



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), IN CHAMBERS)

CIVIL APPLICATION NO. 6 OF 2019

BETWEEN

NILKUNJ RATILAL DODHIA..... APPLICANT

AND

SHASHIKANT MEPA SHAH.....1<sup>ST</sup> RESPONDENT

SHANTILAL K SHAH.....2<sup>ND</sup> RESPONDENT

MANOJ SHAH.....3<sup>RD</sup> RESPONDENT

PIYUSH MEPA SHAH.....4<sup>TH</sup> RESPONDENT

ASHOK KUMAR MEPA SHAH.....5<sup>TH</sup> RESPONDENT

BUDHICHAND MEPA SHAH.....6<sup>TH</sup> RESPONDENT

(Being an application for extension of time to file Notice of Appeal and Record of Appeal out of time in an intended appeal from the Ruling of the High Court at Nairobi (Tuiyot, J) dated 7th December, 2018 in MISC. CASE NO. 245 OF 2018)

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RULING

The High Court ( Tuiyot, J) in a rather lengthy ruling rendered on 7th December, 2018 dismissed the applicant’s notice of motion brought under Section 239(1) of the Companies Act 2015 for leave to commence a derivative action on behalf of Kenmac Limited (the Company).

The respondents raised a preliminary objection arguing that since the applicant was not a shareholder of the Company he could not seek to commence or continue a derivative action on behalf of the Company. The Court upheld the objection and dismissed the application as I have said above.

The applicant is desirous of challenging the decision but is unable to do so without leave because time limited for doing so has elapsed.

Rule 4 of the Court of Appeal Rules grants a single judge the power to extend the time limited by the Rules, or by the Court or of any superior court,

**“ on such terms as it thinks just”**

Pursuant to that Rule and on the authorities of a long line of decisions, the leading one being **Leo Sila Mutiso V Rose Hellen Wangari Mwangi**, (Civil Application No. Nai. 255 of 1997, as a single judge I am only required to satisfy myself that the delay was not inordinate; that the reason or reasons for the delay is or are plausible; that the appeal has reasonable chances of succeeding if the application is granted; and that granting the relief will not be prejudicial to the respondent.

The decision of the High Court was rendered on 7th December, 2018 and this application filed on 10th January, 2019. Although counsel representing the applicant was present when the ruling was delivered, it is his position that he was not able to get a copy immediately; that after making personal inquiries to no avail he wrote to the Deputy Registrar for copies of proceedings and the ruling; that when no response to that letter was forthcoming he, once more visited the registry; that it was only on 19th December, 2018 that he received a copy of the ruling; that by this time there were only two days left of the fourteen days to file a notice of appeal; and that by the time he obtained instructions from the applicant the days had elapsed.

The applicant ought to have filed a notice of appeal fourteen days from 7th December, 2018, that is, on or around 3rd January, 2019, by strict computation of time, excluding weekends and holidays. The delay was therefore only for 7 days. That is certainly not inordinate.

Unless there is a registry system where court documents can be filed in temporary folders where the court files are lost or unavailable, there is very little a litigant can do but simply to wait for the file to be availed. A notice of appeal in terms of Rule 75 of the Court's Rules is lodged in the court appealed from. The explanation for failure to file the notice in time is plausible. It is not denied that after delivering the ruling the learned Judge retained the file for many weeks. This cannot be blamed on the applicant.

The delay was not inordinate and in any case the respondent has not been prejudiced.

As a single Judge I cannot expropriate the powers of a full bench to determine the merit or deficiency of the appeal. Perhaps it was because of this realization that the Court in setting the parameters for consideration of an application under Rule 4 in Leo Sila Mutiso (supra) stressed that the Court takes into account, among other factors “... **the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted**” (my emphasis). Even just from the length of the ruling, 35 pages there are fundamental issues to be considered on appeal. For example the questions that will be asked in the intended appeal are whether the applicant could not use derivative action to obtain the relief he sought; and whether it was sufficient to deny the applicant the opportunity to ventilate his grievance merely because of the existence of alternative remedies.

In the circumstances, and to obviate further delay I grant to the applicant twenty one (21) days from the date of this ruling within which to lodge and serve both the notice of appeal and the appeal itself.

Costs will be in the appeal.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of July 2019.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

**DEPUTY REGISTRAR**