



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, J.A.)

CIVIL APPLICATION NO. 56 OF 2019

BETWEEN

HAWKWIND CORPORATION (THE OWNERS OF "THE MV KAIROS")....APPLICANT

AND

AFRICAN MARINE & GENERAL ENGINEERING.....RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal from the ruling and order of the High Court at Mombasa, P.J. Otieno, J delivered on 20th May 2019 in HCCC No. 40 of 2008)

RULING

By a Notice of Motion dated 20th May 2019 premised on *Article 159 (2)* of the *Constitution*, sections 3A and 3B of the *Appellate Jurisdiction Act* and *rules* of the *Court of Appeal Rules*, the applicant, **Hawkwind Corporation (The Owners Of "The MV Kairos")** has sought orders for extension of time within which to lodge and serve a Notice of appeal against the ruling and orders of the High Court (*P.J. Otieno, J*) dated 20th May 2019. The application was brought on the grounds that after delivery of the Ruling on 20th May 2019, the applicant's advocate based in Nairobi prepared a Notice of appeal, and forwarded it to the firm of Masore Nyang'au & Company Advocates based in Mombasa with instructions to file the Notice of appeal in Mombasa on their behalf. But on account of an error or mistake, the firm inadvertently failed to lodge the Notice of appeal, and only came to learn of the lapse on 12th June 2019 when it received a copy of Notice served on the respondent, indicating that it was received under protest, as it had been served out of time; that the delay was inadvertent and not intentional but was occasioned by an error.

In an affidavit in support of the motion, Paul Wafula, an Advocate practicing in the firm of Walker Kontos Advocates reiterated the assertions in the grounds and further deponed that upon finding that the Notice of Appeal was filed out of time, they withdrew it with a view to seeking an extension.

Harrison Muriithi and Rehema Salim both advocates practicing in the firm of Masore Nyang'au and Company Advocates also swore affidavits in support of the motion where they too reiterated the grounds in the motion. They also took ownership for the lapse that resulted in the delay. They contend that it was occasioned by the mix up of the Notice of appeal, and the letter requesting for the certified proceedings with other documents in their office, which when retrieved, the 14 days' period for filing of the Notice of appeal had already lapsed.

In the written submissions the applicant's case was that the delay was adequately explained, and that two days' period was not inordinate. The applicant further relied on the case of **Phillip Chemwolo & Another vs Augustine Kubede [1982-88] KLR 103** to support the proposition that a party having made a mistake should not be subjected to further suffering by not having his or her case heard; that the intended appeal had a high chance of success and no prejudice would be suffered by the respondent.

The respondent though served with the hearing notice for the applicant's motion neither filed a replying affidavit nor submissions.

Under *rule 4* of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

Whereas the statutory time for filing of the Notice of appeal was within 14 days from the date of the judgment or ruling, the applicant in the instant case filed the Notice of appeal with a delay of two days. The delay, it was explained, was occasioned by an honest and excusable mistake on the part of the representative firm of Masore Nyang’au based in Mombasa where a mix up had occurred when the Notice of appeal was filed away together with other documents of the law firm. The documents, once retrieved were lodged in court two days after statutory period.

On mistakes of advocates, C.B Madan JA in the case of **Belinda Murai & 9 others vs Amos Wainaina**, *Civil Application No. Nai. 9 of 1978* had this to say;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip.... The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

The explanations of the two advocates firms and their respective advocates points to a genuine and honest error on their part, which I am prepared to accept. I also do not find the two days’ delay to be inordinate. And since, the two advocates in the representative firm of Masore Nyang’au have owned up to the mistake, I would not penalize the applicant for their mistake. As such I am satisfied that the delay has been duly explained.

Having so found, the applicant argues that the intended appeal has a high chance of success, because the learned judge wrongly exercised his discretion in determining issues that were neither raised nor canvassed by the parties, and in dismissing the motion for reinstatement of the suit on the basis of mere technicalities. I consider these to be serious matters with a fair chance of success, which therefore ought to be ventilated before this Court. I do not envisage that the respondent would suffer any prejudice if the time were to be extended for filing of the Notice of appeal.

That said, I exercise my discretion to grant an extension of time to file and serve the Notice of appeal which extension will lapse **seven days** from the date of this ruling. The Memorandum and record of appeal must be lodged in accordance with **rule 82** of this Court’s rules and time for such lodging will commence running from the date of lodging the Notice of appeal within the period of extension specified in this ruling. The costs of this application shall be in the intended appeal.

It is so ordered.

Dated and Delivered at Nairobi this 7th day of August, 2020.

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR