



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 34 OF 2017

BETWEEN

KENYA MUSLIM CHARITABLE SOCIETY.....APPLICANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(Being an application for extension of time for filing an appeal out of time from the Judgment and Decree of the High Court at Mombasa (Kasango, J.) delivered on 24th September, 2015

in

HCCC No. 80 of 2001.)

RULING

[1] This is an application under **Rule 4** of the Court of Appeal Rules seeking an extension of time within which to file an appeal by Kenya Muslim Charitable Society (applicant). A brief background information will suffice to place this ruling in perspective. On or about February, 2001, the applicant filed suit by way of a plaint in the High Court at Mombasa against Kenya Revenue Authority (respondent). The plaint was amended severally but in what appears to have been the final version that was amended on the 10th April, 2014 the applicant was seeking the following orders:-

- a) A declaration that the defendant's action in failing to release and detaining the plaintiffs consignment of rice for over a period of six (6) months was unlawful.
- b) Ksh.98,850,000 as special damages as pleaded in paragraph 20 (a) above.
- c) Refund of Kshs.12,259,084 of the tax paid.
- d) Interest on (a) and (b) at court rates from 24th July, 2000 until full and final payment.
- e) Exemplary and punitive damages.
- f) Costs of the suit.

[2] The claim was strenuously opposed by the respondent, the suit was heard by **Kasango J.**, and by a judgement delivered on 24th September, 2015 the entire suit was dismissed with costs to the respondent. The applicant filed a memorandum of appeal dated 28th July, 2016 and a record of appeal on 19th August, 2016. Nonetheless, the respondent applied to have it struck out while citing *inter alia* **Rules 82 (2) & 3, 83 and 84** of this Court's Rules. This was on the grounds that the memorandum and the record of appeal was filed outside the stipulated period of sixty (60) days under Rule 82. The respondent brought an application under Rule 84 which provides that a party affected by an appeal can apply to court to strike out the appeal on the ground that an essential step had not been taken or certain prescribed timelines

had not been met. That application was allowed with the result that the applicant's appeal was struck out vide a ruling delivered on 25th May, 2017.

[3] Unrelenting, the applicant seems to have gone back to the drawing board and seeks to restart the whole process of appeal vide the instant application that was filed on 19th June, 2017. It is predicated on the grounds that the record of appeal was filed on 19th August, 2016 and the respondent applied to strike out the appeal on 22nd September, 2016 and it was struck out on 25th May, 2017. The application is also supported by the affidavit of Mohamed Shariff Abdullahi sworn on the same date. He states that they were not aware and did not receive any notification from court that the proceedings were ready for collection by 3rd February, 2016 until they received a letter dated 15th June, 2016 notifying them of the same and they immediately started following the proceedings through correspondence to the registry. They were issued with a certificate of delay on 23rd June, 2016 but they received it on the 30th June, 2016. However the certificate of delay indicated that the proceedings were ready on the 3rd February, 2016 when they were paid for which was not the case as they got to know the proceedings were ready on the 15th June, 2016. Pursuant thereto the record of appeal was filed on 19th August, 2016 which was struck out as aforesaid. According to the applicant it is desirous of pursuing the appeal to its logical conclusion, it will be in the interest of substantive justice to grant the extension of time.

[4] This application was opposed by Diana Almadi, through the replying affidavit on 14th May, 2016, according to the respondent, the averments that the applicant was not aware the proceedings were not ready and that the Deputy Registrar issued the wrong date on the certificate of delay were determined by this Court vide the Ruling of 25th May, 2017 where it was stated as follows;-

“whatever the case the Appellant is not being candid in its explanation and laying blame on the Deputy Registrar is unfair and in bad faith. There is no reason apparent or given why the Deputy Registrar would state otherwise. Further if indeed the said firm of advocates had acted on the instructions of the Appellant's counsel, we could have expected some sort of evidence perhaps by way of affidavit(s); how they went about executing the mandate bestowed upon them by the Appellant's advocates. There was no such evidence.”

Thus no justifiable reasons were adduced to enable a single Judge exercising discretion to grant the orders in favour of an application for extension of time. On prejudice to be suffered, the respondent stated that the Court having struck out the Appeal on 25th May, 2017 the respondent would wish to plan its affairs which would be impeded by a pending appeal and the attendant costs.

[5] During the hearing of the application, Mr Lakicha, learned counsel for the applicant reiterated the matters deposed in the affidavit of his client and the written submissions. He stated that his law firm was relying on another one based in Mombasa to obtain the court proceedings and that is why the letter was received late. Counsel cited several authorities that provide the guiding principles in an application such as this one among them ***Kenya Commercial Bank Ltd v Pickwell Properties Limited [2016] e KLR***. It was stated that in an application under **Rule 4** of this Court's Rules, a Judge exercises unfettered discretion to administer justice. In this case the matters to bring to bear is the period of delay, the reasons for the delay and the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance. See ***Fakir Mohamed v Joseph Mugambi & 2 Others, Civil Appl. NAI. 332/04***.

[6] Miss Diana Almadi, learned counsel for the respondent equally reiterated the matters deposed to in the replying affidavit, she also relied on her written submissions and list of authorities. According to counsel there were no justifiable reasons for extension of time; the same issues were canvassed before by the applicants and they were determined in the Ruling dated 25th May, 2017 by a full Bench of this Court. A party who seeks extension of time has the burden of laying the basis to the satisfaction of the court; first the application must be made without unreasonable delay and when it does occur there must be a satisfactory explanation including steps taken to remedy the wrong which the applicant failed to do. She also went on to distinguish the cases cited by counsel for the appellant.

[7] I have considered the application, the supporting affidavit, submissions by both counsel and the authorities cited as summarized above. It is obvious from the prayers sought that the instant application call for the exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The grounds relied on by the applicant are all on fours with the Supreme Court case in ***Nicholas Kiptoo arap Korir Salat –v– IEBC & 7 Others, Supreme Court Application No. 16 of 2014*** laid down the following as the under-lying principles that a Court should consider in exercise of discretion to extend time:

a. 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;

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

e. Whether there will be any prejudice suffered by the respondents if the extension is granted;

f. Whether the application has been brought without undue delay; and

g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

[8] The reasons advanced by the applicant for the delay in filing the appeal was that their advocate did not receive a letter dated 3rd February,

2016 from the court registry notifying them that the proceedings were ready for collection. Oblivious of the said letter they were following the proceedings which they received on 30th June, 2016 and the signed certificate of delay that was signed on 23rd June, 2016. Pursuant thereto they filed an appeal on 19th August, 2016 within time. I find these are the same arguments the applicant used to oppose the application to strike out the appeal. A full Bench of this Court explained in their Ruling why they found the reasons unsatisfactory as cited by counsel for the respondent elsewhere in this Ruling. Further the Judges expressed themselves as follows:-

“An attempt at an explanation as to the correct position was made by the appellant in its reply to the application by deposing that the Deputy Registrar despite having first notified the appellant that the typed proceeding were ready for collection on 15th June, 2016, the Registrar still insisted the date of 3rd February, 2016 as the date when the proceedings were actually ready for collection. The appellant however did not offer any explanation as to the reason why the Deputy Registrar would do so or even how it pursued that matter further. In our view, that explanation should be regarded as a feeble attempt by the appellant to clutch onto anything in a bid to salvage the otherwise doomed appeal. A proper reading of the certificate of delay shows that the Deputy Registrar was only clarifying the information that he had given in his letter of 15th June, 2016 that the court fees for the typed proceedings had been paid for on 3rd February, 2016 and proceedings were collected on the same day.”

[9] These are the same reasons being advanced by the applicant, I find myself unable to disagree with the above findings by a full Bench of this Court as indeed I find no reasons to do so. Counsel for the applicant urged that there would be failure of justice, considering the huge claim by the applicant which is an enormous sum of over 98 billion; a matter that can pass for a public interest claim considering that it was a claim against Kenya Revenue Authority that is a statutory body with the mandate of collecting revenue. Looking at the sheer amount of the claim, I could not help but wonder why counsel for the applicant would not fastidiously follow the proceeding and ensure the appeal was filed within time. Judgement was delivered on 24th September 2015, and since the proceedings were ready on the 13th February, 2016 the appeal ought to have been filed within 60 days. The respondent explained that an appeal being filed inordinately out of time impedes on their planning which is prejudicial as they have to factor in the burden of litigation. I agree a good appeal ought to be filed timeously and in accordance with the law otherwise it may cause undue prejudice to other parties who have a legitimate expectation that the litigation had come to an end when no appeal was filed.

[10] For those reasons, I find the application devoid of any merit and I do order it dismissed with costs to the respondent.

Dated and delivered at Mombasa this 5th day of July, 2018

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR