



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 55 OF 2020**

**BETWEEN**

**VISHVA STONE SUPPLIERS COMPANY LIMITED..... APPLICANT**

**AND**

**RSR STONE [2006] LIMITED..... RESPONDENT**

*(Being an application for extension of time to file an appeal out of time to the decision of Justice Makau dated 20th day of December 2018*

**in**

**Milimani Nairobi HCCC No. 388 of 2007)**

\*\*\*\*\*

**RULING**

Before me is a Notice of Motion dated 26th February 2020, and filed on 27th February 2020, brought under Rule 4 of the Court of Appeal Rules, substantively seeking an order granting leave to the Applicant to file an appeal against the ruling and order of **Hon. Mr. Justice Makau** of 20th December 2018, in HCCC No. 388 of 2007, out of time, together with an attendant order that costs of the application do abide in the appeal.

It has been supported by grounds on its body and a supporting affidavit of **Richard M. Mutiso**. It has been opposed by a replying affidavit of **Samji Hirji Rajani**, deposed on 25th June 2020. It was canvassed by written submissions without oral highlighting. Submissions and authorities for the applicant are both undated, while those of the respondent, together with a digest of authorities are both dated 27th June 2020 respectively.

In summary the applicant's averments and submissions are *inter alia* that the applicant was aggrieved with the judgment of the trial Court, and instructed him to lodge an appeal against the said judgment pursuant to which instructions. Counsel simultaneously filed and served a Notice of Appeal and a letter bespeaking proceedings on 29th January 2019. Proceedings were subsequently supplied on 8th November 2019, together with a certificate of delay on the basis of which counsel compiled the record of appeal and tasked an unnamed clerk in their office to file the record of appeal, but who inadvertently failed to do so, prompting the filing of the application under consideration; that the intended appeal is not frivolous, especially when it involves a substantial sum of money; that the default to timeously file the record of appeal lay with counsel's office which default should not be visited on their innocent client.

Counsel relies on the case of **Belinda Murai & 9 Others vs. Amos Wainaina [1979]eKLR**, and **Donald O. Rabala vs. Judicial Service Commission & Another [2020]eKLR**, for principles that guide the court in the exercise of its mandate under Rule 4 of the Court of Appeal Rules; Article 159(2)(d) of the Kenya Constitution 2010, which unfetters the Court from the clutches of technical subservience; and Order 50 Rule 4 of the Civil Procedure Rules which excludes computation of time for purposes of the Civil Procedure Rules, from 21st day of December 2019 to 13th January 2020. Counsel therefore contends that based on the above assertions sufficient explanation has been given for the delay to warrant the exercise of discretion in the applicants favour especially when the delay involved is not so inordinate as to disentitle the applicant to the relief sought.

In rebuttal, the respondent both in its averments and submissions contended that: there has been unexplained, inordinate, inexcusable delay in seeking the Court's intervention to regularize the intended appellate process; the conduct of the applicant and its advocate in the manner the intended appellate processes has been handled has been wanting; the application as presented is an exercise in futility as no validation of the notice of appeal filed out of time has been sought for by the applicant in the application under consideration and in the absence of which the record of appeal cannot be filed in the manner prayed for; the applicant cannot avail itself of the benefit of the certificate of delay for the failure to apply for certified copies of proceedings within thirty (30) days from the date of the judgment as stipulated for in Rule 82 of the rules of the Court; counsel has failed to give a plausible explanation as to why his office took one hundred and seven (107) days to file the application under consideration after capacitation with the certificate of delay and proceedings; the unnamed clerk who allegedly failed to file the record of appeal timeously upon capacitation with the certificate of delay has not sworn an affidavit to confirm the advocate's allegations; and lastly, that the respondent stands to suffer great prejudice if the orders sought were to issue as they would have the effect of prolonging the litigation which has span over a period of thirteen (13) years.

Relying on the case of **Imperial Bank Limited (In Receivership) & Another vs. Alnashir Popat & 18 Others [2018]eKLR**, and **Jimcab Services Limited vs. Bartholomew Benard Osodo & Another [2018]eKLR**, the respondent submitted that the applicant has not demonstrated due diligence in the observance of timelines set in law for filing of appellate processes and is therefore disentitled to the relief sought. On that account the respondent prayed for the application to be dismissed with costs to them.

My invitation to intervene on behalf of the applicant has been invoked under **Rule 4** of the Court of Appeal Rules, which provides as follows:

**“4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations in case law both binding and persuasive. I take it from the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, **Fakir Mohamed vs. Joseph Mugambi & 2 Others; [2005]eKLR**; **Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees [2020]eKLR**; **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018]eKLR** and **Athuman Nusura Juma vs. Afwa Mohamed Ramathan CA No. 227 of 2015**.

See also **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**; **Nyaigwa Farmers' Co-operative Society Limited vs. Ibrahim Nyambare & 3 Others [2016] eKLR**; **Hon. John Njoroge Michuki & Another vs. Kentazuga Hardware Limited [1998] eKLR**; **Cargil Kenya Limited Nawal vs. National Agricultural Export Development Board [2015] eKLR**; **Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR**; and **Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013]eKLR** among numerous others. The principles distilled from the above case law may be enumerated *inter alia* as follows:

*(i) The mandate under Rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.*

*(ii) Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.*

*(iii) The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see Githere vs. Ndiriri.*

*(iv) As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.*

*(v) The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.*

*(vi) The conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity;*

*(vii) Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word “possibly”;*

(viii) *The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.*

(ix) *Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.*

(x) *An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;*

(xi) *The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.*

The above principles were restated by the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others** (supra) as

follows:-

**“(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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**

**(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.**

**(6) Whether the application has been brought without undue delay; and**

**(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”**

I have given due consideration of the record in light of the rival pleading, submissions, and principles that guide the court in the exercise of jurisdiction under **Rule 4** of the CAR. Only one issue falls for determination namely whether the applicant has satisfied the prerequisites for granting relief under Rule 4 of the CAR. On the period of delay in seeking the Courts intervention, the parameter I find appropriate to apply in determining as to whether the applicant has satisfied this prerequisite is that set out in the case of **George Mwendu Muthoni vs Mama Day Nursery and Primary School, Nyeri CA No. 4 of 2014, (UR)**, in which extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months.

Rule 75 of the CAR is the substantive rule that makes provision for the filing of a Notice of Appeal, while Rule 82 of the Court of Appeal Rules is the substantive Rule that provides for the mandatory requirement that a certified copy of the proceedings be applied for within thirty (30) days of the delivery of the decision appealed against, while the record of appeal is required to be filed within sixty (60) days from the date of the filing of the notice of appeal, unless there is demonstration that the circumstances under consideration in an application of this nature fall within the proviso to the said **Rule 82** which provides for exclusion from computation of the sixty days for filing of the record of appeal, time taken by the registry for preparation and supply of a certified copy of the proceedings.

The applicant's notice of appeal and application for certified copies of proceedings ought to have been filed within fourteen (14) and thirty (30) days of 20th December 2018, which fell on 3rd January 2019, for the filing of the notice of appeal and 19th January 2019, for the lodging of the letter bespeaking certified copies of proceedings. As demonstrated that the above prerequisites were complied with, applicant's counsel submitted that the period of time from 21st December 2018 to 13th January 2019, should be excluded from computation of time within which to comply in terms of Order 50 Rule 4 of the Civil Procedure Rules, which period if taken into consideration time for compliance would fall on 26th January 2019, for the filing of the notice of appeal, and 12th February 2019 for the filing of the letter bespeaking proceedings. It therefore means that the notice of appeal having been filed and served on 29th January 2019, was filed out of time both in terms of the requisite fourteen (14) days from the date of the decision, namely 3rd January 2019, and three days later for the failure to file it on or before 26th January 2019, after factoring in the time to be excluded from computation pursuant to Order 50 Rule 4 of the Civil Procedure Rules. The notice of appeal is therefore incompetent and cannot be relied upon by the applicant as basis for seeking leave to file the record of appeal out of time in the manner prayed for in the application. As rightly pinpointed out by the respondent in the replying affidavit no order applying for its validation has been prayed for in the application under consideration.

Counsel who accepts full responsibility for noncompliance with the time in filing of the record of appeal is the same one who filed the

application under consideration without factoring in a prayer for validation for the incompetent notice of appeal seeking for a requisite prayer either to have the notice deemed as properly filed or for a fresh one to be filed. This default is also attributable to his office.

In **Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR**; **CFC Stanbic Limited vs. John Maina Githaiga & another [2013] eKLR**; **Lee G. Muthoga vs. Habib Zurick Finance (K) Ltd & Another Civil Application No. Nai 236 of 2009**, and **Catherine Njoguini Kenya & 2 other vs. Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, the Court variously declined to visit wrongs committed by advocates and their staff on innocent clients where it had been sufficiently demonstrated that clients were not to blame for such default.

In the circumstances of this application since counsel has taken full responsibility for noncompliance with the rules, it is my view that it would be not only unfair but unjust to pin responsibility on the client for noncompliance and use this as basis for withholding the exercise of discretion in the applicant's favour. Second, the delay attributed to the applicants' counsel is one (1) year, two (2) months and seven (7) days from the date of the decision and a period of three (3) months and fourteen (14) days from the date of capacitation with a Certificate of Delay of 8th November 2019 which in my view is far much below the period of time in the **George Mwendu** case [supra] which necessitated the Court therein to decline the exercise of its discretion in favour of the applicant therein, I find the same excusable.

Turning to the request to allow applicant to exercise his now undoubted constitutionally, underpinned right of appeal the position in as crystalized by case is as was set in the case of **Richard Nchapi Leiyagu vs. IEBC & 2 Others** (supra); **Mbaki & Others vs. Macharia & Another [2005] 2EA 206**; and the Tanzanian case of **Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003**; for the holding *inter alia* that:

*(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;*

*(ii) the right to be heard is a valued right; and*

*(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;*

It is appreciated no draft memorandum of appeal is annexed. That default notwithstanding the principle of law set out above on this issue indicates clearly that in the absence of a draft memorandum of appeal the

Court can gauge the arguability of an intended appeal from other supportive evidence. Herein the applicant intends to challenge the dismissal of its liquidated claim which according to counsel involves a colossal amount of money. In my view, that in itself is arguable notwithstanding that it may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court. In my view, the issue of whether the applicant's claim was meritorious or otherwise is arguable notwithstanding that it may not succeed.

The above brings me to determine appropriate orders to make in the disposal of this application bearing in mind the fact that there is no prayer in the application under consideration for the validation of the incompetent notice of appeal without which granting an order for extension of time to file the record of appeal would be superfluous. The default to make provision for such a prayer lay with counsel on record.

The failure of counsel to include a prayer for validation of the incompetent notice of appeal is no justification for failure to grant the relief. The court has mandate to invoke both the inherent power of the Court enshrined in Rule 1(2) of the Court of Appeal Rules and Article 159 (2)(d) of the Constitution to cure that default for ends of justice to be met in the matter. In the case of **Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR**; **Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR**; **Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others eKLR**; **Patricia Cherotich Sawe vs. IEBC & 4 Others [2015]eKLR** it held *inter alia* that:

*(i) Rules of procedure are handmaidens of justice;*

*(ii) A court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case;*

*(iii) The exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice;*

As for the inherent power of the Court in the case of **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR**; and **Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR** and it was stated *inter alia* that:

*(i) Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute.*

*(ii) Inherent powers are endowments to the Court such as will enable it to regulate its internal conduct, and to ensure that its mode or discharge of duty is conscionable, fair and just.*

In light of the assessment and reasoning, above the application dated 26th February 2020 is allowed on the following terms:

- (1) The applicant has fourteen (14) days from the date of the ruling to file and serve a proper notice of appeal.**
- (2) The applicant has sixty (60) days from the date of the lodging of the notice of appeal in item 1 above to file and serve the record of appeal.**
- (3) Costs of the application to abide the outcome of the intended appeal.**
- (4) In default of either item 1 or 2, the leave granted herein to stand lapsed.**

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

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**