



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. E038 OF 2020

BETWEEN

DAVID CHEGE KIARII.....APPLICANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

(An application for extension of time within which to lodge a notice of appeal against the judgment and decree of the High Court of Kenya at Nairobi (Nzioka, J.) dated 28th May, 2020

in

H.C.C.C No. 396 of 2011)

RULING

The banker/customer relationship between the parties took a sour turn when the respondent froze the applicant's account held in its Business Centre Branch. Apparently, there was a malfunction in the respondent's system which some of its customers exploited, between October, 2010 and 6th May, 2011, to effect unauthorised online transactions without the same being debited to their respective accounts. The respondent believed that the applicant was one of the said customers and was indebted to it to the tune of Kshs.33,125,903.68 hence it froze his account.

The applicant, on his part, refuted that allegation explaining that it had no overdraft facilities with the respondent to warrant such withdrawals.

By a suit filed in the High Court being H.C.C.C No. 396 of 2011, the applicant sought a number of declaratory orders against the respondent as well as an order for the release of the funds withheld in his account. In turn, the respondent filed a defence and counter claimed for the amount it deemed was owing from the applicant.

Ultimately, Nzioka, J. in a judgment dated 28th May, 2020, which was delivered virtually in line with the Ministry of Health Covid-19 directives, dismissed the applicant's suit and allowed the respondent's counter claim to the extent of payment of the amount pleaded as owing from the applicant.

According to the applicant, he was not aware that the judgment was delivered on the said date; that there was neither notice of the same nor did the High Court send a video link to his advocate to access the virtual court during the said delivery; that the said delivery came to his attention when the respondent's advocates served on his advocate a letter dated 5th June, 2020 seeking certified copies of the proceedings in the High Court; that his advocate's efforts to access a copy of the said judgment proved fruitless until he wrote to the Deputy Registrar of the High Court on 16th June, 2020 and 22nd June, 2020, in addition to seeking the Presiding Judge's intervention on 25th June, 2020; and that eventually a copy of the said judgment was emailed to his advocate on 7th July, 2020.

Aggrieved by the decision, the applicant filed a notice of appeal albeit out of time on 9th July, 2020 and the motion before me, in which he seeks extension of time within which to file the notice of appeal and an order deeming the filed notice of appeal as duly lodged and therefore properly on record. The applicant attributed the delay to the aforementioned state of affairs and contended that the intended appeal was not frivolous.

As far as the respondent was concerned, the filing of the notice of appeal as well as the application was an afterthought calculated to defeat its enjoyment of the fruits of the judgment. Its position was informed by the fact that the impugned judgment, though initially scheduled for 26th May, 2020, was not delivered on account of non-appearance of the applicant or his advocate; that, pursuant to the court's direction, the respondent's advocates served the applicant's advocates on 27th May, 2020 via e-mail with a notice that the said judgment would be delivered on 28th May, 2020; and that therefore, the applicant had adequate notice of the said delivery date but opted not to attend without any reasonable explanation.

Further, the respondent was adamant that the applicant was fully aware of the terms of the judgment through the letter dated 5th June, 2020 requesting for certified proceedings, that is, his suit had been dismissed while the respondent's counter-claim had been allowed; that no explanation has been offered with regard to the delay in filing the notice of appeal and the current application.

An application for extension of time under **Rule 4** calls for exercise of this Court's unfettered discretionary power within the parameters of the law. Some of the factors that ought to inform the decision if a single Judge seized of this kind of application include, the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of the success of the intended appeal should the application be granted. See **Habo Agencies Limited vs. Wilfred Odhiambo Musingo** [2015] eKLR.

Granted, the applicant's notice of appeal was not filed within the time frame stipulated under **Rule 75(2)** of this Court's Rules. Nonetheless, I am satisfied that the explanation advanced with regard to the lack of knowledge of delivery of the impugned judgment on his part is plausible. Indeed, the applicant's advocate in the letters to the court maintained this same complaint.

Besides, the applicant demonstrated that the judgment notice alluded to have been served by the respondent was sent to the wrong email address as opposed to his advocate's email address. It is equally important to bear in mind the period when the delay occurred; when, due to covid-19, normal court operations were disrupted. Therefore, I find that the delay in filing the notice of appeal was not inordinate. It was for some 27 days, which I find has been sufficiently explained.

Though it is not my place as a single Judge to determine the merit of the intended appeal, I think the issues sought to be raised therein, as set out in the motion, deserve to be canvassed before the Court. I also do not find any prejudice that would be occasioned to the respondent should the current application succeed.

Accordingly, I find the application has merit and allow the same. Costs of this application shall abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 5th day of March, 2021.

W. OUKO, (P)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR