



REPUBLIC OF KENYA



KENYA LAW
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**Bhabra v O'dwyer (Civil Application E043 of 2022)
[2022] KECA 1124 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1124 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E043 OF 2022
P NYAMWEYA, JA
OCTOBER 21, 2022**

BETWEEN

HARTEJ BUILDERS MANPREET SINGH BHABRA APPLICANT

AND

PATRICK (PADDY) O'DWYER RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal out of time in an Intended Appeal from the Ruling of the High Court of Kenya at Mombasa (D. O. Chepkwony J.) delivered on 17th February 2022 in Mombasa Civil Appeal No. 174 of 2018)

RULING

1. The Applicant herein has moved this Court by way of a Notice of Motion application dated 7th July 2022, brought under Rule 4 of the Court of Appeal Rules, 2022, seeking the extension of time to file its Notice of Appeal against the ruling dated 17th February 2022 delivered by the High Court in Mombasa (Chepkwony J.) in Civil Appeal No. 174 of 2018. The application is supported by an affidavit sworn by Manpreet Singh Bhabra, a director of the Applicant. The Applicant's grounds for the application are that it got to know of the delivery of the ruling dated 17th February 2022 on 5th July 2022, as its advocates on record were not served with any ruling notice, and only became aware of the ruling when searching the Kenya Law Reports website for a case, and found it highlighted on the search engine. It was urged that the intended appeal is merited and had a good chance of success. Further, that if the orders sought were not granted, the Applicant shall be subjected to execution and shall suffer substantial loss, and it is therefore, in the interests of justice that the matter be adjudicated upon. The Applicant attached a copy of the impugned ruling dated 17th February 2022.
2. The Respondent filed a replying affidavit he swore on 25th July 2022 in opposition to the application, wherein he provided a background to the impugned ruling by the High Court, which dismissed an application brought by the Applicant to stay execution of a judgment determined in the Respondent's favour by the Mombasa Chief Magistrate Court (hereinafter "the trial Court") on 10th July 2017 in



MSA CMCC No 476 of 2015. That the Applicant had sought the stay of execution of the judgment through several applications in the trial Court and in the High Court, and had abused Court processes in this regard by going to sleep after it got temporary stay orders.

3. On the reasons proffered by the Applicant for the delay in filing the Notice of appeal, the Respondent deponed that the impugned ruling was scheduled to be delivered on 14th October 2021 but was not reached, and parties were directed to attend Court the following day, being 15th October 2021 for the ruling, they were later directed that the ruling was not ready and would be issued on notice. That the advocate kept checking the online cause list and on 14th February 2022, she saw the notice on the scheduling the ruling for 17th February 2022, a copy of which the Respondent annexed. He argued that if his advocate was vigilant enough to constantly check the online causelist, it defeated reason why the Applicant, whose application was pending determination could not be vigilant to check the notices but conveniently spotted the judgment on the same online website.
4. Further, that after the ruling was delivered on 17th February 2022, the Respondent moved the trial Court to execute the judgment and, as required by law, effected personal service of the Notice to Show Cause application on the Applicant on 21st April 2022. That it was therefore dishonest of the Applicant to allege that it learnt of the impugned ruling on 5th July 2022, and on the contrary, the Applicant disappeared from Mombasa when the Respondent obtained a warrant of arrest on 21st June 2022, and only resurfaced to file the instant application for extension of time dated 7th July 2022.
5. It was thus the Respondent's argument that the Applicant had failed to explain the 140 days' delay and was thus not deserving of this Court's discretion. Besides, that it is more than 7 years since the suit in the trial suit commenced, the decretal sum kept escalating, the Applicant's conduct had proved worrying with regards to compliance, and that further delay would cause him irreparable loss.
6. A virtual hearing of the application was held on 26th July 2022, and learned counsel Mr. Githara Chuchu appeared for the Applicant, while learned Counsel Ms. Lilian Amere Machio holding brief for Mr. S. Ramadhan, appeared for the Respondent. Mr. Githara highlighted his written submissions dated 22nd July 2022, in which the cases of *Thuita Mwangi vs Kenya Airways Ltd* [2003] eKLR and *Nicholas Kiptoo Arap Salat vs IEBC and 7 others* [2014] eKLR were cited for the principles applicable for extension of time, and reiterated the Applicant's reasons for not filing the notice of appeal on time. With regard to the prejudice to be suffered by the Respondent, the counsel submitted that any prejudice the Respondent was likely to be exposed to by the 4 months and 10 days' delay was not insurmountable, and could be addressed by costs.
7. Ms. Machio on her part relied on written submission dated 25th July 2022, and placed reliance on the case of *Kenya National Highway Authority vs Joseph Ndolo Mutua* [2020] eKLR to submit that the Respondent Advocate had made efforts to get the notice for delivery of the impugned ruling, and the Applicant cannot therefore feign ignorance of the said notice which was posted online. With regards to the prejudice to be suffered by the Respondent if the application is granted, the counsel submitted that the ruling the Applicant intended to appeal from was meant to stay a judgement delivered in July 2017, and the Respondent was yet to reap the fruits of the judgment after five years, and had been frustrated by the Applicant's numerous frivolous applications for stay of execution.
8. The discretion of this Court to extend time under Rule 4 is unfettered, but must still be exercised judiciously. The factors that govern the exercise of the discretion to extend time under the said Rule were well stated in the case of *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (ur) as being the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted. Rule 75(2) of the Court of Appeal Rules of 2010 which was then applicable,



required that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. The same requirement is now found in Rule 77 (2) of the Court of Appeal Rules of 2022.

9. It is not in dispute that the ruling intended to be appealed from by the Applicants was delivered on 17th February 2022, and that the Notice of Appeal was not filed within time. The relevant period of delay that requires to be explained is therefore that of the four months and twenty-two days between 17th February 2022, and the date of lodging of the instant application on 10th July 2022. I am of the view that while it is probable that the Applicant or its counsel may not have been aware of the online notice of delivery of the impugned ruling, the Applicant has not controverted the Respondent's averments that he was served with a notice to show cause on 21st April 2022 and was therefore aware of the outcome of the ruling as at that date. The Applicant has therefore not explained the 2 months and 18 days delay between 21st April 2022 and the date of filing of the instant application, which delay is therefore inordinate in the circumstances and is inexcusable. In addition, this Court has noted the averments made as to the various applications by the Applicant to stay execution of the judgment delivered on 10th July 2017, which were not controverted, and the prejudice suffered by the Respondent in this regard.
10. I therefore decline to exercise my discretion in favour of the Applicant for the foregoing reasons, and hereby dismiss the Applicant's Notice of Motion application dated 7th July 2022 with costs to the Respondent.
11. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

