



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 277 OF 2016 (UR 225/2016)

BETWEEN

HOMELEX LIMITED.....APPLICANT

VERSUS

JARIBU CREDIT TRADERS LIMITED.....RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal out of time in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (G.V. Odunga, J.) dated 19th January, 2015

in

H. C. C. No. 63 of 2006)

RULING

This is an application under Rule 4 of the Court of appeal Rules for extension of time for filing and service of a notice of appeal.

The applicant intends to appeal against the judgment of the High Court delivered on 19th January, 2015. It is apparent from the facts contained in the judgment that the applicant supplied electronic goods to the respondent in pursuance to a contract, for the value of Kshs. 1,034,818. The respondent failed to honour the invoice claiming that the goods supplied were counterfeits and in breach of an oral guarantee that the goods would be genuine. The applicant filed a winding-up petition in respect of the total claim of Kshs. 1,191,504/-.

The respondent filed a suit seeking an injunction to restrain the applicant from advertising or proceeding with the winding-up petition on the ground that the debt was genuinely disputed. The application filed a defence and counter-claim claiming Kshs.1,191,504/- from the respondent. After full hearing, the High Court allowed the suit with costs and dismissed the counterclaim. The costs were later taxed in the sum of Kshs. 433,446. On 6th December, 2016 the applicant's goods were proclaimed by the auctioneers. It is the proclamation that precipitated the making of the present application.

The applicant states that the delay in filing the notice of appeal was caused by failure by his former

advocates to communicate the judgment of the court to him. He has annexed a copy of the letter dated 10th June 2014 written to its former advocates complaining that the advocates had failed to give a statement of account in respect of payments received in respect of various the cases and to communicate to the applicant. The respondent states that the letter relied on was written 44 days before Adamali E. Mamujee, the applicant's witness in the suit gave evidence and that after the hearing of the suit, several other proceedings took place.

The Court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time on such terms as it thinks fit.

The factors that the Court should take into account in exercising its discretion include the merit of the intended appeal, prejudice that the respondent would suffer if the application is allowed and the question of delay. (**Wasike v. Swala [1984] KLR 591**).

On the question of delay, it is evident that the application was filed almost 11 months since the judgment was delivered. That delay is inordinate. The applicant was aware of the fact that the suit had been heard as its witness gave evidence at the trial. There is no evidence that after the trial the applicant made any inquiries from its former advocates regarding the outcome of the suit.

It is apparent that the application was filed to stave off the execution to recover the taxed costs. I am not satisfied that the applicant has given a reasonable explanation for the inordinate delay in filing the application.

I have perused the proposed grounds of appeal. The main issue was whether the goods supplied to the respondent were counterfeit goods. This was an issue of fact. The learned Judge considered the evidence including the fact that the goods in question had been seized by enforcement authority and the fact that the applicant had been prosecuted in respect of the goods. After weighing the evidence, the learned judge made a finding of fact that the goods supplied were counterfeits. The applicant conceded at the trial that the respondent was not bound to pay for the goods if they were counterfeits. In the circumstances and having regard to the principles for interfering with a trial Judge's finding of fact, I am not satisfied that the intended appeal is, *prima facie*, arguable.

The execution is for recovery of taxed costs for not a relatively large amount. I am not satisfied that any real prejudice will be caused to the applicant if the time to appeal is not extended.

In the premises, the application is dismissed with costs.

DATED and delivered at Nairobi this 3rd day of March, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR