



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ASIKE-MAKHANDIA J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. E 288 OF2020**

**BETWEEN**

**SENTRIM KENYA LIMITED.....APPELLANT**

**AND**

**CFC STANBIC BANK LIMITED.....RESPONDENT**

*(Being an application to extend time for filing a notice and record of appeal*

*and in the alternative for leave to have the notice of appeal filed*

*by the applicant on 15<sup>th</sup> September 2020 in the intended appeal*

*against the judgment of High Court (Odera J) given in Nairobi*

*High court Civil Suit Number 414 of 2013 on 14<sup>th</sup> July 2020*

*e deemed as having been filed within the requisite time in*

**NAIROBI HIGH COURT SUIT NO. 414 OF 2013)**

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**RULING OF THE COURT**

This application dated 21<sup>st</sup> September 2020 by **Sentrim Kenya Limited** (the applicant) seeks an extension of time within which to file and serve a notice of appeal against the judgment and decree of the High Court (**Odero J**) delivered on 14<sup>th</sup> July 2020. The application is expressed to be brought under Rule 4 of the court of appeal Rules.

The background to the application is that the applicant had sued the Respondent in the High Court claiming Kshs. 20,576,625 being unpaid interest and Bank charges not waived on various accounts it had with the Respondent. The suit was successfully defended and the trial court found in favour of the respondent.

Aggrieved by the judgment and decree, the applicant filed the notice of appeal together with a letter bespeaking proceedings and served them on the Respondent on 16<sup>th</sup> September 2020. The notice of appeal should have been filed within 14 days from the date of the impugned judgment in accordance with Rule 75 (1) and (2) of the Court of appeal rules. However this was not to be as it was filed 49 days later. The applicant contends however that the delay in lodging the notice of appeal on time was due to failure by trial court to notify it as to when the judgment was scheduled to be delivered. The applicant only became aware of the judgment on 18<sup>th</sup> August 2020 when infact it had been delivered on 14<sup>th</sup> July 2020. That the delay was further occasioned when it changed advocates. The incoming advocates had to study the file and advice it on whether an appeal should be proffered, and when they did time for filing the notice of appeal had expired. In the circumstances the delay, according to the applicant was inadvertent and was neither deliberate nor intended to obstruct the course of justice. That the intended appeal raises substantial issues for determination and is not frivolous, that the respondent does not stand to suffer any loss, inconvenience or prejudice as the delay is only 49 days and that the court has unfettered discretion to extend time and allow the applicant to file a notice of appeal against the judgment. The application is further supported by the affidavit of **Rajni Shah**, in which he reiterates and expounds on the above the grounds.

In response, to the application, the Respondent filed a replying affidavit sworn by its senior legal officer, **Elisha Nyikuli** dated 4<sup>th</sup> December 2020, in which he deposed that the application was fatally defective, incompetent and untenable in law for the main reason that the affidavit is not commissioned and that the affidavit ought to be expunged from record leaving the application bare and unsupported.

The application was canvassed by way of written submissions without appearance of parties due covid-19 Pandemic. Those submissions once again merely mirrored what the parties had stated in their pleadings filed as aforesaid.

I have considered the application, the grounds in support thereof, the Respondents replying affidavit, submissions by Counsel and the law. Rule 4 of the Court of Appeal Rules does not provide the factors and or conditions the court should consider in an application for extension of time. However, courts have over time devised appropriate principles to be applied in achieving a just decision in the circumstance of each and every case.

I wish first to deal with the main issue of concern by the respondent that the affidavit in support of the application was not commissioned as required. However the supporting affidavit before me on record is a properly executed and commissioned affidavit which is in compliance with the law. Thus the complaint raised by the respondent has no basis and is summarily rejected.

The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus* on issue of extension of time, laid down the parameters as follows:

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

Again in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** the court rendered itself thus on the issue:

***“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path..... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”***

There is no maximum or minimum period of delay set out under the law.

However, the reason or reasons for the delay must be reasonable and plausible.

In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as was cited by the applicant, this Court stated:

***“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”***

The delay in filing the notice of appeal was approximately 49 days. The applicant blames the delay on the fact that the judgment was delivered without notice to it and further the changes it effected in its advocates past judgment. These explanations have not been discounted or disputed by the respondent in its filings thus I take them as true. I am also satisfied that a delay of 49 days is not so inordinate. Further the respondent has not demonstrated the prejudice it will be exposed to in the event the application is allowed.

On the chances of success of the intended appeal, without going into the merits of the intended appeal as this will be determined by the full bench which eventually be seized of the appeal, nonetheless a glance of the grounds of the intended appeal are not idle. In the case of **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** this Court observed as follows:

***“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”***

Bearing in mind the aforementioned parameters, and from the circumstances of the application before me, iam satisfied that the applicant has met the threshold for the grant of the prayer sought in the application. Accordingly the applicant is granted leave to file and serve the notice of appeal out of time. Both notice of appeal and the main appeal must be filed within the next twenty one (21) days from the date of this ruling failing which leave so granted shall stand vacated. Costs shall abide the outcome of the intended appeal

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of April, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**