



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 232 OF 2017

BETWEEN

ABERDARE STEEL & HARDWARE LTD.....APPELLANT

AND

SHREEJI ENTERPRISES LTD.....RESPONDENT

(Being an application for extension of time to file notice of appeal from the High Court of Kenya at Nairobi (Onguto, J.) delivered on 19th May, 2017 in Civil Case No. 37 of 2017)

RULING

1.The applicant has filed an application dated 9th October, 2017, brought under **rule 4 of the Court of Appeal Rules** seeking the following reliefs:

- a)The application be certified urgent and be heard ex-parte in the 1st instance.*
- b)The applicant be granted leave to appeal against the decree of Onguto, J. issued on 19th May 2017 and subsequent orders of 28th September 2017.*
- c)The said leave do operate as a stay of proceedings and/or execution.*
- d)The notice of appeal lodged on 29th June 2017 be deemed as duly filed and served.*
- e)Costs of this application be provided for.*

2.The application is supported by an affidavit of **Solomon Ndibui Ngechu**, the Director of the applicant Company, sworn on even date.

The impugned ruling was delivered on 19th May, 2017 by **Onguto, J.** in favour of the respondent herein in the presence of the respondent's counsel. The applicant's counsel was notably absent. In that ruling, the learned judge struck out the defendant's defence (**the applicant herein**) and also entered judgment for the plaintiff (**the respondent herein**) in the sum of **Kshs14,003,439.04/=** together with interest.

3.It is alleged that the applicant was neither notified of the ruling date nor the entry of the judgment. Apparently, to her dismay, the applicant only became aware of the judgment after a proclamation and warrant of attachment of her movable property was issued on 20th June, 2017.

4.On 21st June, 2017 the applicant filed an application in the High Court seeking leave to appeal and stay of execution pending appeal. This application was also dismissed.

5.The applicant, being dissatisfied with the said judgment, intends to appeal against the same. The applicant is aware that the prescribed time for filing an appeal has lapsed but urges this Court to exercise its discretion to enlarge such time. It is the applicant's averment that the intended appeal has a high chance of success and will therefore be rendered nugatory unless the application is granted; that the delay in filing the appeal was beyond the applicant's control; and lastly, that it is in the interest of justice and fairness that the application be allowed.

6.The application was opposed by the respondent. **Mr. Dhaval Soni**, a director of the respondent, swore an affidavit on 6th December, 2017 raising several grounds of objection as will be discussed hereunder.

7.Parties canvassed the application by way of oral submissions. It is undisputed that the impugned ruling was delivered on 19th May, 2017. However, the applicant filed its notice of appeal on 21st June 2017. Learned counsel for the applicant, **Ms. Musyoka**, reiterated that the applicant was not aware that the judgment was delivered on the aforesaid date. She submitted that they only became aware of the judgment on 19th June, 2017 when the applicant was served with warrants of execution by auctioneers.

8.She submitted that the applicant’s previous advocates had not notified the applicant about entry of the judgment. According to Ms. Musyoka, it was counsel’s mistake which ought not to be visited upon the applicant. Counsel contended that the intended appeal was brought in good faith and has a high chance of success. The applicant apportioned blame on the previous advocates for filing a shoddy defence. She prayed that the application be allowed and orders granted as prayed.

9.On the other hand, **Mr. Muriungu**, learned counsel for the respondent, opposed the application and asserted that the applicant’s substantive prayer was for leave to appeal against the decree, which was not necessary. He submitted that **Order 43 rule 1 of the Civil Procedure Rules** grants an applicant a right of appeal if a defence is struck out. In counsel’s view, there was no prayer by the applicant for leave to file an appeal out of time. He argued that prayer (c) seeking stay of execution can only be sought under **rule 5(2) (b) of the Court of Appeal Rules** before a full bench and could thus not be issued at this point.

10.Counsel went on further to point out that the High Court application was argued on 10th May, 2017, thereafter the court reserved the ruling for 11th May, 2017 but the same was adjourned to 19th May, 2017. It turned out that the applicant’s advocate did not attend court on the material date.

11.He submitted that the applicant has acted in bad faith as there was an identical application before the High Court that was struck out. It was his submission that this being a monetary decree, the applicant had, prior to the filing of the suit, issued the respondent with cheques amounting to the judgment sum that were dishonoured. Furthermore, the applicant never sought to amend her defence to explain why the cheques were dishonoured. He noted that there was neither a draft memorandum of appeal on record nor was there any offer by the applicant to provide security. He urged that the application be dismissed with costs.

12.I have considered the grounds stated on the face of the applicant’s motion, the affidavit in reply as well as the oral submissions.

13.The only issue that falls for my determination is whether the applicant is entitled to an extension of time for purposes of filing an appeal. Under **rule 75(2)** of this **Court’s Rules**, a notice of appeal ought to be lodged within 14 days from the date of the decision against which it is desired to appeal. This motion is brought under **rule 4** of this Court’s Rules. It is settled that the Court has unfettered discretion to determine whether to extend time or not. However, it is equally trite that this discretion must be exercised judiciously, not arbitrarily or capriciously. See. **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA. No. 14 of 2013**).

14.In adherence to the guiding principles, the Court should evaluate the length of the delay, the reason for the delay, the chances of success of the intended appeal, and whether or not the respondent would suffer prejudice if the Court were to grant the extension sought. In **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997**, these principles were set out thus;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

15.In the exercise of my discretion, I am also guided by the underlying principles as enunciated by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others, SC Appl 16/201**:

- i. 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;**
- ii.The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- iii.In exercising the discretion to extend time, it is a consideration to be made on a case by case basis;**
- iv.The reason for the delay should be explained to the satisfaction of the court;**
- v.The Court should consider whether there will be any prejudice to be suffered by the respondent if the extension is granted;**
- vi.The application should have been brought without undue delay.**

As expressed above, a party who seeks extension of time has the burden of explaining the cause of the delay. The applicant has stated that the delay was caused by mistake of her former advocate and in that regard, the mistake should not be visited upon the litigant. The applicant attributed the striking out of the defence to her former counsel’s indolence.

16.Indeed the applicant admits that she was late in lodging the notice of appeal but is requesting this Court to grant her leave to lodge the notice of appeal out of time and the notice filed on 29th June, 2017 be deemed as duly filed and served. From the record, I note that there is no draft memorandum of appeal. The applicant appears to suggest that she became aware of the impugned judgment on 19th June, 2017 when auctioneers served upon her warrants of execution. The ruling was delivered on 19th May, 2017. A notice of appeal was filed on 21st June, outside the statutory timelines. The applicant's motion was filed on 9th October 2017, almost five months after judgment was entered.

17.The respondent complains that this application is an abuse of the Court process and is only designed to frustrate the respondent's pursuit of the fruits of judgment. The respondent also argues that the applicant has acted in bad faith by filing multiple applications before the High Court seeking the same orders as in this Court and is therefore not deserving of the exercise of the Court's discretion.

18.Also, the respondent argues that the intended appeal has no chances of success, considering that the applicant had issued the respondent with cheques amounting to the judgment sum, which had all been dishonoured before the suit was filed. The applicant had not given any explanation as to why the cheques were not honoured.

19.Primarily, it is the applicant's assertion that while she was dismayed by the series of events that contributed to the delay in filing the appeal, the delay is not inordinate. Further, the applicant maintains that she has an eminently arguable appeal with a high chance of success and that the said ruling is likely to adversely affect the applicant for the reason that there is eminent danger of an attachment and an auction of her property, unless the orders sought are granted.

20.While it is fundamental that the Court always tries to determine disputes on their merits in the administration of justice, it does not mean that parties will be granted leave for extension of time automatically and in spite of their conduct in the whole process of litigation. As regards the chances of success of the intended appeal, I find that the information on the record is inadequate since no draft memorandum of appeal has been filed. I am however doubtful whether the intended appeal has any chances of success, considering that the applicant's cheques that had been issued to the respondent in settlement of the outstanding debt had all been dishonoured.

21.Regarding the period of delay, the applicant only approached this court for extension of time a little over 5 months after judgment was entered against her. That delay is inordinate and was not properly explained.

22.In view of the foregoing, I am not persuaded that I should exercise my discretion in favour of the applicant. I find that there is no sufficient cause to extend time for the applicant to file an appeal out of time. I therefore dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 11th day May, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR