



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 77 OF 2019

BETWEEN

THE KENYA REVENUE AUTHORITY-DCI KRA UNIT.....1ST APPLICANT

CHIEF INSPECTOR MOHAMMED JILLO.....2ND APPLICANT

AND

GOOGLE KENYA LIMITED.....1ST RESPONDENT

THE CHIEF MAGISTRATE, MILIMANI LAW COURTS.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

HONOURABLE ATTORNEY GENERAL..... 5TH RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal against the Judgment and Order of the High Court of Kenya at Nairobi (P. Nyamweya, J.) dated 22nd October 2018 in Nairobi Judicial Review No. 14 of 2018)

RULING

1. Before me is an application dated 16th August 2019 presented to Court on 26th August 2019 seeking extension of time to file and serve a notice of appeal against a judgment delivered by the High Court on 22nd October 2018 and for the record of appeal filed herein on 5th March 2019 to be deemed to have been properly filed.
2. The background is that following suspected unauthorized access into the computer system of Kenya Revenue Authority (KRA), the 1st applicant, Kenya Revenue Authority-DCI KRA Unit, presented an application before the Magistrates Court, Milimani, Nairobi in which it sought a warrant to investigate a particular Gmail account handle that was suspected to have been used to perform the task of an authorized officer. That application was made under Sections 118, 118A and 121(1) of the Criminal Procedure Code and Google INCL (c/o Google Kenya) was named as the respondent. On 9th January 2018, the Magistrate's court allowed the application and authorized C. I. Mohammed Jillo, the 2nd appellant, an investigator with the Directorate of Criminal Investigation, to investigate the said Gmail account "*and to require Google Kenya to produce relevant documents*" to facilitate the investigation.
3. After service of that court order on the respondent herein, Google Kenya Limited, by an email sent on 1st November 2018 addressed to the 2nd appellant, pointed out that it is a separate legal entity from Google LLC and was not in a position to supply the information that was required. The respondent requested the appellants to direct the order and all requests to Google LLC.
4. Subsequently, the respondent sought, and was granted leave by the High Court to apply for an order of certiorari to quash the order of the Magistrate's court that was issued on 9th January 2018. After hearing the substantive motion for judicial review, the High Court, in a judgment delivered on 22nd October 2018 allowed the judicial review application, issued an order of certiorari quashing the decision of 9th January 2018 on the ground that the magistrates court acted irrationally in issuing the order against the respondent herein which was not a party to the action. The appellants were condemned to meet the costs to the judicial review application.

5. Aggrieved by that judgment, and intending to challenge it on appeal, the appellants filed a notice of appeal before the High Court on 25th October 2018. That notice was dated 23rd October 2018. It was however not served on the respondent until 16th November 2018. By a letter dated 23rd October 2018 and filed in the High Court on 25th October 2018, the appellants' advocates applied for certified copies of the proceedings and judgment (referred to therein as a ruling) "*to enable us file an appeal to the Court of Appeal*", the letter stated. That letter was copied to the advocates for the respondent who acknowledged receipt by stamping on the letter on 30th October 2010.

On 5th March 2019, the appellants filed the record of appeal.

6. On 3rd April 2019, the respondent filed an application dated 2nd April 2019 seeking orders to strike out the notice of appeal and the record of appeal on grounds that the notice of appeal was not properly lodged and endorsed by the Deputy Registrar of the Court; that the notice of appeal was not served on the respondent in time; that the record of appeal was filed out of time without prior leave of the court and that permitting the same would occasion a miscarriage of justice.

7. Approximately four and half months after that application to strike out the notice and record of appeal was filed, the appellants, on 26th August 2019, filed the application now before me seeking orders under Rule 4 of the Court of Appeal Rules, that time be extended "*within which to file and serve*" the notice of appeal and that the "*record of appeal filed herein on 5th March 2019 be deemed to have been properly filed*" or alternatively time be extended for the appellants to file and serve a supplementary record of appeal.

8. I heard the application on 20th January 2020. Both parties were represented by learned counsel. In support of the application **Mr. J. Shijenje** referred to the grounds on the face of the application, his supporting affidavit sworn on 16th August 2019 and his written submissions and urged that the reason for delay was failure by the advocate on record at the time to serve the notice of appeal within time; that notice of appeal was misplaced in the court and there was a challenge in having it endorsed by the registrar; that the notice that was endorsed by the court could not be traced and the mistake is therefore attributable to the High Court.

9. Opposing the application, **Mr. S. Kiptinnes** submitted that no good reason has been given for allowing the application; that based on a letter from the Deputy Registrar of the High Court dated 28th March 2019 annexed to a replying affidavit filed by the applicants in response to the respondent's application to strike out the appeal, there is no proof of endorsement of the notice of appeal; that although the appellants state that they applied for proceedings, there is no record of that; that no explanation for the delay has been offered; that the applicants cannot blame the previous advocate as the current advocate was also appearing for them before the High Court; that the appellants conduct is dilatory; that although the typed proceedings were ready for collection by 14th December 2018, they were not collected promptly; that the record of appeal should have been filed by 11th February 2019 but was not filed until 5th March 2019 without good reason. It was submitted that the applicants were informed who the correct party is and that the application is mischievous; that further delay in conclusion of the matter is prejudicial to the respondent.

10. In his brief reply, Mr. Shijenje urged that the failure to locate the endorsed notice of appeal is by the court and cannot be blamed on the appellants; that the typed proceedings were received on 17th December 2018; and that no prejudice will be suffered by the respondent if the application is allowed.

11. The principles that should guide me in dealing with an application for extension of time are established. In ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014/2014 eKLR*** the Supreme Court of Kenya stated that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

12. In the same vein, in ***Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR*** Waki, JA stated that:

"The exercise of this Court's discretion under Rule 4... 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, (possibly) 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: See *Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR)*, *Mwangi vs. Kenya Airways Ltd [2003] KLR 486*, *Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR)* and *Murai v Wainaina (No 4) [1982] KLR 38.*"

13. I have considered the application and the submissions and the authorities cited. I am satisfied that the notice of appeal dated 23rd October 2018 and the letter bespeaking proceedings were duly filed before the lower court on the 25th October 2018. That was undoubtedly within the 14 days period required under Rule 75(2) of the Court of Appeal Rules as judgment was delivered on 22nd October 2018. There is also evidence that the letter bespeaking proceedings was copied to the advocates for the respondent as it bears the stamp of the respondent's advocates firm imprinted on 30th October 2010.

14. It is however conceded by counsel for the applicants that the notice of appeal was, either never served or served late. Under Rule 77(1) of the Court of Appeal Rules, the notice of appeal should have been served "*before or within seven days after lodging*". In his affidavit in support of the application, Shijenje Johnson deposed:

“The appellants notice of appeal, was inadvertently served late upon the respondents and endorsed copies by the Deputy Registrar of the High Court could not be traced despite the same having been filed and received in the superior court on 25th October 2018.”

15. First, there is no evidence that the notice of appeal was served at all. Secondly, the statement that the omission was ‘inadvertent’ without more does not explain the delay. Third, having filed the notice of appeal on 25th October 2018, it is not clear why it was not served or why it could not be served unless or until it was endorsed by the Deputy Registrar. The explanation offered by the applicants for failure to serve the notice of appeal is not, in my view satisfactory. The decision of this Court in the case of Commissioner of Income Tax vs. Kencell Communications Limited [2013] eKLR that was cited for the proposition that mistakes of counsel ought not to be visited upon a party does not in my view avail where, as here, no satisfactory explanation is offered.

16. Furthermore, and as already indicated, the present application was not filed until 26th August 2019. The applicants have not offered any explanation at all for that delay.

17. As regards the chances of the appeal succeeding, the less I say on this the better, save to observe that in ground (e) of the application before me the applicants. In that paragraph, it is stated:

“(e) In delivering the Judgment and Orders, inspite of the Honourable Lady Justice Pauline Nyamweya having duly appreciated that the Applicant’s application before the Chief Magistrate’s Court was against one GOOGLE INCL, (C/O GOOGLE KENYA) she misdirected herself in failing to appreciate the fact that the Orders issued against the 1st Respondent was an inadvertent error on the part of the Chief Magistrate, a fact which the applicants did not contest when contacted by the 1st Respondent and neither did the 2nd Applicant insist with carrying on investigations against the 1st Respondent, thus the matter ought to have rested there and then, or corrective action taken in the proper forum and not by way of Judicial Review Proceedings.”

18. The appellants thereby appear to acknowledge that the order of the Magistrates’ court that was quashed by the High Court was wrongly directed at the respondent herein. Whether that be the case is not for me to decide.

19. All in all, the applicants have not demonstrated that they are deserving of exercise of discretion in their favour. I accordingly decline the application dated 16th August 2019. I accordingly dismiss it with costs to the 1st respondent only as the other parties did not participate in the motion.

Dated and delivered at Nairobi this 8th day of May, 2020.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR