



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 7 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. 95 of 2019)

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RULING

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. 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.

How do these principles apply to the matter at hand?

The applicant applied to the court below that a certificate of costs in the sum of Kshs. 72,021.70 be adopted as judgment and decree of the Court **“together with interest at 14% p.a from 09.09.10 until payment in full”**.

Because the respondent, who had been served did not oppose the application, the court (Cherere, J.) allowed it and in a ruling of 9<sup>th</sup> October, 2019 ordered that;

**“a. Judgment is hereby entered for the advocate against the Respondent for Kshs. 72,021.70 (seventy-two thousand, twenty-one and seventy cents)**

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

While the applicant was generally satisfied with the outcome, the above emphasized part of the ruling, where interest to be paid remained as prayed at 14% but with effect from 14<sup>th</sup> July, 2019 instead of 9<sup>th</sup> September, 2010, discounting nearly 9 years, aggrieved the applicant.

The applicant wishes to appeal this part of the order but is unable because time for doing so has lapsed. Instead of lodging the notice of appeal on 23<sup>rd</sup> October, 2019, being the 14<sup>th</sup> day from the date of the ruling in question, it was brought on 22<sup>nd</sup> November, 2019, some 29 days late.

The applicant now applies that time be enlarged and the notice of appeal on record be deemed as duly and properly filed.

The respondent, though served with the hearing notice did not appear or file any response to the application.

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 rebuttal, 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 14<sup>th</sup> July, 2019 or 9<sup>th</sup> September, 2010, 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 the notice of appeal dated 21<sup>st</sup> November, 2019 is hereby deemed as properly filed and served, subject to the requisite court fees being paid.

**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**