



IN THE COURT OF APPEAL

AT MALINDI

[CORAM: F. SICHALE, J.A (IN CHAMBERS)]

CIVIL APPEAL (APPLICATION) NO. 130 OF 2018

BETWEEN

THE COUNTY GOVERNMENT OF MOMBASA.....APPLICANT

AND

KOOBA KENYA LIMITED.....RESPONDENT

(An application for extension of time for lodging of a Notice of Appeal and Record of Appeal against the Ruling of the High Court of Kenya at Mombasa (E.K.O. Ogola) dated 3rd May, 2018 respectively in Petition No. 12 of 2017)

RULING OF THE COURT

The applicant, **County Government of Mombasa**, filed several motions against **Kooba Kenya Limited**, the respondent herein. In the amended motion dated **31st January, 2019**, the applicant sought an order for stay of execution against the ruling of **Ogola, J** delivered on **3rd May, 2018**. In another motion dated **18th January, 2019**, the applicant sought an order for stay of execution and extension of time for lodging a Notice of Appeal against the judgment and ruling of **Ogola, J** dated **13th April, 2017** and **3rd May, 2018** respectively. However, in the one urged before me on **28th May, 2019** dated **31st January, 2019**, the applicant sought an order for extension of time for lodging a notice of appeal and record of appeal against the ruling of **Ogola, J**, delivered on **3rd May, 2018** and further that the Notice of appeal dated **18th May, 2018** as well as the record of appeal filed on **1st October, 2018** be deemed as properly filed.

The motion was supported by an affidavit of **Elizabeth Kisingo**, the Deputy Director of Litigation of the applicant in which she deponed that the applicant was aggrieved by the ruling of **3rd May, 2018** allowing the respondent leave to amend its petition; that the applicant filed a Notice of Appeal on **18th May, 2018** and a letter bespeaking the proceedings on **31st May, 2018**; that the Notice of Appeal was filed one day out of time; that the said Notice of Appeal and the letter bespeaking the proceedings were served upon the respondent's counsel one month late due to inadvertence. It was the applicant's further contention that it has an arguable appeal.

The respondent opposed the motion vide a replying affidavit of **Richard Bell**, the Chief Executive Officer of the respondent sworn on **20th February, 2019** in which he deponed, *inter alia*, that the delay in lodging the Notice of Appeal and filing the application for extension of time had not been explained.

As stated above, the motion came before me for plenary hearing on **28th May, 2019**. **Mr. Ratemo**, learned counsel for the applicant urged me to find that the delay of one day in filing the Notice of appeal is excusable; that this delay was due to inadvertence on the part of the applicant's counsel who miscalculated the calendar days; that the applicant has an arguable appeal and hence it should not be denied its undoubted right of appeal; that the sum of money sought by the respondent is colossal (about Kshs. 840,000,000/=).

In opposing the motion, **Mr. Amollo**, learned counsel for the respondent relied on the replying affidavit, the respondent's written submissions as well as a case digest filed on **1st March, 2019**. He pointed out that granting the orders sought by the applicant is tantamount to an exercise in futility as even if the Court was to grant leave of extension of time in respect of the Notice of Appeal and Record of appeal, these will not cure the lapses of late service of the Notice of Appeal and late service of the letter bespeaking the proceedings. Further, that there was a delay in filing the instant motion after discovery of the one-day delay in the filing of the Notice of Appeal. Counsel contended that the applicant has failed to explain each of the delays and that the Memorandum of Appeal does not fault the ruling of **Ogola, J**. in allowing the respondent to amend his petition. He concluded that the applicant's conduct in filing multiple applications and wanton contempt of the court below makes the applicant undeserving of the orders sought.

In a brief rejoinder, **Mr. Ratemo** maintained that a delay of one (1) day is not inordinate and further that the letter bespeaking the proceedings and the Notice of Appeal were served thirty (30) days late on account of inadvertence by a clerk in the firm of the applicant's

counsel.

I have anxiously considered the motion, the oral submissions made before me, the respondent's written submissions and its case digest and the law.

Rule 4 of this Court's Rules (the Rules) provides as follows:

“R.4 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”.

Therefore, by dint of Rule 4 of the Rules, this Court has wide discretionary powers in its consideration of applications for extension of time. On the face of it, a delay of one day in filing a Notice of Appeal cannot be said to be inordinate. The applicant's counsel explained that this one day delay in filing the Notice of Appeal is attributable to an error in calculating the calendar days. This may well be so and as was held in **Aviation Cargo Support Limited vs. St Mark Freight Services Ltd, CA No. Nai [2013]**, human error is part of our daily living.

However, the Notice of Appeal which was filed on **18th May, 2018** and the letter bespeaking the proceedings which was filed on **31st May, 2018** were served upon the respondents on **18th July, 2019**. The Notice of Appeal ought to have been served within 7 days of its filing. The lapses were blamed on a clerk in the office of the applicant's counsel.

Be that as it may, of concern to me however, is the fact that the motion seeks the following prayers:

- “1. That the Honourable Court be pleased to extend time for lodging of a Notice of Appeal and Record of Appeal against the Ruling of the High Court of Kenya at Mombasa (E.K.O Ogola, J) made on 3rd May, 2018 in Mombasa H.C. Petition No. 12 of 2017.**
- 2. That the Notice of Appeal dated 18th May, 2018 be deemed as properly filed.**
- 3. That the Record of Appeal dated and filed on 1st October, 2018 be deemed as properly filed.**
- 4. That the costs of and incidental to this application abide the result of the intended appeal.”**

It is however not lost to me that although the ruling of **Ogola, J.** was delivered on **3rd May, 2018** and the applicant filed a Notice of Appeal on **18th May, 2018** and on **31st May 2018** wrote the letter bespeaking the typed proceedings; these were served upon the respondent on **18th July, 2018**. The applicant is required to serve the Notice of Appeal within 7 days, (Rule 77(1) of this Court's Rules), hence on or before **25th May, 2018**. The Notice was served on **18th July, 2018**. The letter bespeaking the proceedings ought to have been served within thirty (30) days. The applicant applied for proceedings on **31st May, 2018** but served the letter bespeaking the proceedings on **18th July, 2018**, clearly outside the thirty (30) days. These procedural lapses do not feature in the motion before me. Supposing I were to grant the orders sought, which orders are confined to two substantive prayers, what happens to the late service of the Notice of Appeal and the late service of the letter bespeaking typed proceedings? In my view, there will still be procedural lapses not salvaged by the two prayers in this motion i.e an extension of time to file the Notice of Appeal as well as an extension of time to file the record of appeal. There are no prayers seeking extension of time as regards late service of the Notice of Appeal as well as the letter bespeaking the proceedings.

The other issue is as regards the unexplained delay leading to the filing of the motion on **2nd February, 2019**. The applicants proffered no explanation why it took them time upto **30th October, 2018** to file the instant motion. If by **18th July, 2018**, the respondent had discovered that the Notice of Appeal had been filed late by one day, that the letter bespeaking the proceedings had not been served upon the applicant, why did it take them upto **2nd February, 2019** to lodge the motion dated **31st January, 2019**, the motion urged before me?

In **Karny Zaharya & Another vrs. Shalom Levi. C. Appl. No. 80 of 2018, Koome, JA** stated:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal”. In Athuman Nusura Juma vs. Afwa Mohamed Ramadhan, CA No. 227 of 2015, this Court stated thus, on that issue:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.”

Similarly, in Abdul Azizi Ngoma vrs. Mungai Mathayo [1976] Kenya LR 61, 62, the Court of Appeal held:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

The instant motion was lodged on **2nd February, 2019**. What about the period leading to its filing? What were the intervening circumstances? The delays were not explained. It is in view of the above that I have come to the conclusion that the motion herein is bereft of merit. It is hereby dismissed with costs to the respondents.

Dated and delivered at Malindi this 7th 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