



IN THE COURT OF APPEAL

AT NAIROBI

(CROAM: KANTAL, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. E247 OF 2020

BETWEEN

ANN WANJA T/A KANINI MERCHANTS....APPLICANT

AND

KENNEDY MASINDE.....RESPONDENT

(An application for leave for extension of time from the Judgment of the High Court of Kenya – Commercial and Tax Division at Nairobi (Kasango, J.) delivered on 28th July, 2020 in Civil Suit No. 431 of 2016)

RULING

I am asked in the Motion dated 19th August, 2020 brought under various provisions of law to grant leave to the applicant to extend the time within which to file and serve Notice of Appeal and Record of Appeal arising from the Judgment of **Kasango, J.** delivered on 28th August, 2020 in **HC Commercial and Tax Division Civil Suit No. 431 of 2018**. From what I can glean from the Motion and the affidavit of **Allan George Njogu Kamau**, advocate, the Judge entered Judgment against the applicant in favour of the respondent for **Kshs.6,824,750** plus interest and dismissed the applicant's counter-claim.

On reasons why an appeal was not filed on time it is said in grounds in support of the Motion and in the affidavit that delivery of the Judgment was adjourned several times for not being ready; that on 28th July, 2020 **Miss Cynthia Nyabuto**, an advocate in the lawyers on record for the applicant had challenges with the internet in accessing the virtual delivery of the Judgment forcing her to communication with lawyers for the respondents by e-mail; that those lawyers wrote back the next day 29th July, 2020 advising that Judgment had been delivered in favour for the respondents but they didn't have a copy of the same; that the applicant was furnished with a copy of the judgment on 11th August, 2020 by which time for filing notice of appeal in accordance with the rules had lapsed; that the applicant is dissatisfied with the findings of the High Court and intends to appeal to this Court and, finally, delay was not intentional.

I did not see any replying affidavit.

I have considered material placed before me and I take the following view of the matter.

The principles which I need to consider in an application of this nature were well set out in the case of **Leo Sila Mutiso v Rose Wangari Mwangi [1999] 2 EA 233**. They were identified to be:

“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”.

Judgment intended to be appealed was delivered on 28th July, 2020 and the lawyers on record were aware of that date. It is said that a lawyer in that firm tried to access the virtual proceedings but had difficulty with the internet forcing her to communicate with the lawyers on the opposite side who confirmed that a judgment had indeed been delivered in favour of the respondent. The applicant's lawyers made various attempts to get a copy of Judgment but only obtained a copy on 11th August, 2020 that they obtained a copy. They were thus unable to file a Notice of Appeal within the time stipulated by the rules of this Court.

It seems to me in those premises that the lawyers for the applicant made attempts to obtain a copy of the Judgment though follow-ups with

the Court Registry. It is not lost to me that the prevailing COVID-19 pandemic has affected court operations where some court operations are being conducted virtually, some time with attendant internet challenges. Delay has been sufficiently explained. I note that the decree by the High Court is for money; the amount is not unsubstantial. The applicant should have an opportunity to challenge the findings on appeal.

I allow the Motion dated 19th August, 2020. Let the applicant lodge a notice of appeal within 14 days of today and serve it on the respondent in accordance with the rules. Costs of the Motion will be in the intended appeal.

Dated and delivered at Nairobi this 23rd day of October, 2020.

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR