



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL (APPEAL) APPLICATION NO. 165 OF 2007

BETWEEN

SULTAN HASHAM LALJI.....APPLICANT

VERSUS

DIAMOND HASHAM LALJI.....1ST RESPONDENT

TRIO HOLDINGS.....2ND RESPONDENT

PROPINVEST LIMITED.....3RD RESPONDENT

(An application for seeking extension of time to file and serve the record of Appeal in the appeal against the Ruling and Order of the High Court of Kenya at Nairobi (E.K.O. Ogola, J.) given on 19th April, 2016

in

H.C.C.C. NO. 330 OF 2013)

RULING

Before me is a notice of motion brought under Rule 4 of the Court of Appeal Rules (CAR), dated 26th July, 2017 and filed on the 1st day of August 2017. It seeks prayers as follows:

“(a) The time limited to file and serve the record of appeal herein be extended.

(b) The record of appeal lodged on 7th June 2017 and served upon counsel for the respondents be deemed as having been filed and served within the extended period.

(c) Costs for and incidental to this motion be in the appeal.”

It has been supported by grounds in its body, a supporting affidavit together with annexures thereto. It has been opposed by a replying affidavit deposed by **Maurice Otieno Omuga** on 27th September, 2017 on behalf of the 1st respondent together with annexures thereto, and another deposed by **Felix Ng’ang’a Karanja** on 12th September, 2017 on behalf of the 3rd respondent together with annexures thereto.

It was canvassed by way of written submissions adopted by learned counsel for the respective parties and orally highlighted. Learned counsel **Mr. Fredrick Ngatia**, appeared for the applicant, **Maurice Omuga** for the 1st respondent, **Miss B A. Oele** for the 2nd respondent, while **Mr. A. A. K. Esmail** appeared for the 3rd respondent.

The background to the application is that a ruling was delivered on 19th April 2016, in HCCC No. 330 of 2013. The applicant was aggrieved and timely filed a notice of appeal on 25th April 2016, intending to appeal against the said ruling; and caused it to be served timeously on the opposite parties in compliance with Rule 75(2) and 77(1) of the Court of Appeal Rules (CAR). It was served on the opposite parties on the

28th and 29th April 2016 respectively. The applicant also timeously applied for a certified copy of typed proceedings on 20th April 2016, and caused the letter bespeaking proceedings, to be served on all the opposite parties also on the 28th and 29th April 2016 respectively.

Supporting the application, **Mr. Ngatia** submitted that upon complying with the above rule, he then tasked an unnamed clerk from his office to monitor the progress for the typing of the proceedings; that it was not until the 29th March, 2017 that the said unnamed clerk was informed that the proceedings were ready for collection. These were duly paid for and a copy collected on the same date of 29th March, 2017. According to **Mr. Ngatia**, if the sixty (60) days within which the record of appeal was supposed to be compiled and filed upon capacitation, is to be computed from 29th March 2017 then the appeal ought to have been filed on 28th May, 2017. There was therefore a delay of nine (9) days in filing the appeal. However, if the sixty days is to be computed from 10th April 2017 when they obtained a certified copy of the proceedings, then the appeal record was compiled and filed within time.

In light of the above sequence of events, **Mr. Ngatia** submitted that the applicant has satisfied the pre-requisites for granting relief under the Rule 4 of the Court of Appeal Rules (CAR) procedures because: firstly, the applicant complied with the timeous serving of the notice of appeal and the letter bespeaking proceedings. Secondly, upon applying for proceedings, by diligently, monitoring the progress for the preparation of the typed proceedings. Thirdly, that although the proceedings were supplied to him on 29th March 2017, they had to undergo proof reading and correction of errors, before certification on 10th April, 2017; that it was upon obtaining a certified copy of the proceedings that the appeal record was compiled and filed on 7th June, 2017. The delay in filing the record of appeal upon capacitation is therefore, not inordinate. The appeal is not a frivolous one as demonstrated by the content of the memorandum of appeal on record. It is arguable. No prejudice will be suffered by the respondents if the applicant was to be heard on merit on the appeal which is already filed and served on the respondents and was in fact ready for hearing, had the issue of its validity not arisen, hence the filing of the application under consideration seeking its validation.

Mr. Ngatia relied on the cases of **Keziah Stella Pyman & 2 Others versus Paul Mwololo Mutevu & 8 others [2013] eKLR** for the reiteration of the ingredients for granting relief under the rule 4 of the CAR procedures, namely consideration of the length of the delay, reasons for the delay; (possibly) chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted; the case of **Kirinyaga Construction Limited v. Katherine Wairimu Ndung'u (suing as administrator of the Estate of Francis Ndung'u Githinji [2019] eKLR** for the courts re-echoing of the principle that establishment of sufficient reason is no longer a mandatory requirement for the exercise of discretion in favour of a deserving party under the Rule 4 of the CAR procedures, especially in instances where ends of justice dictate so in an application of this nature. The case of **Richard Ncharpi Leiyagu versus Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** for the holding, *inter alia*, that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the Rule of law.

The case of **Tarcisio Kagunda Waithathu & 3 others versus Regina Nyambura Waithathu [2018] eKLR** in which the court excused a delay of filing the appeal by thirty-five (35) days based on a miscalculation of the days by counsel. The case of **Service Europa/Africa PmbH & Another versus Eliab Muturi Mwangi (practicing in the name and style of Muturi Mwangi & Associates Advocates) [2019] eKLR**, in which the court excused a delay of twenty nine (29) days occasioned as a result of an administrative mix up in the chambers of an advocate. The case of **Imperial Bank Limited (in receivership) & Anor versus Alnashir Popat & 18 others [2018] eKLR**, for the holding *inter alia* that an application for extension of time within which to comply with an appellate process may be made either prior to or upon the filing of the record of appeal; and lastly, the case of **Board of Governors, Moi High School – Kabarak & Anor versus Malcom Bell [2013] eKLR**, on exercise of the court's discretion in favour of a deserving party. On that account, **Mr. Ngatia** urged for the application to be allowed.

Opposing the application **Mr. Omuga** submitted that the 1st respondent does not accept the reasons and/or excuses advanced by the applicant in support of the prayers for extension of time as in his view, the grounds advanced in support of the applicant's application and the conduct of the applicant in the manner his appellate process was handled right from the time of initiation, amounted to an abuse of the Court process; that the excuse given that proceedings were to undergo proof reading, correction of errors and for certification before compiling and filing the record of appeal holds no water as nowhere in the CAR, is there such a requirement; that the delay between 29th May 2017 and 7th June 2017 has not been properly explained; that the applicant has tried to mislead the court by shifting the blame on the Registry of the superior court, while concealing the fact that the certificate of delay was in fact prepared by **Mr. Ngatia's** office and only submitted to court for adoption; that since the remedy sought from the court is an equitable remedy, the applicant who has come to court with unclean hands for non-disclosure of material information pertaining to the relief sought should be denied access to the said relief.

Mr. Omuga relied on the case of **Kisii Petroleum Products Limited versus Kobil Petroleum Ltd. & two others Nairobi CA No. NAI 218 of 2005** in which the court declined to exercise its discretion in favour of the applicant for the failure to be candid and genuine in its

explanation for the delay; and the case of **Orion East Africa Limited vs. Eco Bank Kenya Limited & Another [2015] eKLR**, for the holding, *inter alia*, that a party who is guilty of concealing of material facts does not deserve an equitable remedy as it is now trite that he who comes to equity must do so with clean hands.

Mr. Omuga also submitted that allowing the applicant's application in view of his conduct will be highly prejudicial to the first respondent; especially when it is also clear from the record that the applicant is also guilty of flouting the provisions of Order 21 Rule 8 of the Civil Procedure Rules (CPR) for the failure to extract the decree and have it served on the opposite parties for approval before its inclusion in the record of appeal. The order included in the record of appeal, according to **Mr. Omuga**, is therefore a nullity which nullity operates to vitiate the validity of the appeal. On that accord, **Mr. Omuga** urged for the dismissal of the application with costs to the 1st respondent.

Miss Oele for the 2nd respondent associated herself and fully adopted the submissions of the 1st and 3rd respondents in support of the 2nd respondent's opposition to the applicant's application.

Opposing the application, **Mr. A. A. K. Esmail** for the 3rd respondent relied on the case of **Diamond Trust versus Bidali [1995-1998] 1 EA 45** for the principles that guide the exercise of jurisdiction under Rule 4 CAR; the case of **Patel versus Waweru [2003] KLR 361** for the proposition that the burden is on the applicant who is seeking the indulgence of the court, to produce satisfactory and admissible evidence which would enable the court to exercise its equitable jurisdiction to extend time in his favour; **Rule 43(1)** of the CAR and sections 62, 63, 64 and 65 of the Evidence Act Cap 80 laws of Kenya, and faulted what he termed as offending paragraphs in the supporting affidavit asserting that these were mostly grounded on hearsay as particularly set out in **Mr. Esmail's** submissions which I find no need to reproduce.

Replying on the case of **Mwakyoma versus Mbeya [2001] 2 EA 482**, **Mr. Esmail** submitted that no explanation was offered by the applicant regarding the delay in filing this application especially when there is no indication as to when the error in the certificate of delay was noticed and by whom.

Turning to the competence of the appeal, as filed, **Mr. Esmail** submitted that the appeal was not only filed out of time but is also defective for nonexistence of a decree; that the decision of the trial court giving rise to the impugned order was a final decision; that the above being the correct position in law according to him, it was mandatory for the decree to be drawn, extracted and served on the opposite parties for approval, in terms of the provisions of order 21 rule 8 of the Civil Procedure Rules (CPR); that in the absence of existence of a valid decree, the appeal as filed is incompetent. There is therefore nothing to be validated. Granting the relief sought will be an excise in futility, especially when it is now trite that equity does not act in vain, argued **Mr. Esmail**.

Mr. Esmail also relied on HCCC Number 1388 of 1992 and ELC case number 362 of 2017 (UR) for the holding, *inter alia*, that an order drawn, extracted and issued by the registry of the court in breach of order 21 rule 8 of the CPR was a nullity.

Relying on the case of **Kissi Petroleum Products Limited versus Kobil Petroleum Limited & 2 Others** (supra) and **Orion East Africa Limited versus Eco Bank Kenya Limited & Another** (supra), **Mr. Esmail** submitted that the applicant having polluted the equitable process deserves, no sympathy from the court and is therefore disentitled to the relief sought.

On prejudice to be suffered by the respondents if the application were to be allowed, **Mr. Esmail** submitted that the appeal arises from proceedings which were commenced more than twenty three (23) years ago over a cause of action that arose more than thirty (30) years ago; that there has to be an end to litigation; that two crucial witnesses have since passed on, while the suit against one of the respondent's had abated; that Article 50 of the Kenya Constitution, 2010 cannot therefore be

invoked in favour of the applicant especially when the totality of the circumstances obtaining in this application indicate clearly that a fair hearing is not a possibility.

On the totality of the above submissions, **Mr. Esmail** also urged for the dismissal of the application with costs to the 3rd respondent.

My invitation to intervene on behalf of the applicant has been invoked under the Rule 4 of the CAR procedure. It provides;

“4. Extension of time The Court may, on such terms as it thinks just, by 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.”

Principles that guide the exercise of jurisdiction under the above rule now form a well beaten path as demonstrated by the case law cited by the respective parties in support of their opposing positions as highlighted above. In addition, there is also the case of **Hon. John Njoroge Michuki and another versus Kentazuga Hardware Limited [1998] eKLR** for the holding *inter alia* that an appellant has a right under rule 4 of the CAR to apply for extension of time within which to validate an appellate process; and which order should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking for the indulgence of the court; or that the court is otherwise satisfied beyond *peradventure*, that the intended appeal is not arguable.

See also the restatement of the above principles by the Supreme Court of Kenya (MK Ibrahim & SC Wanjala, (S.C.J.), in **Nicholas Kiptoo Arap Korir Salat versus Independent |Electoral & Boundaries commission & 7 Others.**

[2014] eKLR as follows:

1. **Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.**
2. **A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**
3. **Whether the Court should exercise the discretion to extend the time is a consideration to be made on a case to case basis.**
4. **The delay should be explained to the satisfaction of the Court.**
5. **The court also has to consider whether there will be any prejudice suffered by the respondent if the extension is granted.**
6. **Whether the application has been brought without undue delay.**
7. **Whether in certain cases like election petitions, public interest should be a consideration for extension of time.**

I have given due considering to the record, the rival pleadings, submissions and principles relied upon by the respective parties in support of their opposing positions highlighted above. The factors to be considered in the exercise of jurisdiction under the rule 4 CAR procedures and which I am obligated to apply in the determination of this application, are as highlighted above.

With regard to delay, it is not disputed that the delay involved is nine (9) days. In the case of **Tarcisio Kaguna Waithathu & 3 others versus Regina Nyambura Waithathu** (supra); the court excused a delay of thirty five (35) days while in the case of **Service Europa/Africa GmbH & Anor. versus Eliab Muturi Mwangi (practicing in the name and style of Muturi & Associates Advocates)** where the court excused a delay of twenty nine (29) days.

Applying the above threshold to the rival submissions on the ingredient of delay, I am of the considered view that a delay of nine (9) days is not so inordinate so as to warrant the withholding of the exercise of discretion in favour of the applicant under the Rule 4 CAR procedure.

On the reasons advanced for the delay, it is not disputed that the applicant timeously initiated the appellate process by filing the notice of appeal and applying for a typed copy of the proceedings and causing both processes to be served on the opposite parties within the timelines set in the rules. According to the certificate of delay exhibited on the record, and as confirmed by **Mr. Ngatia** in his submissions, a typed copy of the proceedings was ready and was in fact collected by his office on the 29th March, 2017, the date which is undisputably indicated in the certificate of delay. According to the prerequisites in Rule 82 (2) and (3) of the CAR, a party caught up with noncompliance with the prerequisite in Rule 82 (1) of the CAR on the failure to file an appeal within sixty (60) days from the date of the lodging of the notice of appeal has to rely on the computation of time taken for the preparation of the record for appellate purposes as indicated in the certificate of delay, which is the 29th March, 2017. This is the date when computation of the sixty (60) days within which to compile and file a record of appeal started running. The record of appeal sought to be validated was however not filed within that time which fell on 28th May 2017 going by the applicant's submissions. It was instead filed on 7th June, 2017, nine (9) days late.

The explanation the applicant's advocate on record, gave for the failure to compile and file the record within the stipulated sixty (60) days from the date of 29th March, 2017 indicated in the certificate of day as the date of computation was that the proceedings had to undergo proof reading and correction of errors, an exercise completed on 10th April, 2017 when they were supplied with a certified copy of the proceedings. When confronted with the respondent's assertions that the rules do not provide for a certified copy of proceedings as a pre-condition for compiling and filing of a record of appeal, the applicants advocate did not dispute that position. In fact no rule was cited by the applicant to demonstrate it was mandatory for them to wait for a certified copy of the proceedings before compiling and filing of the record of appeal. The misapprehension of the correct date from where to start computing the sixty (60) days within which to compile and file the record of appeal, therefore lay with the advocate on record for the applicant.

In **Belinda Murai & others versus Amos Wainana, [1978] KLR 278** it was stated that the door of justice is not closed just because a mistake has been made by a lawyer. Secondly, that the role of the court is to do all it takes to rectify any mistakes that may have arisen in the course of the litigation before it if the interest of justice so demands. In the case of **Phillip Chemwolo & Anor. versus Augustine Kubende [1986] eKLR**, it was stated, *inter alia*, that the role of the court is to adjudicate over the rights of litigants before it and not to impose discipline. Secondly, that unless there is evidence of the intention to overreach, there is no error or default that cannot be put right by payment of costs. Thirdly, that a party should not suffer penalty of not having his/her case heard on merit just because a mistake has been made, either by the advocate or the party himself/herself. See also **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR**, for the holding *inter alia*, that rules of procedure are hand maidens of justice and should therefore be adhered to.

In addition to the above case law in **Owino Ger vs. Marmanet Forest Co-operative Credit Society Limited [1987] eKLR**, it was stated that where mistakes of advocates and their clerks are demonstrated to exist would attract the exercise of discretion in favour of a deserving

litigant. In **Lee G. Muthoga vs. Habib Zurich Finance (K) Limited & Another**, Civil Application No. Nai 236 of 2009, it was stated that a litigant should not suffer because of his advocate's oversight. While in **Catherine Njuguni Kenya & 2 others vs. Commercial Bank of Africa Limited**, Civil Application No. Nai 366 of 2009, it was observed that litigants place a lot of trust in the good workmanship of their agents who sometimes fail them. When this happens, the role of the court is to balance the interests of the parties before it without visiting the sins of an advocate on an innocent litigant.

In light of the above guiding principles, I am satisfied that the failure to compute the sixty days within which to compile and file the record of appeal to run from the date indicated in the certificate of delay of 29th March, 2017 lay with the applicant's advocate on record. It is this same default that accounts for the delay of nine (9) days in filing the records which I have already ruled above, that it is not so inordinate so as to warrant the withholding of the exercise of discretion in favour of the applicant. Vitiating the application on account of the applicant's advocate's failure to apply the correct date for computing the sixty (60) days within which to compile and file the record of appeal will be tantamount to giving a relief with one hand and taking it away with another. Secondly for the reasons already stated above that this was a matter within the knowledge of the applicants advocate on record, using it as a reason for vitiating the applicant's application will be tantamount to visiting the advocate's default on an innocent party who had hired the services and good workmanship of the said advocate for value. I therefore, hold that the said error is excusable as in my view, it does not override the need to have the appeal heard on its merit.

On the possibility of the success of the appeal, the applicant contends that the same is arguable as laid, a position disputed by the respondents who have argued that it is a nonstarter. It is appreciated that submissions of learned counsel for the respective parties on this issue spilled over into the arena of the merits of the appeal. It is my considered view that since the merits of the appeal is not one of the prerequisites for granting a relief under the Rule 4 CAR procedures, I will steer clear of those matters and confine myself to the threshold required to be established under this ingredient for purposes of my exercise of jurisdiction under the rule 4 CAR procedure.

In **Joseph Wanjohi Njau vs. Kabau**, Civil Application No. 97 of 2012, it was stated that an arguable appeal is not one that must necessarily succeed but one which ought to be argued fully before court. In this application there is a memorandum of appeal on record which is sought to be validated. In it, the applicant intends to fault the court for; sustaining a preliminary objection which according to him did not meet the threshold for sustaining a preliminary objection; revising and ruling on an issue previously ruled upon by a court of law of competent jurisdiction; misapprehending submissions filed by the applicant; and the failure to appreciate that issue of fraud warranted a merit hearing, all of which in my view are arguable, their ultimate success or otherwise notwithstanding.

On the prejudice to be suffered by the respondents if the application were to be allowed, the 1st respondent just mentioned this without giving any specifics. It is the 3rd respondent who specified the length of time the litigation has lasted since the cause of action arose over thirty (30) years ago, death of two crucial witnesses, and the suit having abated against one defendant. The above have to be weighed against the applicant's right to be heard on the appeal sought to be validated. In **Richard Ncharpi Leiyagu vs IEBC & 2 Others** (Supra) it was stated that the right to a hearing is not only constitutionally entrenched but it is also the cornerstone of the rule of law. In **Mbaki & Others vs. Macharia & Another** (2005) 2EA 206 it was stated that the right to be heard is a valued right and a party seeking to exercise it should be accorded an opportunity to exercise it, unless if there is a good reason for withholding that right. In **National Enterprises Corporation vs. Mukisa Food Limited**, Civil Appeal No. 42 of 1997, the Court of Appeal of Uganda stated that unless and until the court has pronounced a judgment upon the merits of a case or by consent of the parties, it has to revoke the expression of its coercive power where that has been obtained by failure to follow any of the rules of procedure. Lastly in the Tanzanian case of **Abbass Sherally and Another vs Abdul Fazaiboy**, Civil Application No. 33 of 2003, it was stated that the rights of a party to be heard before adverse action or decision is taken against such a party is a basic right whose violation is tantamount to a breach of natural justice.

On the totality of the above assessment and reasoning, I distil the following as the core guiding principles in the determination of this application.

- (1) Rules of procedure are hand maidens of justice and should be adhered to.
- (2) Extension of time being an equitable remedy, is not a right of a party. It is only available to a deserving party.
- (3) The burden of establishing that a party is deserving of the exercise of the court's discretion to extend time in his/her favour, is upon the party asserting that right.
- (4) Although principles for exercising of jurisdiction under the rule 4 CAR procedures have now been crystalized by case law pronounced by the court itself, these have to be applied on a case to case basis.

Bearing the totality of the above in mind, I am inclined to tilt the scales of justice in favour of allowing the application under consideration for the reasons that the delay is only for nine (9) days which I have already ruled, it is not so inordinate so as to disentitle the applicant to the relief sought. Second, the mistake in choosing a wrong date as the date on the basis of which to compute the running of the sixty (60) days within which to compile and file the record of appeal lay with the advocate on record for the applicant. Vitiating the application on that account would be tantamount to visiting that default on an innocent client. Third, there was no delay in seeking the court's intervention as the appeal was filed on 7th June 2017, while the application seeking validation was filed one month and 26 days thereafter, which in my view is also not so inordinate so as to disentitle a party to the exercise of the court's discretion in his/her favour. Fourth, I make no findings with regard to the competence or otherwise of the appeal as this is not one of the ingredients for the exercise of discretion under the rule 4 CAR procedures.

In the result, the orders that commend themselves for me to make in the disposal of the application are as follows:

DATED and delivered at Nairobi this 25th day of November, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR