



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KANTAL, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 9 OF 2018 (UR 8/2018)

BETWEEN

MUCHANGI NDUATI NGINGO

T/A MUCHANGI NDUATI & CO. ADVOCATES.....APPLICANT

AND

SHEPHERD GROUP OF COMPANIES LIMITED.....1ST RESPONDENT

WANJAMA & COMPANY ADVOCATES.....2ND RESPONDENT

(Being an Application for extension of time to file and serve Notice of Appeal out of time

— against the judgment of Hon. Justice Rachel Ngetich, J.) delivered on 28th July, 2017

in

HCC No. 928 of 1999)

RULING

In the Notice of Motion brought under **rule 4** of the rules of this Court, the **applicant, Muchangi Nduati Ngigo T/A Muchangi and Company Advocates** prays that I extend time to file and serve a Notice of Appeal in an intended appeal against the judgment delivered on 28th July, 2017. In grounds in support of the motion and in an affidavit of the applicant, it is said that judgment of the High Court was delivered without notice to the applicant or his advocate; that the matter had been slated for mention on 20th June, 2017 when a counsel appeared before the Judge of the High Court to take a date for judgment and that counsel informed the applicant's counsel that judgment was to be delivered on 20th July, 2017 which date was diarised, but that on that date it was found that the date was entered by mistake as judgment was not to be delivered on that day; that judgment was delivered on 28th July, 2017 in the absence of the applicant or his advocate and that the applicant only got to know that a judgment had been delivered when a bill of costs drawn by the plaintiff (respondents here) was served on 4th December, 2017.

It is further stated that there was an inadvertent mistake on the part of counsel for the applicant which mistake I am told to excuse and not to visit on the applicants and that the intended appeal is not frivolous and shall raise serious issues of substantive and procedural law in challenging the judgment of the high Court.

In a replying affidavit, **Peter Mwangi Wangondu**, a director of the 1st respondent **Shepherds Group of Companies Limited** deponed amongst other things, that judgment was delivered on 28th July, 2017 after a date for the same had been given for 20th June, 2017 in the presence of counsel for all parties; that the application had been filed six months after delivery of judgment which according to him is delay which is inordinate; that the matter is almost 21 years in the Judicial process, that there are certain principles to be followed in considering an application like the current one and that I should not allow the application.

The motion came up for hearing before me on 8th November, 2018 when Mr. Elijah Mageto appeared for the applicant and Miss Nelly Cheruiyot appeared for the respondents. Mr. Mageto informed me that when the matter was mentioned before the Judge of the High Court on 20th June, 2017 he (the lawyer) was away in Kisumu and sent another lawyer to appear before the Judge. That advocate indicated that

Judgment would be delivered on 20th July, 2017 as per an annexure attached to the affidavit showing entries in their diary for 19th and 20th July, 2017. Further that he attended court on 20th July, 2017 when the court clerk informed him the judgment was not for delivery that day. That, he then waited to be served with a notice but what followed was service of the Plaintiff's Bill of Costs on 4th December, 2017. He asked me to exercise discretion and extend time to file a notice of appeal out of time.

Miss Cheruiyot for the respondents relied on the replying affidavit of her client and stated in submissions that counsel for the applicant should have explained why he did not peruse the Court file to find out the proper judgment date. She further told me that it had not been stated whether there was an arguable appeal.

The factors that apply in exercise of discretion to extend time in an application like this one have been settled for some time now. In the case of **Leo Sila Mutiso Vs Rose Hellen Wangare Mwangi (Civil Application No. 255 of 1977)** a decision of bench of three judges, the following passage appears as relate factors which are relevant in a **rule 4** application:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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”

In the application before me it is stated that a date for judgment was given but judgment was not delivered on the date that it was supposed to be delivered. According to counsel for the applicant, he was not served with a notice of judgment and it was not until the 4th of December, 2017 when the applicant came to know that judgment had been delivered upon being served with a bill of costs. I note that the motion was filed in Court on 22nd January, 2018 a period of slightly over six weeks after counsel came to know that judgment had been delivered if I am to believe that the date of 4th of December, 2017 was the date when counsel knew that judgment had been delivered. I have also seen a note attached to the application on page 23 of the record which asked a lawyer to hold brief for counsel for the applicant to take a judgment date. There is a note indicating the date 20th July, 2017 and the lawyer who held brief is shown as Mr. Muthue. There is then the diary entry on 19th and 20th July, 2017 showing that the case was diarised as coming for judgment on 20th July, 2017.

I have perused the draft Memorandum of Appeal attached to the application and I think that the applicant raises matters that I cannot say are frivolous.

I do not agree with counsel for the respondent that there was inordinate delay. The applicant was not served with a notice of judgment and the respondents who were plaintiffs in the case did not inform the applicant of the delivery of judgment and waited until December to serve the applicants with their bill of costs. I am satisfied in any event that the respondents would not be prejudiced if I exercise my discretion in favour of the applicant who I find to have a right of appeal in this matter in any event.

I am satisfied that the applicant is entitled to my exercise of discretion and I allow the motion dated 19th January, 2018 and order that the applicant shall file and serve a Notice of Appeal within 14 days of today. Costs of the application shall be in the appeal.

Dated and Delivered at Nairobi this 23rd day of November, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR