



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU JA (IN CHAMBERS))

CIVIL APPLICATION NO. 381 OF 2019 (UR 332/2019)

BETWEEN

ASTONFIELD SOLESA SOLAR

KENYA LIMITED/CLEARWATER INDUSTRIES LIMITED.....APPLICANT

AND

KENYA POWER & LIGHTING CO. LIMITED.....1ST RESPONDENT

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....2ND RESPONDENT

SHENZHEN CLOU ELECTRONICS CO. LIMITED.....3RD RESPONDENT

(Being an application for extension of time within which to file the record of

appeal out of time against the Judgment of the High Court of Kenya

at Nairobi (P. Nyamweya, J) dated 11th March, 2019

in

JR. Misc. Application No. 181 of 2018)

RULING

[1] By a notice of motion dated 29th November 2019, lodged in the Court on 6th December 2019, the applicant **Astonfield Solesa Kenya Limited/Clearwater Industries Limited**, seeks to inter alia to have time extended to enable them file a record of appeal, or alternatively to have the record of appeal that they had filed on 11th October 2019 and served on the respondent on 14th October 2019 deemed duly filed and served. The applicant through his advocate Mr Stephen Owino, explains that he has an arguable appeal which will be rendered nugatory if the orders sought are not granted.

[2] Mr Owino explains in an affidavit which he has sworn that he had applied for certified copies of the proceedings and judgment after lodging his notice of appeal, and that at the time when his firm was informed that the proceedings were ready for collection, he was bereaved having lost his sister. Subsequently he fell ill and was therefore unable to prepare the record of appeal, hence the delay. He urges the Court to excuse the delay of thirty-four (34) days as the same was due to circumstances beyond his control.

[3] Learned Counsel **Mr. Absolom Osodo**, who held **Mr. Owino's** brief during the hearing of the motion pointed that Mr. Owino was the sole proprietor in his firm and that with his illness, no action could be taken by the firm.

[4] The motion is opposed by Kenya Power & Lighting Co. Limited who is the 1st respondent, through a replying affidavit, sworn by its

advocate, **Mr. Constantine N. Ogari**, in which he contends that the applicant's motion does not disclose any sufficient cause such as would justify the granting of the motion; that the judgment subject of the intended appeal was delivered on 11th March, 2019; that although the notice of appeal was lodged on 19th March, 2019, no record of appeal was filed; and that this was despite the applicant's advocate having received copies of the proceedings and judgment on the 8th July, 2019. Counsel urged that the applicant had not provided any documentary proof of the alleged bereavement or ailment. He therefore urged the Court to dismiss the motion.

[5] The Public Procurement Administrative Review Board, who was the 2nd respondent in the motion was represented by **Mr. Munene** who opted not to take any position in the matter.

[6] The motion before me being one brought under Rule 4 of the Court Rules, the guidelines under which a single Judge operates under that Rule were reiterated in **Thuita Mwangi vs Kenya Airways Ltd** [2003] eKLR as follows:

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

‘It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, 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’.

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”

[7] It is evident from the motion that the judgment subject of the intended appeal was delivered on 11th March 2019, and that the notice of appeal was lodged on 18th March 2019. The applicant has exhibited a copy of a letter dated 18th March 2019 addressed to the Registrar of the High Court beseeching proceedings and as the letter was copied to the respondent's advocate, the proviso to Rule 82 of the Court Rules became applicable, so that the time certified by the Registrar as necessary for the preparation and delivery of copies of the proceedings should be excluded from the computation of the 60 days' period within which the record of appeal should have been lodged.

[8] However, no certificate of delay has been exhibited to confirm the period which should be excluded, Instead, a letter dated 27th May 2019 from the Court addressed to the applicant's advocate in which the Court was informing him that the proceedings were ready for collection. The letter is stamped as received by the advocate on 1st July 2019. In his affidavit the advocate has deposed that between 1st July and 30th September 2019, he was bereaved and then he fell ill and therefore he was away from his office, and that it was only thereafter that he was able to prepare the record of appeal which he filed in Court on 11th October 2019 and served the respondents on 14th October 2019.

[9] The applicant has not produced a certificate of delay. This means that the Court cannot extend to him the benefit of the proviso to Rule 82 of the Court Rules. This means that there has been a delay of about 5 months as the record of appeal ought to have been filed by 17th May 2019. The advocate has attributable this delay to what he has explained as bereavement and illness.

However, at the very least the advocate ought to have exhibited some documentary evidence for the alleged illness, but this was not done.

[10] In the circumstances I find that the delay was inordinate and that the applicant has failed to provide a satisfactory explanation for the delay. In the circumstances, there is no basis upon which I can exercise my discretion in the applicant's favour.

I therefore dismiss the applicant's motion with costs to the respondent

Dated and delivered at Nairobi this 5th day of June, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR