



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CIVIL APPLICATION NO. 50 OF 2017

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....1ST APPLICANT

RAYMOND W. BOMETT & 6 OTHERS.....INTERESTED PARTIES

AND

PONDENI FARMERS CO-OPERATIVE

SOCIETY LTD & 18 OTHERS.....RESPONDENTS

AND

COMMISSIONER OF CO-OPERATIVE

DEVELOPMENT & 7 OTHERS.....RESPONDENTS

(Being an application to strike out an Appeal arising from the judgment and Decree of the High Court of Kenya at Kitale,

(Obaga, J.) delivered on the 13th May, 2015

in

HIGH COURT PETITION NO. 1 OF 2009)

(CONSOLIDATED WITH)

CIVIL APPLICATION NO. 74 OF 2017

BETWEEN

PONDENI FARMERS CO-OPERATIVE

SOCIETY LIMITED.....APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....1ST APPLICANT

(In the matter of application for extension of time to lodge the Record of Appeal, in appeal arising from the judgment and decree of the High Court of Kenya at Kitale (**Obaga, J.**) delivered on the 13th May, 2015

in

KITALE COURT PETITION NO. 1 OF 2009)

RULING OF THE COURT

[1] There are two applications that have been argued before us. The first is a notice of motion dated 19th May 2017 that was lodged by Kenya Commercial Bank Ltd (KCB), on 23rd May 2017. That motion seeks to have the notice of appeal dated 18th May 2015, that was filed and served on KCB's advocate on 20th May 2015, struck out or deemed to have been withdrawn.

[2] Michael Owuor & Co advocates who were the advocates for Pondeni Farmers Co operative Society Limited and 18 others had lodged the notice of appeal in the High Court on 20th May 2015, indicating that his clients who were the petitioners in Petition No 1 of 2009 in the High Court at Kitale intended to appeal against the judgment of the High Court delivered in that petition on 13th May 2015.

[3] The subject of the petition in the High Court is not clear, as neither the petition nor the judgment of the High Court has been availed to this Court. However, an affidavit sworn by Nathan Mutali Mmasi the chairman of the 1st intended appellant Pondeni Farmers Co-operative Society Limited (herein Pondeni Farmers) reveals that the dispute involves parcels of land occupied by 6000 members of Pondeni Farmers.

[4] KCB who was the 5th interested party in the High Court petition contends that no appeal having been instituted by the petitioners two years down the road, it is apparent that the intended appellants have lost interest in the intended appeal. KCB has thus moved the Court to apply Rule 83 of the Court Rules that allows the Court under such circumstances to strike out the notice of appeal or deem it as withdrawn.

[5] The intended appellants were served with KCB's motion and the motion listed for hearing on 2nd October 2017. Meanwhile on 2nd August 2017, Pondeni Farmers filed a notice of motion dated 25th July 2017. This is the second motion before us in which Pondeni Farmers seeks extension of time within which to have the record of appeal filed.

[6] In their motion Pondeni Farmers explain that they had instructed their lawyer Mr. Michael Owuor who lodged an appeal within the statutory period by filing an appropriate notice and applying for proceedings of the High Court; that they expected the advocate to file the record of appeal within the required period but only came to learn later that the advocate had died in October 2015; that it took time to get their file from the advocate's office as the advocate was a sole practitioner; and that the delay was not deliberate or of their making. Further that the intended appellants have an arguable appeal with a likelihood of success and that unless the application for extension of time was granted the appeal would be rendered nugatory and the intended appellants would suffer loss and damage.

[7] Since the two applications were different sides of the same coin, the Court directed that the two applications be consolidated and heard together. For KCB it was submitted, *inter alia*, that no record of appeal having been filed, Rule 82(1)(a) & (b) of the Court Rules were contravened and therefore the notice of appeal should be struck off. In response to the motion for extension of time by Pondeni Farmers, KCB urged the Court that the motion was an afterthought, as Pondeni Farmers had not demonstrated the steps if any that they had taken to pursue the appeal.

[8] On its part, Pondeni Farmers submitted that the Court had powers to extend time notwithstanding the application to strike out the appeal; that the former advocate of the intended appellants had applied for proceedings and served the letter bespeaking the proceedings on the advocate for KCB; and that KCB was unlikely to suffer any prejudice if time is extended for filing the record of appeal.

[9] We have given due consideration to the two applications including the submissions made by counsel and the authorities relied upon. An application for striking out a notice of appeal falls under Rule 53(2) of the Court Rules and can only be heard by the Court, while an application for extension of time falls under Rule 53(1) of the Court Rules and is ordinarily heard by a single judge.

[10] Be that as it may, the consolidation of the two applications was done pursuant to an order of this Court. In addition, Rule 4 of the Court Rules gives the "Court" powers to extend time. "Court" is defined under section 2 of the Court Rules to mean "*the Court of Appeal and includes a division of the Court and a single judge exercising any power vested in him sitting alone.*"

[11] Rule 53(1) of the Court Rules does not take away the power of the Court to extend time, but merely gives the single judge power to hear such applications, and the single judge simply exercises that power on behalf of the Court. This means that where appropriate the Court can directly exercise the power donated to it under Rule 4 of the Court Rules. In the case of Pondeni Farmers the circumstances of the application for extension of time as set out above, justifies the application for extension of time being heard by this Court as constituted.

[12] The motion for striking out the notice of appeal is anchored on the fact that there has been no record of appeal filed within the required period. On the flip side Pondeni Farmers while admitting the delay, have attributed the delay to the death of its former advocate Mr. Michael Owuor, and the time it took to get their file thereafter. The death of the advocate for Pondeni Farmers has not been disputed. Nor can it be disputed that taking action on files that were pending action in the advocates office could have taken time as the clients had to wait for the

winding up of the firm of the deceased advocate and for a sole practitioner this takes time. The reason given for the delay is therefore plausible.

[13] In considering an application for extension of time under Rule 4 of the Court Rules, the Court exercises an unfettered discretion whose sole purpose is to meet the ends of justice and prevent the abuse of the court process. As has been stated before by this court the only caveat in the exercise of the Court's power under Rule 4 of the Court Rules is that the power must be exercised judicially taking into account the peculiar circumstances obtaining in a particular matter (***Mwangi vs Kenya Airways Limited [2003] KLR 486***).

[14] The fact that the intended appellants instructed their advocate to lodge an appeal against the decision of the High Court is evident from the immediate action taken by the advocate in filing the notice of appeal 7 days after the judgment, and applying for copies of the proceedings of the High Court. The intended appellants appear to have taken time in taking action after the death of their advocate, but that delay is in the circumstances excusable.

[15] We concur with the position taken by GS Pall JA in ***Hon. John Njoroge Michuki vs Kentazuga Hardware Limited [1998]*** eKLR that an application for extension of time to file the notice of appeal or lodge the record of appeal out of time should ordinarily be allowed unless the applicant has been guilty of unexplained and inordinate delay in seeking the indulgence of the Court or the Court is satisfied that the intended appeal is not arguable. In our view, the ends of justice demands that the motion for extension of time be allowed.

[16] The granting of the application for extension of time to file the record of appeal has breathed new life into the appeal and revived the notice of appeal that was ripe for striking out. We add that it would be an abuse of the court process to allow the striking out of a notice of appeal when it is clear that the failure to file the record of appeal was due to circumstances beyond the control of the intended appellants

[17] For these reasons, we dismiss the motion for striking out the notice of appeal and allow the motion for extension of time and extend time for the intended appellants to file the record of appeal within 21 days from the date hereof. Given the circumstances of these applications the order that commends itself to us is that costs shall be costs in the appeal.

Those shall be the orders of the Court.

Dated and delivered at Eldoret this 22nd day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR