



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 340 OF 2019

BETWEEN

PETER MATHENGE GITONGA T/A

MATHENGE GITONGA & CO. ADVOCATES.....APPLICANT

AND

NJOROGE KIBATIA & SIMON MAINA KARUGA T/A

KIBATIA & CO. ADVOCATES.....RESPONDENT

*(Being an application for leave to extend time within which to file an application to strike out the Notice of Appeal from the Ruling and order of the High Court of*

*Kenya at Nairobi (J. A Makau, J.) dated 18<sup>th</sup> October, 2018 in HCCC No 413 of 2017 (OS))*

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RULING

[1] Before me is a notice of motion by the applicant dated 28<sup>th</sup> October, 2019 which is an omnibus one as it is seeking an extension of time for filing an application to strike out the Notice of Appeal and an order to strike out the Notice of Appeal as being incompetent. The second prayer, that seeks to strike out the Notice of Appeal is not within my powers as a single Judge. An order made on 2<sup>nd</sup> March, 2020 directed the two issues be separated as one falls under **Rule 4** and the second prayer falls under **Rule 84** which are governed by different jurisdictions. I am therefore dealing with only the extension of time in my capacity as a single Judge.

[2] According to the applicant, this application for extension of time was necessary because under the proviso to of **Rule 84** of this Court it provides as follows: -

**“Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of the service of the notice of appeal or record of appeal as the case may be.”**

In that regard, judgement was entered against the respondent in **HCCC No. 413 of 2017** on 18<sup>th</sup> October, 2018 in which the respondent was given thirty (30) days from the date of the judgment to honour a professional undertaking they had given on the 6<sup>th</sup> February, 2017 by paying a sum of Ksh.278, 690,000 together with interest from the time the sum was due for payment at court rate; in default of payment the applicant was given liberty to enforce the undertaking and the applicant was awarded costs of the originating summons.

[3] Subsequently the parties consented to a conditional stay of execution pending the filing of an appeal and the respondent filed a Notice of Appeal on 25<sup>th</sup> October, 2018. However, the respondent has not filed an appeal as required under **Rule 82 (1)**. The applicant contended that on 4<sup>th</sup> July, 2019 the Deputy Registrar of the High Court wrote to the parties indicating that the typed proceedings were ready for collection. Notwithstanding that notification, and the requirement that the appeal should be filed within sixty (60) days and despite the fact that the proceedings were ready as at 4<sup>th</sup> July, 2019 the respondent has not filed any record of appeal.

[4] In urging that the application seeking extension of time should be allowed, counsel for the applicant relied on the oft' cited cases of this

Court where it is indicated that the powers exercised under **Rule 4**, on whether or not to grant an order extending time are “discretionary and unfettered”. See among them, the case of **Fakir Mohamed vs. Joseph Mugambi & Two Others Civil Application No. Nai. 332 of 2004** thus: -

**“The exercise of this Court’s discretion under rule 4 has followed a well beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of acts the court would consider so long as they are relevant. The period of delay, the reason of 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 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 by factors ...”**

[5] Explaining the delay in filing this application, counsel submitted that the applicant had given the respondent a latitude to file an appeal following the consent entered into to stay execution so as to allow the respondent file an appeal. However, there has been lack of due diligence on the part of the respondent to file an appeal; since the notice of appeal was lodged on 25<sup>th</sup> October, 2018 the respondent has not made any attempt to file the appeal which is an indication that the respondent has no interest in the matter and the court cannot aid a party who is indolent and has no respect for court orders. The case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakia & 3 Others [2015] eKLR** was cited to support this proposition.

[6] This application was opposed by a replying affidavit sworn by **Moses Maina Karuga** on 29<sup>th</sup> November, 2019 and a further affidavit sworn on 26<sup>th</sup> February, 2020. The respondent refutes the allegation that they were served with a letter by the Deputy Registrar indicating that the proceedings were ready for collection nor have they been issued with a certificate of delay despite numerous letters and visits to the court registry to pursue the same. The respondent also faulted the applicant for failing to disclose to this Court the existence of a suit being **ELC No 58 of 2018 Kagwe Tea Factory Limited vs. Grace Chelat & Others** which is between the same parties and where the court granted conservatory orders restraining further payment of the balance of the purchase price to the individual sellers or the retransfer of the parcels of land to individual sellers.

[7] The respondent also challenged the competency of the instant application on the grounds that it is filed by **Kyalo & Associates Advocates** who had not sought an order allowing them to act for the applicant. Counsel for the respondent also filed written submissions stating *inter alia* that under the proviso to **Rule 84**, an application to strike a Notice of Appeal or Appeal itself should not be made outside of the thirty (30) days from the date of service of the said notice. Counsel cited the case of **Joyce Nyamweya vs. Jemima Nyaboke Nyamweya & Another [2016] eKLR** where it was indicated that the proviso to **Rule 84** is couched in mandatory terms. Also, the case of **Edward Njuguna Kangethe vs. Joel Kiema Mutinda 2015 eKLR** in which an application to strike out was held to be incompetent as it was filed outside of the thirty (30) days. The Supreme Court’s ruling in the case of **Nicholas Kiptoo Arap Korir vs. IEBC & Others [2014] eKLR** was also cited where it was observed that a document that is filed out of time is presumptive, inappropriate a nullity with no legal consequences. Counsel for the respondent therefore urged the application be dismissed.

[8] The principles that guide the Court in an application for extension of time have been thrust to a pulp by many authorities. See Paul **Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR** the Court of Appeal while referring to other authorities observed (at paragraph 12):

**“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance”**

[9] Following the approach set out in the above decisions, any party can apply for extension of time and I take that authority to cover even parties seeking extension of time under **Rule 84** of the Court Rules. In this regard the case of **Joyce Bochere Nyamweya** (supra) is distinguishable because counsel for the applicant had applied to strike out a notice of appeal without first seeking an extension of time and he wanted the court to exercise its discretion and extend the time under **Rule 84** without making a formal application. That is the reason why the court found as it did, that an application to strike an appeal must be made as provided thereunder. I do not take it to mean that if a party is late to file an application under **Rule 84**, such a party cannot invoke the provisions of **Rule 4** to seek extension of time. By the same parity of reasoning, if the framers of **Rule 4** intended it to exclude extension of time under

**Rule 84** nothing would have stopped them from saying so.

[10] That said, I discern the following considerations to be key in determining whether to grant leave to extend time or not: -

- 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; and**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted and of course the test is not exhaustive depending on the circumstances of each case.**

[10] The Notice of Appeal in this case was filed on 25<sup>th</sup> October, 2018 and the instant application was probably filed a year later on 28<sup>th</sup> October, 2019 as the court stamp for the date is not legible. The explanation given for the delay in filing, the application is to do with the averments made by the applicant in the supporting affidavit that he was giving the respondent a latitude to file the appeal. To that extent the applicant had even consented to a conditional stay order of execution of the decision appealed against to allow the respondent file an appeal. However, the respondent is accused of being indolent. The applicant relies on a letter dated 4<sup>th</sup> July, 2019 from the Deputy Registrar of the High Court notifying the applicant that the proceedings were ready for collection. Counsel for the applicant took the liberty to forward the said letter to the respondent's counsel on 10<sup>th</sup> July, 2019. That notwithstanding, the respondent did not take the initiative to file an appeal or to seek an extension of time.

[11] On the other hand, the respondent states that the typed proceedings have never been availed nor a certificate of delay and denies ever having been served with the said letter from the court registry. The obligation to file the appeal rests with the respondent, to follow up the proceedings and comply with the time provided for filing the appeal. If the letter from the court registry is alleged not to be authentic, it was the responsibility of the respondent to obtain confirmation letter from the court registry to that effect that the proceedings are not ready. As matters stood, there is no cogent justification why the respondent has failed to file an appeal within the time provided.

[12] This explanation offered by the applicant to me is plausible that they are totally frustrated of waiting for the respondent who in their view is indolent and as not shown any diligence in filing an appeal. However, by the time they came to this realization the time for moving the court under **Rule 84** had lapsed and therefore they are justified to seek extension of time. Accordingly, I find merit in the application seeking an extension of time and I hereby grant the applicant thirty (30) days from the date of this Ruling to file an application under **Rule 84** of this Court Rules. Costs of this application shall abide the outcome of the application to be filed or the appeal whichever the case.

*Dated and delivered at Nairobi this 7<sup>th</sup> day of August, 2020.*

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**