



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, JA (IN CHAMBERS)]

CIVIL APPLICATION NO. 226 OF 2018 (UR 181/2018)

BETWEEN

TOM MSHINDI.....1ST APPLICANT

THE STANDARD GROUP LIMITED.....2ND APPLICANT

AND

GRACE WANGUI NGENYE.....RESPONDENT

(An application for extension of time for the filing of the Notice of Appeal and to deem the Notice of Appeal filed on 10th March, 2016 as being properly on record against the judgment of the High Court of Kenya at Nairobi (A. Mabeya,J) dated 24th February, 2016

IN

HC.CC NO. 795 OF 2005

RULING OF THE COURT

The applicants, **Tom Mshindi** (the 1st applicant and the Standard Group Limited (the 2nd applicant) filed a motion dated **30th July, 2018** and sought two main orders:

“1. Spent

2. That this Honourable Court be pleased to extend time for the applicants to lodge the Notice of appeal and record of appeal.

3. That this Honourable Court be pleased to deem the Notice Appeal filed on 10th March, 2016 as having been filed within time.

4.”

In the motion, **Grace Wangui Ngenye** was named as the respondent. The applicant’s motion was supported by an affidavit of **Millicent Ngetich**, the 2nd applicant’s Company Secretary sworn on **30th July, 2018** in which she deponed that the applicants were aggrieved by the judgment of **Mabeya, J** delivered on **24th February, 2016**; that on **10th March, 2016**, their then counsel, **Makhecha & Gitonga** filed a Notice of Appeal dated **9th March, 2019**; that the Notice of Appeal was filed one (1) day late on account of inadvertence.

The motion was opposed by the respondent who in a replying affidavit dated **12th October, 2018** deponed that as far back as **30th March, 2017**, she pointed out the delay in the filing of the Notice of Appeal in an affidavit in response to the applicant’s Notice of Motion who sought *inter alia*, to allow the firm of **Githae & Company** Advocates to come on record in place of **Makhecha & Gitonga** Advocates; that the instant motion was precipitated by the respondent’s motion dated **14th June, 2018** seeking to strike out the Notice of Appeal for having been filed out of time; that the letter dated **14th March, 2016** by **Makhecha & Gitonga** Advocates requesting for proceedings was neither filed in Court and /or copied to her advocates; that the letter of **3rd October, 2017** requesting for proceedings

in HC.CC No. 795 of 2005 was presented one (1) year and eight (8) months later and neither was it served upon her advocate.

On **15th October, 2019**, the motion came before me for hearing. In urging the motion, **Mrs. Githae**, learned counsel for the applicants submitted that whereas she came on record on **20th March, 2017**, she was all along under the impression that the Notice of Appeal was filed within time, only to discover that the year 2016 was a leap year. She cited several decisions emanating from this court on the principles for consideration in an application for extension of time.

These are:

- (i) **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibe – Eldoret Civil Application No. 91 of 2017**
- (ii) **Oshwal Academy (Nairobi) & Another vs. Induvishwanath Civil Application No. Nai. 79**
- (iii) **Joseph Wanjohi Njau vs. Benson Maina kabau Civil Application No. Nai. 92 of 2012.**
- (iv) **Fakir Mohamed vs. Joseph Mugambi & 2 others, Civil Application No. 332 of 2004**

Mr. Mwaura, leaned counsel for the respondent vehemently opposed the motion. He contended that the motion before me was brought one (1) year & eight (8) months late and after he had filed an application to strike out the Notice of Appeal; that the letter bespeaking the proceedings was not served upon him; that on **30th March, 2017**, attention of the applicants was drawn to the fact that the Notice of Appeal was filed late and that there was no application for proceedings; that the applicant's counsel has been on record long enough to make right what her predecessor had not corrected and that there is no affidavit by previous counsel to explain miscalculation of time. He relied on this Court's decision of **A.O. Menya vs. Mccreas Limited [1978] eKLR** for the proposition that

“... a mistake of clear law or fact without more on the part of the advocate or his clerk will not constitute sufficient reason ...”; the decision of **Donald O. Raballa vs. JSC & Another 2018 eKLR** wherein several decisions of this court were referred to and on laying the firm basis that mistakes of counsel can be visited upon his /her client (see **Bains Construction Co. Ltd vs. John Mzare Ogowe [2011] eKLR**;

I have considered the application, the affidavit in support of the application, the replying affidavit the authorities cited and the law.

Rule 4 of this Court's rules provide as follows:

“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”.

Whereas it is true that the applicant's counsel came on record on **20th March, 2017** and whereas it is true that the motion was filed on **30th July, 2018**, the applicant's counsel explained the delay in moving the Court for enlargement of time on the basis that she was all along under the mistaken impression that the Notice of Appeal was filed within time. Her belief, she contended was informed by her lack of reckoning that 2016 was a leap year. In my view, this is a reasonable explanation as in computing time, the applicant's counsel failed to take into account that the year 2016 was a leap year. She therefore was all along of the view that the notice of appeal had been filed within time.

As regards the letter bespeaking the proceedings, the applicant admits that there was no letter bespeaking the proceedings. However, her application for enlargement to file the appeal out of time is not predicated on the proviso to rule 82 (1) of the rules of the court. The proviso states:

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy”.

In my view, it is within the law for one to seek enlargement of time even in the absence of compliance with the proviso in rule 82 (1) as aforestated. Rule 4 of this Courts rules gives the court the discretionary power, in the exercise of its discretion to enlarge time on terms that it thinks just and fair. Taking into account all the foregoing and bearing in mind the overriding objectives in Section 3A and 3B of the Appellate Jurisdiction Act which is to facilitate the just, expeditious, proportionate and affordable resolution of appeals, I allow this application and extend time for the filing of the Notice of Appeal. The Notice of appeal filed on **10th March, 2016** is deemed to have been filed within time.

Secondly, the record of appeal is to be filed within fourteen (14) days of today's date. In each instance, service is to be effected within seven (7) days of filing.

I make no order as to costs.

Dated and Delivered at Nairobi this 22nd Day of November, 2019.

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR