



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, J.A (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 132 OF 2016

BETWEEN

LANDBANK REAL ESTATE

INVESTMENT TRUST LIMITED.....APPLICANT

AND

STANDARD CHARTERED BANK

KENYA LIMITED.....RESPONDENT

*(Being an appeal from the ruling/decision of the High Court of Kenya at Nairobi (E.K. Ogola, J.) dated 16<sup>th</sup> May, 2016 in H.C.C.C. No. 543 of 2015)*

RULING

[1] The notice of motion before me principally seeks an order of leave to file a supplementary Record of Appeal. Although the application cites *Articles 159 (2) (d)* of the Constitution, *Sections 3A* and *3B*, of the *Appellate Jurisdiction Act* and *Rules 42, 88* and *92* it is essentially a matter to be considered under *Rule 4* of this Court. It deals with extension of time in the following terms;

*“The Court may, on such terms as it thinks just, by an order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”*

[2] This Rule provides an unfettered discretion to the Court to extend time. However, such discretion must be exercised judiciously. In *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* Civil Appeal No. Nai. 255 of 1997, the Court gave guidance on the exercise of this discretion as follows:

*“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 in general the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of delay, secondly, the reason for the delay, thirdly (possibly) the chances for the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted”.*

[3] Under *Rule 87 (1) (h)* the applicant was supposed to include in the Record of Appeal a certified copy of the order being appealed against. The applicant did not do so and therefore filed the aforesaid application seeking leave to file a supplementary Record of Appeal and or to deem the Supplementary Record of Appeal dated 20<sup>th</sup> January, 2017 as duly filed. The application is supported by the grounds stated thereto and matters deposed to in the affidavit of *Mr. George Miyare* learned counsel for the applicant. It is stated that counsel for the applicant lodged the Record of Appeal on the 16<sup>th</sup> June, 2016 and served it on counsel for the respondent on the 17<sup>th</sup> June, 2016. On 11<sup>th</sup> July, 2016 counsel for the respondent notified counsel for the applicant that a certified copy of the order of the High court dated 16<sup>th</sup> May, 2016 was omitted from the Record of Appeal and further advising them to correct the omission.

[4] That is what prompted the applicant to file the instant application claiming that the order was omitted from the record inadvertently. However that was not the only problem as the attached order had errors and it was also not sent to counsel for the respondent for approval as required under the Civil Procedure Rules. These blatant omissions by counsel for the applicant were not well taken by counsel for the respondent. The application thus was opposed by the respondent vide a replying affidavit sworn by *Wanjiru Mutero* on 12<sup>th</sup> June, 2017 and they also filed a list of authorities. The respondent’s resistance to the said application seems to be based on the grounds that the order sought

to be introduced in the Supplementary record is erroneous. Moreover the respondent has already moved the Court on 15<sup>th</sup> July, 2016 to strike the Record of Appeal on the grounds that it did not comply with the provisions of **Rule 87** of the Court of Appeal and **Section 75** of the **Civil Procedure Act**.

[5] During the hearing of this application **Mr Miyare**, learned counsel for the applicant submitted that the omission to include the order was inadvertent and in his view, it is curable while citing the overarching objective in the administration of justice that advances the doctrine that courts should always aim at addressing the real issues in controversy and not to be impeded by procedural technicalities. He went on to submit that, the omission is curable and would not prejudice the respondent except an inconvenience of defending this application which can be compensated with an award for costs.

[6] As aforesaid, **Mr. Ondieki** opposed the application stating that the Record of Appeal was filed contrary to the Rules of this Court in that there was no order or decree which was being appealed against. Even after the respondent pointed out the omission the applicant purported to introduce a defective order; the omission to include an order is not a mere technicality but a substantive matter that completely renders the Record of Appeal defective. Finally counsel submitted that the omission is not curable short of the entire Appeal being struck out as the overriding objectives in the administration of justice cannot be used to shield an applicant who has failed to comply with the Rules.

[7] I have considered this application and submissions by respective counsel. Leave is sought to extend time within which the applicant can file a supplementary record to include a crucial document being the order of the High Court that is being appealed against. Counsel for the applicant attributes the omission to include the order in the Record of Appeal to an inadvertent mistake on his part. Ordinarily a mistake by counsel is usually excusable if it is genuine, and does not cause prejudice to the other side. See the case of:- **Belinda Murai & others vs. Amoi Wainaina, (supra) Madan, J.A.** (as he then was) was at his best legal wit when he explained what constitutes a mistake in the following words:

*“A mistakable is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of 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 lawyer of experience who ought to know better. The court may not 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...”*

[8] Is this mistake excusable? In addition to the supporting affidavit by **Mr. Miyare**, one **JacJohn Owino** an advocate practicing in the same law firm also swore an affidavit on 2<sup>nd</sup> July, 2019 explaining the steps they took to extract the order which included an application seeking leave to extend time within which to file an appeal; they also had to defend an application made by the respondent in the High Court seeking to recall and expunge the order issued on 14<sup>th</sup> December, 2016 which contained some errors. That application was heard by **Nzioka, J.** who declined to grant it but directed the Deputy Registrar to issue an amended order forthwith. In compliance thereto, an amended order was issued on 22<sup>nd</sup> February, 2018 correcting the errors and that is the order the applicant seeks to file in the supplementary record as per the said affidavit.

[9] To me these are all human errors but I recognize there were concerted efforts albeit slovenly undertaken to comply as counsel for the applicant failed to include the order as per the Rules, he extracted an order that contained errors and he failed to seek the approval by counsel for the respondent as per the rules. I have also considered the matters raised by counsel for the respondent that no appeal lies in the absence of the order being appealed against. I think those are matters to be raised before the Bench that will deal with the application to strike out the appeal. As far as extension of time is concerned, paradigms shifted with the Revision of the this Court Rules in 2010 as **Rules 88** now allows a party who has omitted the documents set out in **Rule 87** to seek leave to file a supplementary record if this is happening after fifteen (15) days after the Record of Appeal was filed. Before the revision of the Rules, an omission such as this one would have been fatal and the applicant would have had to go back to the drawing board.

[10] In conclusion I find all these are mistakes by counsel which in my view were born out of sloppiness but can be excusable. I do not see a great prejudice that has been caused to the respondent besides the delay and the inconvenience of defending this application which can be compensated with costs of the application. Accordingly the application is allowed and the respondent is given seven (7) days within which to file and serve the Supplementary Record of Appeal. The respondent shall have the costs of this application.

**Delivered and dated at Nairobi this 27<sup>th</sup> day of September, 2019.**

**M.K. KOOME**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**