



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI,JA (In Chambers))

CIVIL APPLICATION NO. NAI 294 OF 2015

DELTA HAUKLAGE SERVICE LTD APPLICANT

VERSUS

COMPLAST INDUSTRIES LTD RESPONDENT

(Being an Applicant for extension of time to file Notice of Appeal

against the judgment of the High Court of Kenya at Nairobi

(Mabeya, J) dated and delivered on 22nd day of May 2015

in

H.C.C.C. NO. 1058 of 2006)

RULING

The applicant, Delta Hauklage Services Ltd, a limited liability company, lodged in this court on 10th December 2015 an application by notice of motion dated that day imploring the court to exercise its discretionary under rule 4 of the Court of Appeal Rules to extend time to file notice of appeal and record of appeal against the judgment of the High Court (Mabeya J) delivered on 22nd May 2015 in Nairobi High Court Civil Case No.1058 of 2006. The grounds for making the application are stated in the body of the application to be; that the applicant's notice of appeal was filed late by six days on 10th June 2015 and was struck out on 17th November 2015; that after filing it, the applicant collected the notice from the court registry on 19th June 2015 after the Registrar had endorsed it; that the applicant served the notice of appeal on 19th June 2015 on the respondent; that by that time the 7 day period within which it should have been served had elapsed; that this is what led to the striking out of the notice on 17th November 2015; that at the material time, the applicant's counsel was away from his office for two weeks following the demise of his father thereby occasioning delay in filing and serving the notice of appeal; and that the delay is not inordinate.

The affidavit in support of the application was sworn by Julius Juma, an advocate of the High Court of Kenya instructed by the applicant. It reiterated the grounds for making the application and annexed a copy of the letter dated 10th June 2015 by the applicant's said advocate to the Registrar seeking copies of the

judgment, decree and proceedings.

The respondent opposed the application in its replying affidavit sworn on 18th May 2016 by James Rimui, the advocate instructed by the respondents, which was lodged in court on 20th May 2016. In the replying affidavit, the respondents aver that the delay has not been satisfactorily explained and that there is no explanation why the other partners or associates of the firm of Julius Juma & Company advocates could not file the notice in absence of Julius Juma who, although said to be bereaved, did not annex a copy of the death certificate to prove the demise of his father. It is the contention of the respondent that the notice of appeal was filed late on 10th June 2015 instead of 5th June 2015 and was served out of time on 19th June 2015 instead of within 7 days of the date of filing on 17th June 2015. The respondents contend that it was as a result of the applicant's default in meeting the time-lines set by the Rules that the respondents applied on 25th June 2015 in application No.172 of 2015 for striking out of the notice of appeal which was dismissed for non-attendance following which the respondents filed another application No.189 of 2015 for striking out which was conceded on 17th November 2015 leading to the striking out of the notice of appeal dated 10th June 2015.

The respondents contended that the application for extension of time by the applicant was filed 7 months after delivery of judgment on 22nd May 2015 and that the delay has not been sufficiently explained and that it is inexcusable.

When the applicant's notice of motion for extension of time came up for hearing before me, learned counsel Mr. Julius Juma appeared for the applicant while learned counsel Mr. H. Shah assisted by learned counsel Mr. Rimui appeared for the respondents.

Mr. Juma implored the court to grant the application urging that the delay was not due to negligence and that the fact of his bereavement contributed to the delay of six days in filing the notice. It was Mr. Juma's submission that the applicant's appeal which relates to material damage claim is arguable. Counsel sought to distinguish this court's decision in Civil Application Nai 246 of 2013 (unreported) involving **Aineah L. Njirah versus Aga Khan Health Service** by pointing out that the delay in the case was of 6 years, judgment having been delivered in 2008 and extension of time to appeal being sought in 2012.

In **Pan African Life Assurance Ltd v. Carolyn Chegero Vereso** [2015] eKLR, counsel contended that the respondent had an opportunity for more than one year to take steps to regularise the notice of appeal but failed to do so.

On behalf of the respondent, Mr. Rimui opposed the application. He contended that the applicant is underserving of the exercise of discretionary power by this court to extend time because, in his view, the applicant failed to show that conditions that warrant the exercise of the discretion exist and further because no satisfactory explanation for the delay was given.

It was Mr. Rimui's submission that the applicant had failed to satisfactorily explain the delay between the time for filing of the notice of appeal and time of filing of the notice of motion which spanned six months; that the lateness of one month in filing the notice of motion on 14th February 2015 was not explained. Counsel contended that if the applicant's application is allowed, the respondent will suffer prejudice especially as the cause of action accrued 12 years ago in 2004 and extension of time will also keep alive a matter that has been determined. In conclusion, the respondent's counsel urged that the applicant had failed to show that the intended appeal had merit and further, that decisions of this court on the principles for extension of time to appeal under rule 4 of the Court of Appeal Rules do not support the applicant's case.

I have perused the application and the supporting affidavit as well as the replying affidavit. I have also duly considered the rival submissions of counsel.

The facts emerging from the application are not in contest. The applicant intends to appeal against the judgment of the High Court (Mabeya J) delivered in Suit No.1058 of 2006 on 22nd May 2015. He ought

to have given Notice of

Appeal within 14 days of delivery of the judgment pursuant to rule 75(1) of the Court of Appeal Rules and served it upon the respondent within 7 days of filing as required by rule 77(1) of the said Rules. However, he filed the notice of Appeal on 10th June 2015. He was out of time by six (6) days in serving the notice as he served it on 19th June 2015 instead of on or before 17th June 2015. The respondent's application to strike out the notice of appeal was heard and allowed on 17th November 2015 when the notice of appeal was struck out. On 14th December 2015, the applicant applied for extension of time, hence this ruling.

The period of lateness in filing the struck out notice of appeal was 6 days. The applicant took 27 days to apply for extension of time.

The respondent contended that the applicant has failed to explain the delay between 17th November 2015 when the notice of appeal was struck out and 14th December 2015 when the application for extension of time was lodged in Court. However, the failure to give the notice of appeal within 14 days which resulted in 6 days lateness which in turn led to the striking out of the notice on 17th November 2015 was explained. The applicant's counsel averred in the supporting affidavit that he lost his father and was forced to be away for two weeks. Although counsel for the respondent contended that the applicant did not exhibit a copy of his father's death certificate, it is hardly likely that an advocate of this court would invoke the death of a parent in explaining delay if such death did not take place. I also do not expect an advocate in circumstances of death of a parent of a colleague to doubt the veracity of the statement, much less seek documentary evidence to prove it. On my part, the delay of six days in filing the notice in the circumstances where the advocate for the applicant had suffered loss of his father cannot be said to be inordinate.

At any rate, it has been satisfactorily explained.

As regards the delay in seeking extension of time, the applicant knew that the notice of appeal was struck out on 17th November 2015. He avers that he conceded the application to strike out. He ought after this to have acted with dispatch to apply for extension of time. He lodged an application in this regard on 14th December 2015, exactly after 26 days. The burden of giving a satisfactory explanation for that delay reposed on the applicant.

The applicant's counsel, both in the affidavit sworn by him on 14th December 2015 and in his submissions in court, seems to have focused more on explaining the delay of 6 days in giving the notice of appeal that led to striking out of the notice on 17th November 2015. He bore the burden of explaining why he took 26 days to apply for extension of time and also show that the intended appeal is arguable and that no prejudice will be caused to the respondent which cannot be compensated for by an award of costs if time to appeal is extended.

Taking all the circumstances of this application into account and the fact that the lateness by the applicant's counsel in giving notice was not inordinate and was in any case satisfactorily explained, and having regard to the fact that the applicant's counsel was in a state of bereavement, and although he should have moved with a greater sense of dispatch to seek extension of time, I think in the circumstances of this case where the applicant's counsel was bereaved and the intended grounds of appeal reflect, prima facie, an arguable appeal and the alleged prejudice to the respondent can be redressed by costs, extension of time ought to be granted. I observe that unless the judgment intended to be impugned is reviewed on appeal, the applicant shall lose his right to have the appeal heard and determined on merits and as his cause of action in tort became time barred in 2007, having crystallized in June 2014, there is need to have the appeal heard on merits.

In the result, I allow the application and order that the time for lodging notice of appeal is extended to the end of 14 days from the date of this ruling and the notice of appeal shall therefore be filed on or before

the expiry of 14 days from the date of this ruling.

The applicant shall pay to the respondent costs of this application in any event.

Dated and delivered at Nairobi this 31st day of March, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR