



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: DR. K. I. LAIBUTA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. E015 OF 2021

BETWEEN

DEL MONTE KENYA LIMITED APPLICANT

AND

PATRICK NJUGUNA KARIUKI..... RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal and Record of Appeal out of time, from the Judgment of Justice Byram Ongaya, dated 26th October, 2012

in

Nairobi Industrial Cause No. 953 of 2011)

RULING

Background

Before me is a Notice of Motion dated 15th January 2021 made under Rule 4 and 5(2) (b) of the Court of Appeal Rules in which the Applicant, Del Monte Kenya Limited, seeks extension of time pursuant to Rule 4 to file and serve a Notice of Appeal and Record of Appeal from the judgment of Hon. Mr. Justice Byram Ongaya delivered on 26th October 2012 in Nairobi Industrial Court Cause No. 953 of 2011. The application has been duly served on the Respondent and is opposed as appears from the replying affidavit of the Respondent, Patrick Njuguna Kariuki, sworn on 30th April 2021.

The application is made on 6 grounds set out on the face of the Motion, which I need not recite. A summary thereof would suffice to guide the exercise of my discretion in determination of the application. Briefly stated, the grounds are that –

- (a) the Applicant is aggrieved by the judgment in Industrial Court Cause No. 953 of 2011 delivered on 26th October 2012, and its intended appeal has prospects of success;
- (b) the Applicant's record of appeal was struck out by the Court in its Ruling delivered on 18th December 2020 in Nairobi Court of Appeal Civil Application No. 295 of 2017 for want of compliance with Rule 82 of the Court of Appeal Rules;
- (c) the Respondent having collected the entire sum awarded by the superior court in the sum of KShs. 8,863,282.29 deposited in court will not suffer any significant prejudice if this Motion is allowed; and
- (d) the Applicant will suffer irreparable harm if this application is not allowed.

The Applicant's Notice of Motion is supported by the annexed affidavit of its legal counsel, one Harry Onyango Odondi, sworn on 15th January 2021. In his supporting affidavit, counsel for the Applicant narrates the events leading to (a) the striking out of its Notice of Appeal dated 8th November 2012 together with its record of appeal by a Ruling of this Court delivered on 18th December 2020; and (b) the subsequent delay in filing the requisite Notice of Appeal and Record of Appeal for a second time. According to him, the Respondent collected the decretal amount of KShs. 8,863,282.29 deposited in court on 8th November 2012. He states that the Applicant's only concern is

that the judgment of the superior court stands to be executed to re-engage the Respondent. It appears to me that this is the only grievance that motivates the intended appeal.

In paragraph 15 of his affidavit, counsel for the Applicant states that "... the only stay to be enjoyed by the applicant was in respect of the order of re-engagement." Paragraph 27 of his affidavit reads:

"... no prejudice or injury that the Respondent will suffer if this application is allowed, appreciating that he or his counsel have collected from the court the entire monetary award of KShs. 8,863,282.29. On the other hand, the Applicant's appeal will be entirely prejudiced if this application is not allowed."

In his replying affidavit sworn on 30th April 2021, the Respondent contends that the Applicant is guilty of indolence in light of inaction for a period of more than eight years. According to him, a similar application for extension of time had been heard by this Court and a Ruling delivered on 9th May 2014 and 9th October 2015. There is no record of such Rulings before me other than two screenshots of email communication of 16th and 18 December 2020 notifying and forwarding the Ruling sought to be challenged in the intended appeal. Otherwise, there is nothing before me to suggest that similar applications had been made previously.

In a second replying affidavit of Elijah Mwangi, the Respondent's counsel, sworn on the same date, counsel states that it is approximately nine years since the judgment sought to be challenged was delivered. According to him, it is grossly unfair for the Applicant to prolong the litigation between the parties. All along, the Applicant had not applied for certified copies of the proceedings in the superior court. No leave was required for this purpose. Neither has the Applicant lodged a fresh Notice of Appeal.

Submissions by Counsel

Counsel for the Applicant filed their submissions dated 5th April 2021 urging me to grant the application and extend time to lodge a Notice of Appeal and record of appeal. He relies on the authority of *Richard Ncharpi Leyangu v Independent Electoral and Boundaries Commission and 2 others* [2013] eKLR and *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR.

In reply, counsel for the Respondent filed their submissions dated 3rd May 2021. They rely on their written submissions dated 30th September 2019 and made in the authority of *Stephen Ndung'u Njuguna v Joseph Kahora Ngugi* [1998] eKLR and *Equity Bank Limited v West Link MBO Limited* [2013] eKLR and urge me to dismiss the application.

Determination

With regard to the Applicant's prayer pursuant to Rule 5(2) (b) of the Court of Appeal Rules for stay of execution of the Judgment and decree of Hon. Mr. Justice Byram Ongaya delivered on 26th October 2012, I hasten to observe that the orders sought are not within my jurisdiction to grant. Accordingly, I restrict myself to the prayer for extension of time under Rule 4.

Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to "... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ...," on such terms as it thinks just.

The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that

"the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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."

The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. 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, 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 factors."

Having carefully read the Applicant's Notice of Motion dated 15th January 2021, the supporting affidavit of Harry Onyango Odondi sworn on 15th January 2021, the replying affidavits of the Respondent and counsel for the Respondent sworn on 30th April 2021, and the written submissions of counsel for the Applicant and counsel for the Respondent, I find that –

- (a) the judgment in respect of which the intended appeal is preferred was delivered on 26th October 2012;
- (b) the decretal amount of KShs. 8,863,282.20 previously deposited in court was released to the Respondent in satisfaction of the decree;

- (c) there is no material before me to suggest that the Respondent is taking any steps to execute the decree in relation to the order for re-engagement;
- (d) the Applicant has not lodged a Notice of Appeal since the striking of a similar Notice and record of appeal on 18th December 2020;
- (e) the Applicant does not require leave of this Court to lodge a Notice of Appeal; and
- (f) in view of the foregoing, the application for extension of time to file a Notice of Appeal and record of appeal would serve no useful purpose.

I hasten to add that there must be an end to litigation. It is nine years since judgment in this matter was delivered. The subsequent steps taken by the Applicant in the proceedings were characterised by misperceptions of procedure. In my considered view, they served no useful purpose in light of the admitted discharge of the decree, save for re-engagement, which the Respondent has not sought. Moreover, no reasonable explanation has been furnished for the inordinate delay in taking appropriate steps in the proceedings since 2012. I use the word “appropriate” intentionally because misconceived action would not count.

Finally, I am at a loss as to what is sought to be achieved by the intended appeal in respect of which the Applicant has not given notice. Neither is there a Memorandum of Appeal on record to aid in determining the probability of success of such an appeal. For the foregoing reasons, I order and direct that the Applicant’s application for extension of time to file a Notice of Appeal and record of appeal be and is hereby dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 9th day of July 2021

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR