree with the respondent that any diligent litigant would have checked the outcome of its suit in the session under reference.

25. The respondent having failed to check the outcome of its case at the time ordered by the Tribunal, cannot be heard to say that it failed to get to know about the outcome of its reference because it was not

notified of the date of delivery of the judgment. I also find the conduct of the applicant of waiting until he got certified copies of proceedings and judgment before he could apply for the leave to appeal to be unreasonable. A diligent litigant in the circumstances of the applicant would have moved the court immediately he got to know about the unfavourable judgment.

26. In view of the foregoing, I agree with the respondent that the delay of two and half years is in ordinate and inexcusable.

27. In my view, reopening a case that terminated two and a half years and requiring the respondent who is no longer interested in the outcome of the case to participate in it will highly prejudice the respondent.

28. For the foregoing reasons, I find the application to be lacking in merit and dismiss it with costs to the respondent.

Dated, signed and delivered at Nyeri this 8th day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ombongi h/b for Mr. Gori for the respondent

N/A for the applicant

Court assistant - Lydia