



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KANTAL JA (IN CHAMBERS)]

CIVIL APPEAL/APPLICATION NO. 274 OF 2016

BETWEEN

LSG LUFTHANSA SERVICE

EUROPA/AFRIKA GmbH.....1ST APPLICANT

LSG SKY CHEFS KENYA LIMITED.....2ND APPLICANT

AND

ELIAB MUTURI MWANGI

Practicing in the name and style of

Muturi Mwangi & Associates Advocates.....RESPONDENT

(Being an application to seek leave to file the Applicants' Record of Appeal dated 25th November, 2016 out of time, being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kariuki, J) dated 29th January, 2016 In

High Court Civil Case No. 154 of 2014)

R U L I N G

The motion on notice is said to be brought under Rule 4 and 82 of the rules of this Court and is brought by two applicants, **LSG Luftansa Service Europa/Afrika GmbH** and **LSG SKY Chefs Kenya Limited**. The respondent is named as **Eliab Muturi Mwangi** practicing in the name and style of **Muturi Mwangi & Associates Advocates**. In the prayers set out in the motion I am asked to grant leave to the applicants for an extension of time within which the applicants may file their Record of Appeal; that I be pleased to have the applicants' record of appeal filed on **29th of November, 2016** as properly on record and that I provide for costs. It is stated in the grounds in support of the application and in a supporting affidavit of **Cecil Kuyo**, an Advocate of the High Court of Kenya practicing in the applicant's law firm that there was a ruling of the High Court delivered on **29th January, 2016**, in High Court Civil Case **No. 154 of 2014**, against which a notice of appeal had been lodged on **4th February 2016**; that an application for typed copies of the proceedings was made and lodged at the High Court on **1st February, 2016** by advocates of the applicants; that by a letter dated **1st September, 2016**, the Deputy Registrar of that Court notified the applicants' advocates that typed proceedings requested for were ready for collection on payment of court fees and that court fees was paid the same day. It is further stated that a Certificate of Delay was prepared by that Court and was ready for collection on **11th November, 2016** and that the applicants' lawyers thereafter filed record of appeal on **29th November, 2016**. Further that by the time the applicants' lawyers obtained the Certificate of Delay the time stipulated in the rules for filing record of appeal had lapsed, thus the need for leave to extend time. There are other matters raised in the grounds and the supporting affidavit relating to an application for stay at the High Court but that is not of assistance for determination of this application.

The application was opposed and there is a replying affidavit of the respondents sworn at Nairobi on **10th of July, 2017**. It is stated amongst other things that there is pending in court an application to strike out Civil Appeal No. 274 of 2016, for having been filed out of time without leave of the court. The deponent states further that under rule 82(1) of the rules of this Court a party who has lodged a notice of appeal but who does not institute or file a record of appeal as required by the rules is deemed to have withdrawn the notice of appeal. Therefore, according to him, at the expiry of 60 days from when notice of appeal was lodged the appeal was deemed as withdrawn. The deponent

further states that he collected proceedings in the High Court and was able to file a different appeal against the same ruling and orders that it is intended to appeal here. The deponent wonders why the applicants here had failed to lodge their appeal in time when he had himself managed to file an appeal. He questions authenticity of a letter dated **11th November, 2016** to the High Court which letter is received by that court the day before, that is **10th November, 2016**. The deponent further questions whether the certificate of delay was actually collected on **11th November, 2016** and why in such event, record of appeal was not prepared until **21st November, 2016**. The deponent questions the candidness of the applicants and their advocates stating that depositions in the applicants' affidavits are not true. It is also said that delay by the applicants in bringing the application has not been explained and for those and so many other reasons stated I should not exercise my discretion in favour of the applicants.

I heard the motion on **30th January, 2019** when **Mr. Cecil Kuyo** advocate appeared for the applicants while **Mr. Wifred Nderitu** advocate appeared for the respondent. **Mr. Kuyo** readily conceded before me that there had been delay explaining that there was a mistaken belief by him that he was obligated to wait for certificate of delay before lodging record of appeal. He submitted that the delay was not inordinate considering all the circumstances of the case. According to him the respondent will not suffer any prejudice because there are two appeals filed by both parties which should be allowed to be heard. He concluded by submitting that the appeal by the applicants raises serious issues on whether non- parties in a suit can be asked to answer interrogatories.

In opposing the application **Mr. Nderitu** relied on the replying affidavit already adverted to. According to him proceedings were ready for collection on **1st September, 2016** and there was no requirement to file the record of appeal with certificate of delay as certificate of delay could be included in a supplementary record. **Mr. Nderitu** submitted that the appeal was deemed as withdrawn, it not having been filed within the period required by the rules. He questioned authenticity of the letter dated **11th November 2016** but which was received by court on **10th November, 2016** and wondered further why record was not filed until **29th November, 2016** when certificate of delay had been collected on **11th November 2016**. Finally, it was **Mr. Nderitu's** submission that the application before me was filed on **19th May 2017** which was after he for the respondent had filed an application to strike out the appeal.

In a brief reply it was **Mr. Kuyo's** position that time should be computed from **1st September, 2016** and the record should have therefore been filed on or about **1st November, 2016**, a period of 60 days. He attributed the date on the letter of **11th November, 2016** which bore a court stamp of **10th November, 2016** to an administrative lapse at their chambers, where the typing on the letter was erroneously indicated as the next day.

I have considered the application, the rival affidavits, and the submissions made by counsel and I have taken the following view of the motion.

The principles that govern the exercise of discretion in an application for extension of time brought under rule 4 of our rules are well known. As was stated in the oft-cited case of **Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi Civil Application No. NAI 255 of 1997 (ur)** which was a decision of the court on a reference from a decision of a single judge:

"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".

The applicants in the matter before me explained that after the ruling of **29th January, 2016** intended to be appealed, a notice of appeal was lodged timeously, on **4th February, 2016**. It is explained further that proceedings were applied for but it took time for the same to be furnished and even after they were furnished, a certificate of delay was not issued until some time in November, 2016. The respondents challenge that explanation stating that the applicants are not candid in their explanations.

I have perused the record of the motion and I note that by a letter dated **1st February, 2016**, about 3 days after the ruling, the applicants' advocates applied to the High Court for certified copies of the ruling and a copy of the proceedings for purposes of an appeal. That letter was copied to the lawyers for the respondent as required by the rules. I have also noted that by a letter dated **1st September, 2016**, the Deputy Registrar of the High Court informed the applicants' lawyers that certified copy of the proceedings and ruling were ready for collection.

By a letter dated **11th November, 2016** but which bears the court stamp for **10th November, 2016**, the applicants' lawyers requested the Deputy Registrar of the High Court to furnish to them a certificate of delay which had been requested for earlier to enable them to file record of appeal.

There is on record a Certificate of Delay dated **11th November, 2016** under the hand of the Deputy Registrar of the High Court of Kenya. According to **Mr. Kuyo** the confusion in the date on the letter shown to be authored on **11th November, 2016** must have arisen from an administrative mixup at their Chambers. I am prepared to accept that as a reasonable explanation for the mixup in the dates arising from a typing error by a staff in their office. **Mr. Kuyo** who is a lawyer readily admitted before me that he mistook the rules and believed that he could not file record of appeal without certificate of delay. I was impressed by the candidness of that admission. Mistakes will be committed by even those who should know better as lawyers should. **Madan, JA**, had this to say of mistakes by a lawyer in the case of **Belinda Murai & 9 others vs. Amos Wainaina [1979]eKLR delivered way back in 1979:**

"The former advocate's belief was a mistake on a point of law however wrong he might have been in his belief. No one has said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely, though mistakenly, believed his view was correct.

A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. 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. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress”.

I fully agree with those sentiments which I am happy to adopt for purposes of this ruling.

I note that the proceedings of the High Court and ruling intended to be appealed were ready and were collected on **1st of September 2016**. That is the relevant period for purposes of computation of time. 60 days allowed by the rules of this court to lodge the appeal would have expired on or about **1st November, 2016**. Record of appeal in **Civil Appeal No. 274 of 2016** was filed on **29th November, 2016** a period of less than 30 days thereafter. That is not a long period of delay and to my mind the delay is well explained and is not unreasonable or inordinate.

On the chances of the intended appeal succeeding, I note that in the ruling of the High Court delivered on **29th January, 2016**, **Mr. Tobias Diebold** and **Mr. Paul M.F. Lyimo** were jointly and severally compelled within 14 days to respond fully to all the questions put to each of them by way of interrogatories filed in the High Court on **13th March, 2015** and were ordered to serve the applicants’ advocates on the same date amongst other orders that were made by the High Court. The parties in the suit at the High Court are the same as the parties in the motion before me. According to **Mr. Nderitu**, learned counsel for the respondent, the said two persons are Directors of the applicants. I don't have that material before me. To my mind it is arguable whether persons who are not parties to a suit in the High Court can be ordered or compelled to provide answers to interrogatories. There is a chance that the appeal could succeed.

On whether the respondents will suffer prejudice if I allow the application I note from submissions of both sides that the applicants on the one hand and the respondent on the other have both taken issue with the ruling and orders of the High Court and there is an appeal by the respondent on the one hand and this appeal on the other. I note, also from documents on record that the parties have consented to a stay of the suit at the High Court and the applicants have met conditions on deposit of money in court as a condition for grant of stay. The applicants have further paid to the respondent fees ordered as a condition for stay. The respondent will in my considered view not suffer any prejudice if I grant the motion. Prejudice if any would anyway be adequately compensated in an award for costs in an application like this one.

In the premises, I allow the motion dated **15th May, 2017** lodged in court on **19th May, 2017**. I extend the time for filing record of appeal and the appeal lodged by the applicants on **29th November, 2016** is deemed as duly filed and if not served on the respondent, to be served within 7 days of today. I grant costs of the motion to the respondent which I assess at **Kshs fifteen thousand (Kshs 15,000/=)** to be paid by the applicants within 15 days of today in default execution to issue.

Dated and Delivered at Nairobi this 22nd day of February, 2019.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR