



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE J.A IN CHAMBERS]

CIVIL APPLICATION NO. 298 OF 2019

BETWEEN

KENYA BUREAU OF STANDARDS.....APPLICANT

AND

LANDMARK FREIGHT SERVICES LIMITED.....1st RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

MINISTRY OF TRADE.....4TH RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....5TH RESPONDENT

(Being an Application for extension of time to file and serve the notice of appeal and the letter requesting for proceedings against the ruling of the High Court at Nairobi, (Weldon Korir, J.) dated 29<sup>th</sup> July, 2019 **in Constitutional Petition No. 290 of 2018**)

RULING

Before me is an application dated **9<sup>th</sup> September, 2019** made under **Rule 4** and **Rule 75** of this Court's rules (*"the Rules"*) seeking extension of time to file a notice of appeal and the letter requesting for proceedings out of time. The applicant, **Kenya Bureau of Standards** intends to file an appeal against the ruling of the High Court in Nairobi (**Korir J.**) delivered on **29<sup>th</sup> July, 2019** and prays that the Notice of Appeal and letter requesting for proceedings both dated **30<sup>th</sup> August, 2019**, be deemed as filed.

The grounds upon which the application for extension is based are stated on the face of the application and deposited in the affidavit of **Benard Njiraini**, the Managing Director of the Applicant, dated **9<sup>th</sup> September, 2019**, where it is deponed that:

- a) The High Court delivered its judgment on **20<sup>th</sup> June, 2018** where it declined to grant the reliefs sought by the 1<sup>st</sup> respondent but held that it was unable to determine whether the 1<sup>st</sup> respondent's sugar was good or bad for human consumption, and accordingly directed the applicant's expert witness, **Clarkson Ogembo Nyambok** to provide to the court and the 1<sup>st</sup> respondent a report, within 3 days of the judgment, on whether the sugar was fit for human consumption.
- b) On **29<sup>th</sup> July, 2019**, the Court delivered a ruling where it dismissed the applicant's application contesting the recalling of the witness and upon weighing the evidence of the witness, arrived at the conclusion that the sugar was safe for consumption and directed that the seizure notices be lifted and the sugar be released to the 1<sup>st</sup> respondent.
- c) Upon being instructed, notice of appeal on **30<sup>th</sup> August, 2019** was traced. However, the applicant's advocate presented the **August, 2019** but the file could not be successfully lodged the notice on **2<sup>nd</sup> September, 2019**.
- d) The delay was occasioned by delayed decision making. Consultation between management and the technical departments where officers had been involved in out of station assignments, took time with regards to the necessity of instituting the appeal.
- e) The delay was also occasioned by the lack of a substantive managing director, after the applicant's former managing director was

arrested and charged in Court. This impacted the applicant's ability to make the crucial decision on whether to appeal or not.

f) That it is in the interest of justice and the public that the orders sought be granted given the subject of the appeal is sugar which had expired at the time of delivery of the ruling and which if not allowed would lead to the public consuming harmful and expire sugar.

g) The appeal has high chances of success.

h) The delay is not inordinate.

The application was vehemently opposed by the 1<sup>st</sup> respondent in a replying affidavit dated **14<sup>th</sup> October 2019** sworn by **Samuel Kamau Mburu**, a director of the 1<sup>st</sup> respondent who deponed that the court file was never missing as the 1<sup>st</sup> respondent was able to extract the court's orders and serve them on all parties and if at all it was missing the applicant has not shown the effort it undertook to recover the file; that the reasons proffered by the applicant are not backed by evidence and do not meet the threshold for the grant of orders sought and that the applicant does not have an arguable appeal.

When the motion came up for hearing before me on **10<sup>th</sup> March, 2020**, learned counsel, **Ms. Kariuki** appeared for the applicant, learned counsel **Mr. Ogada** held brief for **Prof. Ojienda** and learned counsel **Ms. Almadi** appeared for the 2<sup>nd</sup> respondent.

Ms. Kariuki informed the court that the applicant had already filed its appeal in this matter pursuant to the orders of this court in an application seeking stay of execution which had been allowed. In explaining the reason for the delay in filing the Notice of appeal, counsel reiterated the contents of the supporting affidavit dated **9<sup>th</sup> September, 2019** and contended that the applicant had complied with the principles enumerated in **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR Sup. Ct Application No. 16 of 2014** to wit; that the delay of 21 days was not inordinate, there was a reasonable reason for delay and that the appeal had high chances of succeeding.

Counsel was of the view that that no prejudice would be suffered by the 1<sup>st</sup> respondent if the orders sought were granted given that the sugar had since been released and that the 1<sup>st</sup> respondent had filed Nairobi High Court Civil Case No. 263 of 2019 on **29<sup>th</sup> November, 2019** claiming damages relating to the subject sugar. In her view, the appeal raised other legal matters that were of public interest and which touched on consumers' rights to healthy and safe products. Lastly, it was submitted that this Court (**Ouko, Githinji & Okwengu, JJ. A**) in granting the applicant's application for stay of execution in **Civil Application No. 288 of 2019**, found that the applicant's intended appeal was arguable and raised points that were neither idle or frivolous.

In opposing the motion **Mr. Ogede** contended that the applicant had not met the threshold outlined for the grant of the orders sought. He submitted that the reasons for delay were unsatisfactory and dishonest. In his view, the applicant had a legal department filled with competent advocates who understood the procedure of the court and secondly if the sugar was unfit for consumption then the decision to appeal ought to have been instantaneous.

It was counsel's submission that the appeal was moot given that the sugar which formed the substratum of the appeal was released into the market shortly after the same was declared fit for consumption by the High Court. The court would therefore be undertaking an academic exercise if the application was allowed. Lastly counsel asserted that if the application was allowed, it would continue to suffer great prejudice in the form of loss of business, revenue and injury to reputation.

**Miss Almadi** for the 2<sup>nd</sup> respondent indicated that the 2<sup>nd</sup> respondent was not opposed to the application. I have critically examined the application, the affidavit in support of the application, the replying affidavit, the authorities and the law. I am cognizant that the grant of an application for extension of time is an unfettered discretion which must be anchored on reason and which must be exercised in such a manner as to meet the ends of justice. I am guided by the case of **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** where the Supreme Court aptly stated:

*"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.*

*"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;*
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
- 5. whether there will be any prejudice suffered by the respondents, if extension is granted;*
- 6. whether the application has been brought without undue delay; and*

**7. whether in certain cases, like election petitions, public interests should be a consideration for extending time”**

Taking the above guidelines into consideration, the delay that must be explained in this instance is from **12<sup>th</sup> August, 2019**, the date when the statutory period of 14 days lapsed to **10<sup>th</sup> September, 2019** when the application before me was filed.

The applicant herein has attributed the delay to its inability to timeously make the crucial decision on whether to appeal or not. This was attributed to the lack of a substantive managing director after the applicant’s former managing director was arrested and charged in Court and a delayed consultation between management and the technical departments whose officers had been involved in out of station assignments. Whereas counsel for the 1<sup>st</sup> respondent termed the explanation as unreasonable given the urgency of the matter and the fact that the applicant had a competent legal department to advise it on the appropriate measures to take, I find that the presence of delay caused by a lack of a requisite authority and leadership on the way forward cannot be wished away. The gazette notice attached by the applicant showing the date of appointment of the current managing director as **29<sup>th</sup> August, 2019**, is a clear indication that once he was appointed, prompt action was taken in the matter. Instructions to represent the applicant were given to the advocate on record, the notice of appeal was filed on **2<sup>nd</sup> September, 2019** and the instant application was filed on **10<sup>th</sup> September, 2019**. I thus find that the delay has been explained to my satisfaction. I further find that the delay of 28 days is not inordinate in the circumstances.

In the result, I find merit in the motion and accordingly grant it. In the premises, I make the following orders: -

- i. Leave be and is hereby granted to the applicants to lodge and serve their Notice of Appeal and the letter bespeaking the proceedings out of time.
- ii. The Notice of Appeal dated **30<sup>th</sup> August, 2019**, be and is hereby deemed as filed. It shall be served within 7 days of delivery of this Ruling.
- iii. The letter bespeaking the proceedings dated **30<sup>th</sup> August, 2019** is deemed to have been filed on time. It is to be served within 7 days of the ruling.
- iv. The applicant shall file and serve the Record of Appeal upon the Respondents within 60 days of the delivery of this Ruling. In default, the appeal shall stand dismissed.
- v. Costs shall abide the outcome of the appeal.

***Dated and delivered at Nairobi this 8<sup>th</sup> Day of May, 2020.***

**F. SICHALE**

**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR**