



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, JA (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 60 OF 2017

BETWEEN

HEZEKIAH W. GICHOHI.....APPELLANT

VERSUS

UHURU HIGHWAY DEVELOPMENT LTD.....1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

LIBYAN ARAB AFRICAN INVESTMENT

T/A GRAND REGENCY HOTEL.....3RD RESPONDENT

(An application for extension of time to file and serve a record of appeal against the ruling and decree of the High Court of Kenya at Nairobi (Mwera, J.) delivered on 12th May, 2010)

in

H.C.C.C. No. 292 of 2008)

RULING

1. The applicant, **Hezekiah W. Gichohi**, moved this Court on 21th March 2017 by way of notice of motion dated 20th March 2018 brought under **rule 4** of the **Court of Appeal Rules**, and **sections 3A** and **3B** of the **Appellate Jurisdiction Act**. He sought orders, first, for an extension of time to file and serve the record of appeal and second, that the record of appeal dated 6th March 2017 and served on the respondents on 8th March 2017 be deemed to have been properly filed and served. He also prayed for costs.
2. In his affidavit in support of the motion, the applicant deposed that the impugned ruling that gave rise to this application was delivered on 12th May 2010; that he was dissatisfied with the said ruling and immediately filed a notice of appeal on 26th May 2010.
3. The record shows that the respondents had commenced the proceedings for execution of the resulting decree on costs by filing their bill of costs which was taxed on 28th October 2011 in the sum of Kshs. 15 Million. The applicant averred that since then he has filed various applications to challenge those costs including the most recent, being a taxation reference filed on 7th December 2016.
4. In the meantime, the applicant approached his then advocates on record, **M/S Kinoti Kibe & Company**, to inquire if they had collected the proceedings for purposes of filing the appeal. From time to time, the applicant sent reminders to his advocates regarding the appeal but nothing much was done. After waiting for a number of years, the applicant became frustrated with his advocates and he decided to instruct the firm of **M/S Gacheru Ng'ang'a & Company Advocates** to act for him in place of his erstwhile advocates. The new advocates were instructed on 1st December 2016 but filed a notice of change of advocates on 5th December, 2016.
5. He further deposed that on 1st March 2017, his advocates perused the court file, only to discover that there existed on record an original copy of certificate of delay indicating that the previous advocates had collected the proceedings on 16th August 2012. He then instructed the

said advocates to file the appeal without further ado.

6. The applicant explained that the delay in filing the appeal was not intentional on his part but due to the mistake and blunder of his former advocates.

7. The applicant believes that his intended appeal is meritorious and has a good chance of success as exhibited in his memorandum of appeal dated **4th February 2017**. He also believes that the respondents shall not be prejudiced if this application is granted since the respondents are corporate bodies with perpetual succession.

8. When the application came up for hearing on 18th September, 2018, all the parties' counsel were in attendance. The applicant's advocate, **Mr. P.G. Nga'ng'a**, submitted that there were two delays, the first one being between **21st August 2012** and **1st March 2017** and the second one from **1st March 2017** to the date of filing this application on **21st March 2017**. In his view, the record of appeal having been filed on **6th March 2017**, the delay was not inordinate.

9. He attributed the first delay to the mistake of the previous advocate who even after collecting the High Court proceedings, failed to file the appeal on time. He urged the court to allow this application.

10. **Mr. Adala**, learned counsel for the 1st respondent, did not oppose the application. On the other hand, **Ms. Kavagi**, learned counsel for the 2nd respondent, opposed the application. She relied on the replying affidavit filed by **Mr. Chacha Odera** and reiterated that the ruling was delivered on 12th May 2010, notice of appeal filed on 26th May 2010 and this application filed on 21st March 2017.

11. She further submitted that the correspondence relied on by the applicant related to the period between June 2012 and August 2015. Nothing was said to explain the delay between May 2010 and June 2012. She urged the Court to dismiss the application with costs for the reasons that the dispute has been pending for over 16 years, the delay is inordinate and no sufficient reasons have been given for it. She blamed the applicant for his indolence, asserting that even if his former advocates were to blame, the case belongs to the applicant and he ought to have taken appropriate steps much earlier.

12. **Mr. Mwangi**, learned counsel for the 3rd respondent, equally opposed the application. He argued that the notice of appeal was not accompanied by a letter seeking typed proceedings and therefore the appeal ought to have been lodged within 60 days otherwise the applicant is deemed to have withdrawn his appeal under **rule 83** of this Court's Rules.

13. Counsel contended that there was no application for extension of time to file a notice of appeal. He asserted that the delay was 6 years and 8 months and no sufficient explanation had been given for it. He urged that this application be dismissed with costs.

14. In reply, **Mr. Ng'ang'a** stated that the certificate of delay was issued. He admitted that the delay was inordinate but maintained that the explanation rendered was sufficient.

15. He cited **Sections 3A and 3B** of the **Appellate Jurisdictions Act** and submitted that advocates have a duty to assist the Court to dispose of matters expeditiously. He further relied on **Articles 159 2(d)** which requires that justice shall be administered without undue regard to technicalities and **48** of the **Constitution** which provides for access to justice.

16. The principles that guide this Court in an application of this nature are well settled. The Court exercises its unfettered discretion and in so doing, it considers the period of delay; the reason for the delay; the chances of success of the intended appeal if the application is granted; and the degree of prejudice that the respondent is likely to suffer if the application is allowed, among other considerations. See **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR**.

17. The applicant herein alleges that he instructed his former advocates to file an appeal against the High Court's decision delivered on 12th May 2010. It is not disputed that a notice of appeal was filed on 26th May 2010. The certificate of delay issued on 21st August 2012 indicates that the applicant's advocates applied for the certified proceedings on 26th May 2010 and collected the said proceedings on 16th August 2012.

18. Whilst it is true the applicant expressed his frustration several times in his letters to his former advocates, he only decided to change his advocates on 1st December 2016. There is however no explanation as to why he had to wait for so long. It is also true that the applicant cannot be faulted for his former advocates' mistake in failing to prepare and file the record of appeal. From the record, I note that the correspondence alluded to by the applicant was between 2014 and 2015, although there is an initial one written on 14th June 2012 in which the applicant was asking about the status and progress of the matter.

19. The letter dated 12th June 2014 from **Kinoti Kibe & Company Advocates** indicated as follows; "**Finally now that the file is back in the court registry we shall ensure the proceedings are quickly typed so that we can file an appeal against the ruling of Mwera J. which struck out our suit**". However, the certificate of delay indicates that the advocates collected the proceedings on 16th August 2012. It is quite unfortunate that even with that information at hand, the said advocates were less than candid with the applicant; they were privy to the certified proceedings and yet they failed to take any action in filing the appeal, let alone inform the applicant or if they did, there is nothing on the record to show that they did so.

20. Nevertheless, even if I was to fault the said advocates for the delay in filing the appeal after receiving the proceedings, there is still this other delay that needs to be addressed.

21. As correctly stated by the applicant, the first delay is the period between the date the certificate of delay was issued and the date the applicant appointed his new advocates 1st December 2016. The second one is from 1st March 2017 when the current advocates perused the court file and became aware that the certified proceedings had been collected to the date of filing this application.

22. I shall not dwell on the delay between the date of the impugned ruling, 12th May 2010 and the date the typed proceedings were issued in 2012 as this was an administrative issue on the court's part and hence the applicant cannot be faulted for that. In that regard, the Supreme Court in **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** observed that:

“The issue of delay of typed proceedings is well known in our legal system and on this basis; this Court has previously extended time and held that such a delay is not on part of the party but the court and that this issue consists of facts beyond a party's reach.”

23. What concerns me is the period after issuance of the certificate of delay and the period after new counsel was appointed. A court of law will not shut out a litigant who acts with a sense of dispatch and is able to show that he was diligent in pursuing the filing of an appeal, especially where the delay was unavoidable. However, all manner of delay and non-compliance with the set timelines must be properly explained.

24. In this case, there is no plausible explanation given as to why the applicant did not change his advocates much earlier, and why the current applicant's counsel did not seek extension of time soon after he was instructed or upon receipt of the proceedings, and even after filing the record of appeal on 6th March 2016 he still took some time, 15 days to be precise, before filing this application.

25. It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. That was not done. Having received instructions in December 2016, the current advocate for the applicant waited until March 2017 when he perused the court file and found that the applicant's former advocate had collected the proceedings in August 2012. I do not agree with Mr. Ng'ang'a that this delay was not inordinate in the circumstances.

26. On the issue of whether the intended appeal has a high chance of success, the applicant contended that the issues raised in the memorandum of appeal raised arguable points. The Supreme Court in **County Executive of Kisumu v County Government of Kisumu (supra)** had this to say regarding this issue of arguability:

“We have also perused the issues framed, which the applicant intends to raise on appeal before this Court.

While we find that indeed the issues as highlighted are germane and novel, this alone cannot be a reason for grant of extension. This Court will not admit a matter for hearing on the premise of the novelty of a matter, but upon due exercise of its jurisdiction and within the laid out legal framework. Arguability of a matter is not a ground alone for extension of time.”

27. I fully associate myself with the above proposition and hold that even though an arguable appeal does not necessarily mean one that will succeed, the chances of success of an appeal is not a ground alone for granting extension of time.

28. For the reasons stated above, I am not inclined to grant the orders sought by the applicant. Consequently, the application dated 20th March, 2018 is hereby dismissed with costs to the 2nd and 3rd respondents.

Dated and delivered at Nairobi this 26th day of October, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR