IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 284 OF 2019

BETWEEN

BAKE N BITE (NAIROBI) LIMITED…….....……..1ST APPLICANT

SEIF MOHAMED SEIF ……..……..2ND APPLICANT

AND

BAKEHOUSE INVESTMENTS LIMITED.....…...…….RESPONDENT

(Being an application for extension of time within which to file a Notice of Appeal and Record of Appeal out of time from the Ruling of the High Court at Nairobi (O. Sewe, J) dated 15th October 2018 and delivered on 12th November, 2018 In Civil Suit No. 243 of 2016)

RULING

On the 26th day of October, 2016, Sewe, J entered a summary judgment in favour of the respondent in the sum of Kshs. 27,267,520 together with interest and costs after the learned Judge expressed satisfaction that, though served with summons to enter appearance together with the plaint, the applicants neither entered appearance nor filed a defence. The Judge was also persuaded, from the material before her that the applicants were truly indebted to the respondent, the former having explicitly acknowledged the indebtedness; and that there was overwhelming and incontrovertible documentary evidence to support the respondent's claim. The applicants also failed to respond to the application for summary judgment, which was served on them on two different occasions. They too failed to attend court when the application came for hearing.

That ruling was made on 26th October, 2016. On 9th February, 2018, the 2nd applicant took out an application to ask the court to set aside or vary the aforesaid orders of 26th of October, 2016, contending that he was not served with both summons to enter appearance and the plaint. Not convinced by that averment the court rejected the application with costs in a ruling dated 15th October, 2018 but delivered on 12th November, 2018.

Aggrieved and intending to challenge the ruling but late to do so, the 2nd applicant now applies to a single Judge to enlarge time within which to file and serve both the notice and record of appeal. The 2nd applicant explained away the delay on his poor health; that it was only on 14th December, 2018, after recovering that he was able to go through the ruling but failed to instruct his advocate to challenge it due to loss of memory caused by the illness. When he visited the chambers of his advocate on 20th August, 2019, the time permitted for the filing of the notice of appeal had elapsed; and that, although such a notice had been drafted, it could not be lodged without his instructions. He prays that the Court finds the delay explained; and that it was neither inordinate nor prejudicial.

The respondent has asked the court to disallow the application as no appeal lies as of right to this Court from the decision in question; that, as such, the application is premature and ought to have been brought only after obtaining leave to appeal; that the delay of about 9 months was inordinate; that the reasons advanced for the delay are implausible as there is nothing to show that the applicant was incapable of giving instructions to his counsel; that as a matter of fact, he swore an affidavit in this very matter in the court below during the period of the alleged illness; that interestingly too is the fact that his advocate has deposed in her affidavit that he had instructed her to file an appeal on 14th December, 2019; and that during the period, the 2nd applicant is alleging to have been unwell, he approached the respondent's counsel with a proposal for an out of court settlement.

The decision in question, I repeat, was rendered on 12th November, 2018. By **Rule 75(2)** of the Court of Appeal Rules the applicants were required to give to the respondent a notice of their intention to appeal the decision within 14 days of the decision. They did not and instead took out this motion on 30th August, 2019, nine (9) months later. Where a party fails to give a notice of intention to appeal, **Rule 4** opens a window for such a party to approach the Court and seek leave to lodge the notice out of time. The court, in considering whether or not to

grant the relief, will essentially be exercising a judicial discretion which is wide and unfettered. (See **Leo Sila Mutiso v. Rose Wangari Mwangi,** Civil Application No. Nai. 255 of 1997). Though wide and unfettered, the discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment. (See. **Julius Kamau Kithaka V. Waruguru Kithaka Nyaga & 2 Others,** CA. No. 14 of 2013) Some of the considerations to be borne in mind, and which are certainly not exhaustive of the catalogue, according to the parameters laid down in judicial decisions, including **Leo Sila Mutiso** (supra), are the length of the delay, the reason(s) for the delay, the possible prejudice that each party stands to suffer; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In **Athuman Nusura Juma V. Afwa Mohamed Ramadhan,** CA No 227 of 2015, this Court warned that a single judge must exercise care in considering whether the intended appeal has merit as that question can only be determined with finality by a full bench. That explains 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"**. Its consideration will be limited to seeing that an appeal or intended appeal that is *ex facie* and obviously frivolous, taken together with the other considerations, should not take up the scarce judicial resources.

On the length of delay, considering that a notice of appeal ought to have been lodged within 14 days of the decision sought to be challenged, and this application being brought 9 months later, by any standard, and in proportion to 14 days, there cannot be any doubt that the delay was inordinate.

The applicants proffered two reasons for the delay; the 2nd applicant's ill health which was accompanied by loss of memory and secondly, lack of instructions to counsel to file the notice of appeal. Lack of instructions was explained by counsel to mean lack of payment of advocate's fees. This was confirmed by the submission that the notice of appeal had in fact been prepared but for this reason, was not lodged.

The medical report from Mathari National Teaching and Referral Hospital is dated 26th August, 2019 and states that the hospital has been attending to the 2nd applicant since March, 2017 for Bipolar Mood Disorder (BMD). Copies of five medicine prescriptions for the years 2017, 2018 and 2019 are annexed to the affidavit supporting the application. While I sympathize with the 2nd applicant's condition, none of the medical documents he is relying on allude to any dementia. He himself says that on 14th December, 2018 he was able to read and understand the ruling of 12th November, 2018. Yet he took no action until 9 months later. It is the delay during this period, between 12th November, 2018 and 30th August, 2019, that the 2nd applicant was expected to explain, excusing the delay of two weeks and assuming that between 12th November 2018 and 14th December, 2018 he suffered memory loss. He has not satisfactorily declared and explained this period of delay as was emphasized by the Supreme Court in the case of **County Executive of Kisumu V. County Government of Kisumu & 8 others,** Civil Application No. 3 of 2016 as follows;

> **"[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court."** (My Emphasis)
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> See also, **Moses Onchiri (Suing on behalf and in the interest of 475 persons being former inhabitants of KPA, Maasai Village within Nairobi) V. Kenya Airports Authority &4 others,** (2019) eKLR

On the second ground, while counsel was candid that she had not been paid by the applicants, I do not think that should constitute reason enough to excuse a delay of 9 months, and particularly for counsel, who must know the importance of timelines in litigation.

With the caution outlined earlier, and with respect to learned counsel for the respondent, I do not think the 2nd applicant requires leave to appeal the order dismissing his application for setting aside interlocutory judgment. Under **Order 43 rule 1**, an appeal lies as of right from the following, among other orders relating to setting aside of judgment in default of appearance or setting aside of judgment or dismissal for non-attendance. Only to state, without saying so definitively that, in my humble view, *ex facie* it is doubtful that the learned Judge's exercise of discretion can be faulted.

The transaction, the subject of this dispute, was in 2016. An extension of time will simply prolong the respondent's anxiety and further delay its enjoyment of the fruits of the judgment made by a competent court.

In the result, the application fails and is accordingly dismissed with costs against the 2nd applicant.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR