



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 33 OF 2019 (UR 6/2019)

BETWEEN

JOSEPH WAMBUTSI SHIKHOBBA (suing as Leg Rep. of the Estate of
EMMANUEL NYAROTSO WAMBUTSIAPPLICANT

AND

IMA HAULIERS LTD.....RESPONDENT

(An application for extension of time to file and serve notice of appeal and the record of appeal out of time in respect of the judgment of the High Court of Kenya at Kakamega (Musyoka, J.) dated 3rd December, 2018

in

HCCC No. 43 of 2017)

RULING

By the motion dated 4th April 2019 brought under **Rule 4** of the rules of this Court, the applicant **Joseph Wambutsi Shikhoba** seeks the following orders;

(a) THAT the time for lodging the notice of appeal in the High Court be extended and the applicant be granted leave to file and serve the Notice of Appeal out of time.

(b) THAT the time for filing the Record of Appeal in the Court of Appeal be extended and the applicant be granted leave to file and serve the Record of Appeal out of time.

(c) THAT the costs of the application be provided for.

It is premised on grounds appearing on its face as follows;

“1. THAT the applicant and his Counsel were not notified of the rescheduled judgment date when it failed to be delivered on its due date of 25/10/2018.

2. THAT the applicant’s Counsel learnt of the judgment having been delivered through the Respondent’s Counsel’s phone call without the specifics of the decision and at the time when the time for lodging the Notice of Appeal had lapsed and the period for filing the Record of Appeal was just about to lapse.

3. THAT by the time the applicant’s Counsel obtained a photocopy of the judgment after a delay in getting a certified one as had been preferred by the Registry, the time for filing the Record of Appeal had also lapsed.

4. THAT the delay in filing the Notice of Appeal and the Record of Appeal as is required by law was not intentional and was not inordinate in the circumstances of the applicant.

5. THAT the applicant was aggrieved by part of the Superior Court's judgment and he desires to be heard on his appeal which is arguable and has prospects of success.

6. THAT there shall be no prejudice to the respondent if the application is granted."

The applicant swore a supporting affidavit on 5th April, 2019 in which he states that his first appeal at the High Court was scheduled for judgment on 25th October 2018 but on that date the court did not sit and that he and his counsel "waited to be notified of the rescheduled date when judgment would be delivered." He went on to swear at paragraph 4 to 7 as follows;

"4. THAT I have been informed by my advocate on record and I believe this informed to be true that he had received a call from counsel for the respondent on Sunday of 27/1/2019 that judgment had been delivered without being specific about the date and that someone had held my advocate's brief.

....

5. THAT on 29/1/2019 my advocate sent his clerk to obtain a copy of the judgment where the registry staff proposed to avail a certified copy of the same by 2/2/2019.

6. THAT when my counsel went back on 5/2/2019 the judgment had not been certified and he asked to be given the uncertified photocopy of the same which he took and used to prepare the decree. Annexed and marked JWS-1(a) is a copy of the judgment.

7. THAT on 13/2/2019 my counsel filed the letter requesting for proceedings and the decree which he had drawn based on the photocopy of the judgment. Annexed and marked JWS – 1(b) is the letter for proceedings."

He then stated that the certified proceedings and judgment were finally obtained on 26th February, 2019 after a delay occasioned by the filing of irrelevant trial court proceedings. He swore that the respondent would not suffer any prejudice were the time to be extended and that he does have an arguable appeal.

The respondent opposed the application by way of a replying affidavit sworn by **Harminder Singh Saini**, one of its directors. He accused the applicant of being an indolent party who made no effort to enquire as to when the judgment sought to be appealed against was to be delivered. He swore thus at paragraphs 6 and 9;

"6. THAT, even if the applicant were to be believed, the length of time between when he became aware of the existence of judgment to the time of filing the present application is over 3 months, a period which is inordinate and has not been adequately explained. The court judgment as delivered, was in typed version and the appeal was argued by way of written submissions and hence there were no court proceedings to be typed as alluded to by the applicant in his Supporting Affidavit as an excuse for seeking the indulgence of this Court."

.....

9. I am aware, that the award made by the Superior Court, has been paid to the applicant and duly acknowledged and any further indulgence will greatly prejudice the respondent in terms of added expenses and costs. The Applicant has insatiable appetite for money."

Swearing that the intended appeal has absolutely no chance of succeeding, he prayed that the application be dismissed.

Arguing the motion before me, **Mr. O.M. Wanyama**, the applicant's learned counsel relied on the supporting affidavit. In answer to my questions as to why he had to await a copy of the judgment before filing a notice of appeal or even the current application, counsel's response was, "we thought we needed to have the full record before we could do so". He admitted to have obtained the proceedings on 29th February, 2019 and blamed the filing of the application on 4th April 2019 on the fact that he practices in Busia while the High Court is in Kakamega, and that he needed his client's instructions before filing. Describing the delay as not intentional or deliberate, he asked me to extend time to enable the applicant to file his appeal, which he submitted was arguable.

Mr. Muma the respondent's learned advocate relied on the replying affidavit and added that the applicant was indolent and had failed to give good reasons for the delay of 4 months, which was inordinate. He added that the affidavit did to raise a single point of law yet, by virtue of **section 72 of the Civil Procedure Act**, such an appeal as is intended must be confined to points of law. As the respondent has already paid the decretal sum determined by the High Court, it has closed its file and the litigation must come to an end.

Mr. Wanyama briefly replied that the intended appeal will raise points of law in the memorandum of appeal and that the same would revolve around the High Court's improper exercise of discretion in the matter of quantum of damages.

Having considered the application before me and the opposing arguments made, I remind myself that what I am being called to grant falls within my wide and unfettered discretion. It is a discretion to be exercised to do justice on a case by case basis. It is not to be exercised capriciously or arbitrarily on the basis of sympathy or idiosyncrasy. Rather, it is a judicial discretion guided by settled principles. I must have before me some material to enable me to decide the matter. The material must go to answering the questions". *How long was the delay? What reason is advanced for that delay? Does the applicant have an arguable appeal (though I needed not consider it)? Will the grant of the application prejudice the respondent? Is the conduct of the applicant as a whole deserving of my favourable consideration? What would the*

wide interests of justice require in the particular case? See MWANGI vs. KENYA AIRWAYS [2003] KLR 486.

In the case before me, it is not in dispute that the judgment in respect of which an appeal is sought to be preferred was delivered on 3rd December 2018. This application was filed on 4th April 2019 which was a full 4 months later. Then, as now, no notice of appeal had been filed. Such notice is required by **Rule 74** of the Court of Appeal Rules to be filed within 14 days of the decision against which an appeal is intended to be filed. On the face of it, therefore, the delay appears to me to be long and inordinate, regard being had to the fact that a notice of appeal is really a rather simple and straight-forward document signifying intention to appeal without even going into the reasons or grounds on which such appeal is to be premised.

What reasons does the applicant offer for the delay? First, he says that his advocates were not notified of the date for delivery of judgment the court not having sat on the scheduled date of 25th October, 2018. It is only later on 27th January, 2019 that said counsel learnt from the respondent's advocates that judgment had been delivered. The said advocates finally got hold of the uncertified judgment on 5th February, 2019.

Next, the applicant explains that his advocates then waited for the certified copies of the proceedings and judgment before they could take action. Finally, the advocate himself states from the bar that some further delay occurred because he was waiting for the applicant's instructions. The question I have to determine is whether the reasons are satisfactory. I think, with respect, that a litigant and his legal advisers whose judgment is not delivered on the scheduled date ought to be keen to find out when the same gets to be delivered. Vigilance is not a burden but rather a pragmatic attitude of the mind consistent with taking one's interests seriously. Here, the applicant and his advocates, on their own showing, literally left matters to sort themselves out. It took a call from opposing counsel for them to know that judgment had been delivered. The respondent averred, and I did not see or hear any serious rebuttal, that the adjourned date for delivery of the judgment was notified to the parties. There is no reason why the applicant did not get acquainted with the delivery of the judgment sooner.

Even after seeing the judgment, however, the applicant did not move with speed. The explanation that proceedings had to first be obtained is wholly unconvincing. Indeed, the applicant did not need the proceedings in order to file a notice of appeal. What is more, even after the proceedings were collected on 26th February, 2019 as the applicant swears, it took another five weeks before the present application was filed. What emerges is a pattern of indolence and dilatoriness in the face of which the reasons given ring hollow. I do not find that plausible, bona fide reasons have been given for the delay.

Whereas the applicant states that the respondent will suffer no prejudice were I to extend time, the respondent has sworn, without controvert, that it has already paid the decretal sum and closed its file. The respondent has therefore put this matter behind it and moved on, so that to open the door to the filing of an appeal would be to re-open a rested litigation and the anxieties that go with it. I find merit in the argument that litigation must come to an end.

I apprehend that this is why the Court should take seriously any lapses in filing of notices of appeal. When one level of litigation ends, parties are entitled to hope and to expect that closure has been attained, unless they get notice from their opposites that there will be an escalation of the matter to a higher court in our hierarchical structure. It cannot be right or proper that weeks, even months, should elapse and then suddenly a party wishes to awaken cases that have slept. Such belated moves bear the signature of afterthoughts and I, for one, would not encourage them.

I have said enough to show that the application before me does not merit my favourable discretion. It is accordingly dismissed with costs.

Dated and delivered at Kisumu this 3rd day of July, 2019.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR