



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR J.J.A.)

CIVIL APPLICATION NO. E443 OF 2020

BETWEEN

RIFT VALLEY MACHINERY SERVICES LIMITED.....APPLICANT

AND

AGRO COMPLEX (K) LIMITED & 14 OTHERS.....RESPONDENTS

(Being an Application for extension of time to file and serve a record of appeal against the Judgment of the Environment and Land Court at Milimani (K. Bor, J) dated on 17<sup>th</sup> January November 2020 in ELC Case No. 348 of 2008 (Consolidated with Milimani ELC Case No. 1018 of 2014))

RULING OF THE COURT

*The applicant, Rift Valley Machinery Services Limited*, has brought this Notice of Motion dated 17<sup>th</sup> November 2020 under various provisions including *rules 4, 5 (2), 82(1) and (2)* of the rules of this Court seeking for time to be extended within which to file and serve the letter requesting for proceedings and a record of appeal out of time.

The application was brought on grounds on its face, and an affidavit in support sworn by *Edgar Washika Ochima*, that contended that a Notice of appeal was filed on 31<sup>st</sup> January 2020, and thereafter in a letter dated 20<sup>th</sup> January 2020 and lodged in the registry on 23<sup>rd</sup> January 2020, the applicant requested to be supplied with the typed proceedings; that thereafter, it was contended, when the proceedings were finally ready for collection on 3<sup>rd</sup> June 2020, the applicant was unable to access the court Registry to collect them due to the Covid-19 pandemic; that further delays were occasioned by the registry's failure to communicate the cost of the proceedings; and provide the applicant's counsel with the Certificate of Delay. Consequently, it was asserted, the delay in filing the appeal which was not inordinate should not be attributed to the applicant; that it was only fair and just for the applicant to be allowed to file its appeal which was arguable and had a high chance of success.

The 13<sup>th</sup> and 14<sup>th</sup> respondents and the 3<sup>rd</sup> Interested Party filed grounds of opposition and written submissions in support of the application for extension asserting that the delay was not inordinate, and that it would be in the interest of justice for the appeal to be ventilated before this Court.

In a replying affidavit of *Peter Kimani Kimaru* sworn on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it was averred that since 10<sup>th</sup> March 2020 the applicant failed to follow up the proceedings with the registry, and only commenced pursuing them on 29<sup>th</sup> May 2020; that when the applicant was informed on 3<sup>rd</sup> June 2020 that when the proceedings were ready for collection, it was at the same time informed that the cost had been assessed at Kshs. 12,400; that therefore it is not true that the applicant was unable to obtain the costs of the proceedings until 1<sup>st</sup> October 2020, or that the registry was responsible for the delay in assessing the costs of the typed proceedings; that in fact, the applicant was aware of the assessed costs, and only paid for the proceedings on 2<sup>nd</sup> October 2020.

Under *rule 4* of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997*.

As to the length of delay, the Notice of appeal was filed on 31<sup>st</sup> January 2020. The Certificate of delay indicated that the period for preparation of the typed proceedings as 142 days from 23<sup>rd</sup> January 2020 to 3<sup>rd</sup> June 2020. And from 3<sup>rd</sup> June 2020 to the date of this application was a delay of 135 days.

Was the delay explained? The applicant's case is that the delay was occasioned by its inability to access the court registry due to the Covid-19 pandemic, and that the delay in filing the record could be attributed to the registry's failure to communicate the assessed costs for the typed proceedings.

It is not disputed that the applicant was notified that the typed proceedings were ready for collection on 3<sup>rd</sup> June 2020. It is not also disputed that the assessed costs were paid on 2<sup>nd</sup> October 2020. A review of the letter dated 3<sup>rd</sup> June 2020 discloses that, not only was the applicant informed that the typed proceedings were ready for collection, it also indicated that assessed costs for the proceedings was Kshs.12,400. In addition, the Certificate of delay indicated that the proceedings were not collected until 13<sup>th</sup> October 2020.

Though the applicant claims that it was unable to obtain the assessed costs, there is nothing that shows that it communicated the difficulty it was experiencing to the registry. Since there is nothing to support the claim that the assessment of the proceedings was the cause of the delay, I find it to be unsubstantiated and implausible.

Having said that, from 3<sup>rd</sup> June 2020 when it was informed that the proceedings were ready for collection, the applicant had 55 days in which to file the record of appeal. Instead, it filed this application on 18<sup>th</sup> November 2020, which was a further delay of 80 days which required an explanation. None was provided.

**In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98**, the Court stated thus:

**“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”**

As such, without any substantive explanation or material provided as to the reason for the delay in filing the record of appeal after the typed proceedings were provided, I find that the delay has not been explained at all.

Turning to whether the appeal has any chance of success, the application does not disclose that the applicant filed the trial court's decision of 17<sup>th</sup> January 2020, and neither did it file a draft memorandum of appeal. Without the judgment or draft memorandum, I am unable to assess the likelihood of success or not of the appeal. And given the unwarranted missteps in filing of the appeal, it is envisaged that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents will suffer prejudice were time to be extended in filing of an appeal.

In sum, I have come to the conclusion that the application for extension of time is not merited. I decline to exercise my discretion to allow it. I order that the Notice of Motion dated 17<sup>th</sup> November 2020 be and is hereby dismissed with costs.

**It is so ordered.**

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY, 2021**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**