



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KIAGE, JA.(IN CHAMBERS))

CIVIL APPLICATION NO. 42 OF 2019

BETWEEN

FAMILY BANK LIMITED.....APPLICANT

AND

ALFRED MOFFAT OMUNDI MUCHIRA.....RESPONDENT

(Application to enlarge the time within which the appellant may lodge its intended

appeal following the decision by (Okwany, J.) dated 20th November, 2018

in

KISII HCCC NO. 132B OF 2008)

RULING

The motion before me dated 18th April, 2019 seeks enlargement of time within which to lodge an appeal against the judgment of the High Court (Okwany J) delivered on 20th November, 2018. Even though the notice of appeal was filed on time, it is urged that the applicant's former advocates inadvertently failed to request for proceedings within time.

It is only when the current advocates came on record that they discovered the omission. They proceeded to bespeak the proceedings vide their letter dated 7th January, 2019.

It is apparent from the record of the motion that the proceedings are now ready, and this following strenuous follow up for the same as evidenced by the letters from the applicant's advocates to the Deputy Registrar of the High Court at Kisii exhibited.

It also transpires that before the current application another had been filed by the applicant seeking extension of time but was withdrawn "without prejudice" according to **Mr. Isinta**, the applicant's learned counsel, though he might have called it a technical withdrawal to enable the applicant to refile on firmer ground.

Be it as it may, it seems to me that the failure to apply for proceedings was an inadvertent error on the part of the applicant's former advocates. Even were it to be due to inattention, I would be inclined to view favourably the industry and commitment evinced by the advocate it later instructed.

I am not persuaded that the applicant is an indolent party and one that is attempting to overreach or otherwise play mischief. I have considered the replying affidavit filed by the respondent and the submissions of his learned counsel, **Mr. Gichana**. His main thrust is that no proper explanation has been given as to why the applicant never bespoke the proceedings within time. To him, absent such explanation I should not be moved by the applicant's plea for favourable discretion. He also says that by virtue of **Rule 83**, of the **Court of Appeal Rules**, the notice of appeal is deemed to be withdrawn so this application is of no help to the applicant.

I think, with respect, that whereas indeed, rules and timelines must be obeyed, we must not enforce them at the expense of justice.

In the case before me there is no denying that the applicant has been keen in pursuit of its rights. I see industry and commitment notwithstanding the initial omission by its former advocates.

The purpose of the wide discretion donated to a single Judge in matters such as the current one is to ensure that lapses of procedure do not cost parties their rights and do not keep them away from the seat of justice.

Where, as here, which Mr. Gichana has very properly conceded, there is no prejudice to be occasioned by extension of time, and where the conduct of the applicant is not reprehensible or slothful, I think that extension of time ought to be granted.

In the end, the application succeeds and I extend time for the applicant to lodge and serve the record of appeal. It shall do so within fourteen (14) days of this day.

For the avoidance of doubt, the notice of appeal is also validated by this extension. Costs shall be in the appeal.

DATED at Kisumu this 21st day of May, 2019

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.