Diamond Trust Bank Limited v Mohamed & another (Civil Appeal (Application) E074 of 2021) [2024] KECA 863 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 863 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E074 OF 2021

GV ODUNGA, JA

JULY 26, 2024

BETWEEN

DIAMOND TRUST BANK LIMITED ..... APPELLANT

AND

FUAD MHAMOUD MOHAMED ..... 1ST RESPONDENT

INSURANCE AGENCY LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Mombasa (P. J. Otieno, J) dated and delivered on the 25th day of January 2021 in Mombasa HCCC Suit No. 72 of 2012 ~Consolidated with~ Mombasa HCCC No. 16 of 2011)

RULING

1. By a Chamber Summons dated 19th June, 2024 and brought under Rule 117 of the Court of Appeal Rules, 2010, the applicant herein, Fuad Mhamoud Mohamed, seeks extension of time for filing the Reference to the Taxation rendered on 23rd January, 2024 so that the Chamber Summons application dated 22nd February, 2024 (the Reference) is deemed to have been filed within time. According to the 1st respondent, he filed the application dated 22nd February, 2024 seeking to file a reference out of time against the ruling of the Taxing Officer of this Court delivered on 23rd January, 2024 but there was a typing mistake on the cover page of the application as it read "Record of Appeal" hence it did not attract any filing fees as evidenced by the receipt issued by Court; that as a consequence, the said application was withdrawn vide a letter dated 18th June, 2024 upon the realisation of the blunder on 5th June, 2024 when the matter came up for hearing; that it was that inadvertence that occasioned the filing of the present application; and that no prejudiced will be occasioned to the respondents to the application if the orders sought are granted.

2. In opposing the application, through her replying affidavit sworn on 27th June, 2024, Faith Ndonga, the appellant's Debt Recovery averred that all the parties were notified of the ruling via email dated 29th

January, 2024; that the ruling was delivered on 29th January, 2024 and not 23rd January, 2024 hence the failure by counsel to note the correct date was not a mistake but professional negligence; that the initial application seeking extension of time was not properly filed in the Judiciary e-filing platform hence it cannot be claimed that it was filed on 23rd February, 2024 but filed on 21st June, 2024, 4 months and 29 days (150 days) after the ruling; and that this application is an afterthought aimed at keeping the appellant from its rightful judgment hence it should be dismissed with costs.

3. I heard the application on the Court's virtual platform on 3rd July 2024 during which Learned Counsel Mr Gikandi Ngibuini appeared for the applicants while Mr Jackson Kisinga appeared for the respondents. Both counsel relied on their written submissions which they briefly highlighted.

4. It was submitted on behalf of the applicant that unless there are overwhelming circumstances, the applicant ought not to suffer due to the mistake of counsel. Reliance for this submission was placed on Murai v Wainaina (No 4) [1982] KLR 38 and Pithon Waweru Maina v Thuku Mugiria [1983] KLR

    78. It was submitted that the mistake in question though negligent was committed in good faith and that no prejudice will be occasioned to the respondent by the grant of the application. It was contended that while the applicant was not challenging the payment of costs, it was taking the issue with the quantum thereof and that Kshs 4,000,000/= is manifestly excessive since the amount in question ought not to exceed Kshs 2,000,000/=. According to the applicant the reference is not frivolous and the delay in question has been explained.

5. On behalf of the respondent it was submitted that the delay in this matter was unreasonable as the applicant filed the application for leave to file the reference under Rule 117 of the Court of Appeal Rules four months (4) and twenty nine (29) days' after the Ruling was delivered on the 29th March 2024; that the blame for the delay in filing is being placed on unknown members of staff who filed the initial application but the staff members have not sworn an affidavit stating the above; that the previous application having not been properly filed then prayer for extension of time as sought in this application is moot as the applications were never filed. Reliance was placed on Prime Bank Company v Joseph Mwangi Ndegwa [2019] eKLR where court cited Mombasa Cement Ltd v Speaker National Assembly and Another [2018] eKLR on the consequences of non-payment of requisite court fees. According to the respondent, the reference and application for extension of time having not been paid for, they are incompetent hence this Court ought not to issue orders in vain; that the failure to file the reference within time amounts to professional negligence as an advocate ought not to take on work that he has no capacity to undertake within time hence no reasonable explanation for the delay has been offered by the applicant; that the respondents will suffer great prejudice as it will continue being kept away from their lawful judgment; that it was only after the respondent forwarded a draft decree and the ruling on taxation to the High Court via a letter dated 2nd April 2024 that the applicant filed the present application. The respondent urged this Court to dismiss the application for lack of merit with costs.

6. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon.

7. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are well settled. This Court has unfettered discretion to extend the time prescribed for taking any action permitted under the Rules. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain considerations that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly (possibly), whether the proceedings for which time

is sought to be extended is frivolous; and fourthly, whether the respondent in those proceedings will be unduly prejudiced if the application were to be granted. See Leo Sila Mutiso v Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA

8. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations. The Court would of course also consider the overriding objective spelt out in Sections 3A and 3B of the *Appellate Jurisdiction Act*.

9. Those principles were restated by Waki, JA in Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR as follows:

> "The exercise of this Court's discretion under Rule 4... 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: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

10. On its part, the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No. 16 of 2014 [2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

11. Regarding the length of the delay, in the case of Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor [2014] eKLR it was appreciated that:

> " Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

12. In the instant case, the Bill of Costs was taxed on 23rd January 2024. Rule 117 of the Court of Appeal Rules provides for reference on taxation and sub rule (4) of the said rule provides that:

> An application for a reference may be made to the Registrar informally at the time of taxation or in writing within seven days thereafter.

13. Therefore, the applicant was required to make the reference by 30th January 2024. It is however averred by learned counsel for the applicant that he was overwhelmed with work and overlooked the filing of the said reference and was unable to complete the application between mid-January and late February; that being out of time he filed an application for leave to file the reference out of time as well as the reference both dated 22nd February 2024, three weeks after the last date prescribed for doing so; that instead of the cover of the application bearing the title "application", it instead bore the title of the Record of Appeal and therefore did not attract payment of court fees; that as a result he was compelled to withdraw the application by a letter dated 18th June 2024 as the application was not properly filed.

14. In my view the period that is required to be explained is the delay between the delivery of the ruling on taxation and the filing of the application for extension of time to file the reference and the period between the date of the withdrawal of the earlier application and the filing of the instant application. That was, by parity of reasoning, the view adopted by Lakha, JA in *Dorcas Wangari Macharia v Terry Wacheke Muigai & Another Civil Application No. Nai. 344 of 2000* where he held that in an application for extension of time to file a fresh appeal where the former appeal was struck out, the time relevant in considering the delay is the time taken in making the present application from the date the appeal was struck out.

15. In this case the period of question remains three weeks since the instant application was made immediately the earlier application was withdrawn. That in my view is not an inordinate delay. The reason for the delay is that oversight on the part of the advocate for the applicant. This Court, while citing Murai v Wainaina (No. 4) [1982] KLR 38, in Shital Bimal Shah & 2 Others v Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323 held that:

> " Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a 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 junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice 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."

16. Ringera, AJA, as he then was in Githiaka v Nduriri [2004] 2 KLR 67 held that:

> " Under rule 4 of the Court of Appeal Rules the court is perfectly invested with a clear and unfettered discretion to extend the time limited by the Rules or its decisions and such a discretion like all judicial discretions, is to be exercised judicially, that is to say on sound reason other than whim, caprice, or sympathy. In exercising the discretion the Court's primary concern should be to do justice to the parties and in considering which way the scales of justice tilt, the Court should among other things consider the length of the delay in lodging the notice and record of appeal and, where applicable, the delay in lodging the application for extension of time, as well as the explanation therefore; whether or not the intended appeal is arguable; and the public importance, if any, of the matter, and generally the requirements of the interest of justice in the case... Oversight has been defined to mean the omission or failure to see or notice. It is inadvertence. Whilst ignorance may not be equated to a mistake, it may and normally does arise through negligence."

17. Appreciating that oversight on the part of counsel may warrant extension of time, Shah, JA when faced with a similar situation in Michael Njoroge B. & Others v Vincent Kimani Chege Civil Application No. Nai. 217 of 1997 held that advocates may have many things to deal with leading as a result of which an oversight may lead to delay in rectifying mistakes and that such mistakes should not be visited on the client and that the Court of Appeal being the last court ought to give a litigant a chance to be heard on merits. In arriving at that decision the learned Judge appreciated that where rules of procedure should not be flouted with impunity since they serve specific purposes, are good servants but bad masters but should not be flouted with impunity as all rules have specific purposes but and should not drive a litigant out of judgement seat if all other rules allow such a litigant to come back to the Court. In his view, though professional standards must be maintained, if an error is remediable, the client ought to be heard.

18. I am therefore satisfied that the reason given for the delay is in the circumstances of this case justifiable. Regarding the prospects of success of the reference, the consideration of this issue, however, does not apply in all cases. Dealing with that consideration, this Court in Mwangi v Kenya Airways Ltd [2003] KLR 486, where the court stated:

> " It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered. This is understandable because the "the chances of an appeal succeeding" is normally dealt with by this Court under the rubric of "an arguable appeal" or "an appeal which is not frivolous" and the full court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of Bhaichan Ghagwanji Shah v D Jamnadas & Co. Ltd [1959] EA 838 where Sir Owen Corrie, Ag. JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:
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> > "..... It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application."

19. The court then observed that the Shah case (ante) was decided under rule 9 of the former rules which required that "sufficient cause" be shown before extension of time could be obtained. It then concluded: -

> "It must not be forgotten that even the recent case of Mutiso did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration."

20. In Ramesh Shah v Kenbox Industries Limited [2007] eKLR, this Court debunked the myth surrounding the arguability of the intended appeal in applications of this nature by observing that:

> " The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think, that except in very exceptional and limited circumstances, that

proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay."

21. While in certain borderline cases the Court may consider the chances of success of the intended action, in my view, that condition plays a very peripheral role where the other conditions have been fulfilled particularly where the applicant has a right to take up the proceedings in question. In this case however, the issue whether the amount taxed was reasonable or excessive is certainly arguable. It may not necessarily succeed but that is not a determination that is within the province of a single Judge. An arguable process, it has been held, is one which ought to be argued fully before the court; one which is not frivolous. See Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

22. On the issue of prejudice, the respondent's position is that this application is an afterthought aimed at keeping the appellant from its rightful judgment. However, as appreciated by Waki, JA, while citing Grindlays Bank International (K) & Another v George Barbour Civil Application No. Nai. 257 of 1995 and Gichuhi Kimira v Samuel Ngunu Kimotho & Another Civil Application No. Nai. 243 of 1995 in Janet Ngendo Kamau v Mary Wangari Mwangi Civil Application No. Nai. 338 of 2002:

> "Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should in so far as it may be reasonable prefer, in the wider interest of justice, to have a case decided on its merits... The consideration that one case should not hang over the heads of parties indefinitely must be weighed against the wider interests of justice, namely that where possible cases must be brought to a close after a hearing on the merits."

23. It is now appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. In Chemwolo and Another v Kubende [1986] KLR 492; [1986-1989] EA 74, it was held that:

> " Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

24. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the respondent contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs.

25. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.

26. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicant. I accordingly allow the Chamber Summons dated 19th June 2024 and extend the time for filing the Reference to the Taxation rendered on 23rd January, 2024 and deem the Chamber

Summons application dated 22nd February, 2024 (the Reference) as having been filed within time, subject to payment of the requisite fees.

27. The costs of this application are awarded to the respondent.

28. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY, 2024

G. V. ODUNGA

.....

. JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR