



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OUKO, (P) (IN CHAMBERS))**

**CIVIL APPLICATION NO. 8 OF 2020**

**BETWEEN**

**OTIENO, RAGOT & COMPANY ADVOCATES.....APPLICANT**

**AND**

**CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT**

*(An application for extension of time for filing the Notice of Appeal lodged in the Court Registry*

*at Kisumu on 22<sup>nd</sup> November, 2019 filed against the Ruling and Decree of*

*Hon. Lady Justice Cherere, J. dated 9<sup>th</sup> October, 2019*

*in*

*HCCC No. 97 of 2019)*

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**RULING**

On the same day the High Court ( Cherere, J. ) determined HCCC No. 95 of 2019 which is the subject matter of my ruling in Civil Application No. 7 of 2020, ( the first application) it also rendered a ruling in HCCC No. 97 of 2019. In the ruling the Judge concluded, after the respondent failed to defend the application, that;

**“a) Judgment is hereby entered for the advocate against the Respondent for Kshs. 118,289.54 (one hundred eighteen thousand, two hundred eighty-nine and fifty-four cents)**

**b) Interest shall be paid at 14% from 14th July, 2019 till payment in full.”**

Like in the first application the applicant is only aggrieved by the part of the effective date for the accrual of interest. The applicant had sought for interest at 14% p.a from 06<sup>th</sup> September, 2012. The court below fixed the effective date as 14th July, 2019.

The applicant wishes to appeal this part of the order but is unable because time for doing so has lapsed. They have now moved me to extend time within which to lodge and serve the notice of appeal. Like in the first application the applicant has asked me to excuse the lateness of 29 days, explaining the delay on the fact that, while delivering the ruling the Judge merely stated that the application was allowed; that only upon perusal of the file later that the applicant discovered that the effective date of interest accrual was not granted in the manner sought.

The respondent has filed a replying affidavit in which it is contended the applicant was not vigilant enough to know when the ruling was rendered; that the applicant has not approached the Court with clean hands for lodging a notice of appeal without first obtaining leave; and that if time is extended it will be prejudiced and burdened with additional and unnecessary costs.

By **Rule 4** of the Court of Appeal Rules, the Court can extend the time limited by **Rule 75(2)** for the filing of a notice of appeal. The rules are clear that time can be extended whether before or after the doing of the act. There is therefore nothing irregular in the applicant seeking to formalize the notice of appeal which has already been lodged.

A notice of appeal, on the other hand must be filed within 14 days from the date of the decision being appealed against.

Whether or not to extend the time is a matter of judicial discretion subject only to the requirement that it must be exercised judicially. But being unfettered, there is no limit to the number of factors the court will consider so long as they are relevant. See **Cargil Kenya Limited Nawal vs. National Agricultural Export Development Board** [2015] eKLR. The Court has however defined some boundaries to guide it in the determination of such applications. For example, in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (Civil Application No. Nai 255 of 1997), it was explained that, in general, the Court will take into account the length of the delay; the reason for the delay; the degree of prejudice to the respondent if the application is granted, and, possibly, the chances of the appeal succeeding if the application is granted.

Depending on the explanation for the delay, a delay of 29 days may be or may not be considered inordinate. The applicant explained, without any serious rebuttal, save for the argument that they ought to have been vigilant, that the learned Judge did not read the entire ruling, but simply pronounced the outcome, that the application was allowed without mentioning the issue of interest. It was not until the applicant obtained a copy of the decree that they realized that the application was not granted in the terms prayed. By which point, the time to lodge a notice of appeal had expired.

I find nothing unusual in the explanation offered why the decision was not challenged in time; that counsel for the applicant assumed that, the respondent having failed to challenge the application, the reliefs were granted fully as prayed since the learned Judge did not read the whole ruling of 9<sup>th</sup> October, 2019.

There will be no prejudice to the respondent if the application is granted. Though it is not for me sitting as a single Judge to determine the chances of the appeal succeeding if the application is granted, I think it is enough to say that, whether or not the effective date for the payment of interest, (at 14%) was from 06th September, 2012 or 14th July, 2019 is an arguable point that should be allowed to go for determination on the appeal.

In the result, this application is allowed with no orders as to costs and leave is granted to the applicant to lodge and serve the notice of appeal within 14 days of the date of this ruling.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2021.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**