



REPUBLIC OF KENYA



KENYA LAW
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**Jetha v Guaranty Trust Bank (Kenya) (Civil Appeal (Application)
16 of 2018) [2023] KECA 1205 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1205 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 16 OF 2018
S OLE KANTAI, JA
OCTOBER 6, 2023**

BETWEEN

DINESH KUMAR ZAVERCHAND JETHA APPELLANT

AND

GUARANTY TRUST BANK (KENYA) RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya at Nairobi
(Grace Nzioka, J.) dated 30th October, 2017 in H.C.C.C. No. 438 of 2016)*

RULING

- 1 In the Motion on notice brought under rules 44 and 90 of the Court of Appeal Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of law the applicant, Dinesh Kumar Zaverchand Jetha prays in the main that he be granted leave to file a Supplementary Record of Appeal out of time; that the Supplementary Record of Appeal dated November 18, 2022 be deemed to have been properly filed and served within time and that costs of the application be provided for. In grounds in support of the Motion and in an affidavit of his lawyer Mutiso Steve Kimathi it is said *inter alia* that the law firm of M/S Andrew & Steve Advocates recently took over the conduct of the matter from previous advocates; that upon perusal of the file it was noted that on October 17, 2018 leave was granted to the applicant to file a Supplementary Record of Appeal to include the first page of a letter dated September 7, 2015 but that it was not done despite leave having been granted. It is further stated that a perusal of Record of Appeal dated January 11, 2018 revealed that certain documents attached to a supporting affidavit sworn on October 26, 2016 and a replying affidavit sworn on January 11, 2017 had been inadvertently left out of Record of Appeal; that Record of Appeal was lodged on January 25, 2018 out of time. Further, that the respondent's advocates had, upon the applicant's advocates writing to them, objected to a filing of Supplementary Record of Appeal and that the documents sought to be included are central to the substratum of the appeal and are not prejudicial to the respondent; that failure to grant leave will lead to the applicant suffering irreparable harm. Steve Kimathi Mutiso,



- an advocate of the High Court of Kenya says that he has been authorized by the applicant to swear the affidavit on his behalf but he does not say why the applicant could not have sworn an affidavit in support of the application. The lawyer depones to matters of fact which it would have been better for the applicant to speak to.
- 2 Beth Karanja, an advocate of the High Court and the head of Legal, Guaranty Trust Bank (Kenya) – the respondent – in a replying affidavit opposes the application terming it an afterthought “... and a belated attempt by the Applicant to delay the final conclusion of a dispute whose cause of action arose more than 7 years ago, and the present application is hence for dismissal with costs; she says at paragraphs 5, 6 and 7 of the replying affidavit:
5. I am further advised by my advocates on record whose advice I verily believe to be true that whereas the Applicant has alleged at paragraph 4 of the supporting affidavit that on October 17, 2018, leave was granted to the Appellant to file a Supplementary Record of Appeal to include the first page of the letter dated September 7, 2015, according to their records, the Applicant was not granted leave to file a Supplementary Record of Appeal. In any event, no Order has been exhibited by the Applicant to this effect.
6. On the strength of the decision in Civil Appeal No. 71 of 2004 (*New Kenya Co-operative Creameries Ltd v Omari Mzee Segu* [2019] eKLR, the Applicant is guilty of laches. The 5 years delay exhibited is not only inordinate but sufficient reason has not been given and evidence tendered to warrant the exercise of the Court’s jurisdiction in favour of the Applicant.
7. Further, the fact that the present Application has been brought over 5 years after the suit last came up in Court shows the level of disinterest in the suit by the Applicant. Indeed, the Appellant has been indolent and has never shown any seriousness in prosecuting this suit. In fact, this motion is a further delay, so much so that the court is entitled to dismiss the Appeal for want of prosecution.”
- 3 The respondent further says that no valid reasons are given why the documents sought to be included in Supplementary Record of Appeal were not included or why an application for leave to include the documents was not made within a reasonable time.
- 4 I have seen and perused written submissions by both sides and the case law filed to assist me in determining this application.
- 5 The applicant has cited the Supreme Court of Kenya decision in the case of *Kenya Hotel Properties Limited v Attorney General & 5 Others* [2021] eKLR where that court allowed extension of time having found that documents sought to be introduced through Supplementary Record of Appeal were not prejudicial to any of the respondents.
- 6 I note that the Judgment being appealed was delivered on October 30, 2017 about 6 years ago. The applicant says through its lawyer that leave had been granted on October 17, 2018 to include a certain document. That was not done and I am not told why it was not done. The lawyer says that he perused Record of Appeal and found that certain documents had been omitted. He does not say where he found these documents or why they were omitted. He also says that Record of Appeal was lodged out of the time required by the rules of this Court but I am not told whether that position was regularized through filing and obtaining leave to file it out of time.
- 7 I am not satisfied that the applicant deserves my exercise of discretion in his favour. I am not satisfied that the explanations given for the various omissions to comply with timeliness are reasonable and in those circumstances I dismiss the Motion dated December 8, 2022. The respondent will have costs of the Motion.



DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

