Associated Construction Company (K) Ltd v Kyamu Construction & Engineering Ltd (Civil Application E047 of 2022) [2022] KECA 872 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 872 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E047 OF 2022

K M'INOTI, JA

JULY 22, 2022

BETWEEN

ASSOCIATED CONSTRUCTION COMPANY (K) LTD ..... APPLICANT

AND

KYAMU CONSTRUCTION & ENGINEERING LTD ..... RESPONDENT

(Application for extension of time to appeal out of time from the Judgment and Decree of the High Court of Kenya at Machakos (Kemei, J.) dated 1st December, 2020 in HCCA No. 87 of 2018)

RULING

1. This is yet another of those untenable omnibus applications where the applicant, Associated Construction Co (K) Ltd, seeks, in the same application, an order for extension of time to file an appeal out of time and an order for stay of execution. This Court has decried this practice, which is taking root among some practitioners at an alarming rate. Recently in *Abdulrazak Rageh Haji v. Mahadho Abdulrazak Adichare*, CA No. E030 of 2020 I stated as follows regarding this practice:

> " Before me is one of those omnibus applications that this Court has decried time and again. (See, for example, Riccardo Fannelli & 2 Others v. Frigrieri Graziano, Civil Application No. 51 of 2015 and Christopher Iddi Moto & 15 Others v. Chiriba Nyambu Barua, Civil Application No 43 of 2014). The applicant seeks extension of time to file a notice of appeal and in the same application, an order for stay of execution of the judgment and decree that he intends to appeal. It is not rocket science to appreciate that under the Court of Appeal Rules an application for extension of time is the remit of a single judge whilst an application for stay of execution is the business of the full court. How exactly the same application can be heard in instalments, first by a single judge, and subsequently by the full Court, is not clear to me. Plus, a party cannot obtain stay of execution of a decree or judgment of the High Court without first filing a notice of appeal!

2. This practice has to stop forthwith. For purposes of this application, and in deference to Article 159 (2) (d) of the *Constitution*, I shall treat the application before me as one solely concerned with extension of time. After all, that is the only issue that I can legitimately deal with as a single Judge.

3. The background to the application for extension of time is that on March 14, 2018, the respondent, Kyamu Construction & Engineering Co Ltd, obtained a judgment against the applicant in the Senior Principal Magistrates Court at Mavoko. By that judgment the trial court ordered the applicant to hand over the log book of an Hydraulic Excavator, the subject matter of the suit, to the respondent within 30 days from the date of the judgment or refund Kshs 6.5 million to the respondent. The applicant failed to comply within the prescribed period, leading to execution proceedings by the respondent. The applicant then proceeded to the trial court and on July 4, 2018 obtained orders of stay of execution and release of the log book in its possession in settlement of the case. It appears that the applicant was able to deliver the log book, albeit eight days out of the prescribed time.

4. The respondent was aggrieved and preferred an appeal in the High Court, contending that the trial court was functus officio and that its orders were tantamount to a review of its judgment. The High Court agreed with the respondent and by the judgment dated December 1, 2020, set aside the orders of July 4, 2018. The applicant was aggrieved and set its mind on appealing to this Court.

5. As far as is relevant to the application for extension of time, the grounds upon which extension of time is sought in the Motion on Notice dated February 17, 2022 is that after the delivery of judgment on December 1, 2020, the applicant's counsel inadvertently, on December 15, 2020, filed the notice of appeal online in the Court of Appeal instead of the High Court as required by rule 75(1) of the *Court of Appeal Rules*. The Court did not assign the matter a number and the applicant's error was only discovered "recently" after a physical visit to the Court of Appeal registry, though exactly when this discovery was made is not stated. In the meantime, the respondent started executing the decree, forcing the applicant to go back to the High Court for an order of stay of execution, which was denied vide a ruling dated February 15, 2022. The applicant has annexed a copy of the notice that was filed in the Court of Appeal and urges that the mistake of its counsel should not be visited on it; that the appeal involves unjust enrichment by the respondent, and that the respondent stands to suffer no prejudice if the application is granted.

6. The application was opposed by the respondent vide a replying affidavit sworn on March 31, 2022 by Mr. Charles Kyalo Ngati, a director of the respondent. Not surprising, because of the omnibus nature of the application, the respondent devoted much time responding to the application for stay of execution, which is not my remit. As far as that affidavit is relevant to the question of time, the respondent contends that the applicant is guilty of inordinate delay, that the respondent will suffer prejudice if it is kept out of the fruits of its judgment any longer, and that litigation must come to an end. In its written submissions, again, as far as is relevant to the application for extension of time, the respondent submits that the applicant has not sufficiently explained the reason for failing to file the notice of appeal on time. In support of that submission the appellant cites *County Government of Mombasa v. Kooba Kenya Ltd* [2019] eKLR. It is also contended that the notice of appeal that the applicant alleges to have been filed in the High Court rather than in this Court has not been exhibited.

7. I have carefully considered the application for extension of time. In such an application the Court's discretion is wide and unfettered, the only qualification being that the discretion should be exercised judiciously and on reason, rather than whimsically or capriciously. The submission by the respondent that a party seeking extension of time must provide sufficient reason is based on *Abdul Azizi Ngoma v. Mungai Mathayo* [1976] KLR 61, which was decided before the amendment of rule 4 in 1985 to

remove the stricture or requirement of "sufficient reason". In *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR, I observed as follows:

> "A look at the legislative history of rule 4 will readily show that before 1985, the rule required an applicant to show"sufficient reason" why discretion to extend time should be exercised in his or her favour. After an amendment of the rule in 1985, that "sufficient reason" stricture was removed and the Court was henceforth allowed to extend time on such terms as it though just."

8. The considerations that guide the Court presently were stated as follows in the same ruling:

> Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

9. Turning to the merits of this application, the judgment in question was delivered on December 1, 2020. The application for extension of time was made on February 17, 2022, fourteen months later, which, if not explained, I would not hesitate to find is inordinate. The applicant's explanation, however, is that it indeed filed a notice of appeal on December 15, 2021, which was within the 14 days prescribed by rule 75 of the *Court of Appeal Rules*, but by oversight it filed the same in the Court of Appeal rather than in the High Court. All that time the applicant was under the mistaken belief that it had a valid notice of appeal on record.

10. The applicant has annexed to the affidavit in support of the application a snapshot of the dashboard of the e-filling system, which shows the following information:

> Parties: Associated Construction Co (K) Ltd vs Case Type: Civil Appeal Case Number: Case Number not generated Filling Date: 15-Dec-2020 08:12 Description: Appellant seeks to appeal against the judgment of Kemei J. of the High Court at Machakos which judgment ordered the appellant to pay twice Case Category: Civil Appeal Station: Nairobi Court of Appeal Filled by: Ameyo Guto & Company Advocates

11. The above information convinces me that indeed the applicant filed the notice of appeal on December 15, 2020 seeking to appeal the decision of Kemei, J of the High Court at Machakos and that unfortunately the filing was done at the Court of Appeal in Nairobi. Most probably because of that error, the system did not generate any case number. Appreciating that those were the very nascent days of deployment of technology in our Judiciary I would give the applicant the benefit of doubt and accept its explanation of innocent mistake in making the filing in the wrong court.

12. The respondent has on its side a judgment in its favour whilst the applicant has on its side an undoubted right of appeal. To some degree both stand some prejudice but what has weighed more in my mind is the applicant's contention that it was never heard in the proceedings leading to the initial judgment. The applicant further contends that it stands to pay the respondent twice, if it is not able to appeal. All that I can say is that the intended appeal is not prima facie frivolous. Lastly, I have not seen anything

on record that convinces me that the applicant is trying to steal a match on the respondent and to that extent I would echo Lakha, JA in *Tononoka Steels Ltd v. The PTA Bank*, CA No. 295 of 1998:-

> It is, of course, undesirable and indeed dangerous to enumerate all the cases in which the Court will exercise its discretion under rule 4 of the Rules. Broadly speaking, my view of the matter is that 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 interests of justice, to have a case determined on its merits."

13. Taking all the foregoing into account, I allow the motion dated February 17, 2022 and direct the applicant to file and serve its notice of appeal within fourteen days from the date of this ruling. Costs of the application will abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND OF DAY JULY, 2022

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR