



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KIAGE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 259 OF 2014

BETWEEN

NATIONAL CEREALS AND PRODUCE BOARD.....APPLICANT

VERSUS

PETER GITHINJIRESPONDENT

(Being an application for extension of time to file and serve the Memorandum of Appeal and Record of Appeal, respectively, out of time in an intended Appeal from the Judgment and Decree of the Industrial Court of Kenya at Nakuru delivered by the Hon. Mr. Justice Byram Ongaya on 12th July 2013 in Industrial Court Cause No. 3 of 2013)

RULING OF THE COURT

By its Notice of Motion dated 8th September 2014 but lodged on 24th September 2014, the applicant, National Cereals and Produce Board, seeks the following prayers;

- 1. THAT the applicant be granted leave to file and serve the Record of Appeal in respect of the Judgment and Decree of the Honourable Mr. Justice Byram Ongaya delivered on 12th July, 2013, out of time and/or there be an extension of time for filing and serving the Record of Appeal.**
- 2. THAT the Record of Appeal filed vide NAK No. 27 of 2014 be deemed to have been filed and served within time.**
- 3. THAT the costs of this application be provided for.**

The application is expressed as brought under the provisions of **Sections 3A and 3B** of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya and Rules 4, 47, 74, 75 and 82 of the Court of Appeal Rules 2010 and “all enabling provisions of the law”, a mere surplusage. The substantive rule is **Rule 4** of the Court of Appeal Rules.

On the face of the motion appear the following grounds on which it is based;

- a. The High Court rendered the decision the subject of the intended Appeal on 12th July, 2013.**
- b. The applicant was aggrieved by the Superior Court’s decision and duly instructed its**

Advocates to proceed and file an appeal against that decision.

- c. **A Notice of Appeal was duly lodged on 25th July, 2013 which period is within the fourteen (14) days period prescribed by the Rules of the Court to lodge an appeal.**
- d. **The application for typed and certified copies of the proceedings was made by letters dated 22nd July, 2013 and 20th August, 2013.**
- e. **The Deputy Registrar of the Superior Court notified the applicant's advocates that the proceedings were ready for collection on 6th June, 2014 and that the same would be supplied upon payment of the requisite charges.**
- f. **The applicant's advocates only managed to pay for and collect copies of the proceedings and judgment on 13th June, 2014.**
- g. **The record of appeal was lodged in Nakuru on 25th August, 2014.**
- h. **The delay was occasioned by a delay in the appellant giving final instructions on the filing of the appeal.**
- i. **The delay is not inordinate.**
- j. **The appeal has been lodged vide CIVIL APPEAL NO. NAK 27 OF 2014 and should be regularized and heard on merit.**
- k. **The respondent will not suffer any prejudice.**

l. The appeal raises substantial questions of law and fact which should be allowed to proceed on merit.

In support of the application the applicant's Acting Board Secretary Patrick Karanja swore an affidavit on the said 8th September 2014 in which he averred that following a judgment for Kshs. 1,035,623.40, in favour of Peter Githinji (the respondent) on 12th July 2013, he gave "preliminary instructions" to the applicant's advocates to file a notice of appeal. This was followed by a request for proceedings which proceedings were paid for, and upon being ready collected, by the applicant's advocates who then sought instructions for lodging of the appeal.

Those instructions did not issue, however, until 18th August 2014 and the record of appeal was finally filed on 25th August 2014 as Civil Appeal No. **NAK 27 of 2014** and served on the respondent's advocates. The deponent then avers as follows in paragraphs 13 to 17;

13. THAT the delay in giving instructions for filing of the appeal was occasioned by the appellant's administrative processes owing to the absence of a substantive Managing Director until July, 2014 when Mr. Newton K. Terer was appointed.

14. THAT the delay in lodging the appeal is not inordinate and deliberate.

15. THAT the appeal raises substantial questions of law and fact which should be heard and determined on merit.

16. THAT the appellant is a public corporation and public funds are involved.

17. THAT the respondent will not suffer any prejudice as the decretal sum has been deposited in a joint interest earning account. Attached hereto and marked ANNEXURE "1" is a copy of the

said Fixed Deposit Receipt.

The respondent on 8th October 2014 swore an affidavit in reply by which he opposed the application, terming the delay lengthy, without reasons for it being given. He termed the delay in getting instructions from top management as ‘not valid’ and the application itself as “an afterthought actuated by malice and is meant to defeat the cause of justice”. It was lacking merit, frivolous, vexatious and an abuse of process, deserving of dismissal.

At the hearing of the application **Mr. Lutta**, the applicant’s learned counsel reiterated the contents of the supporting affidavit by way of explanation for the delay which he urged me to find not to have been inordinate. He added that any delay that occurred in his own chambers was occasioned by the fact that he had been trying to seek instructions for an out of court settlement. He explained further that there was no substantive Head of his client following the departure of the Prof. Misoi sometime in April 2014. He had been the Managing Director and Chief Executive Officer of the applicant. Urging that the delay was of eighteen or so days only and therefore not inordinate, Mr. Lutta prayed that I allow the application and cited in aid the ruling of my learned sister J. Mohammed J.A in **NIC BANK LIMITED vs. VICTOR OLOO OCHIENG** [2014] eKLR and that of my learned brother Githinji J.A in **THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND vs. JORIM WAHOME MARENDA** [2014] eKLR.

Mr. Murimi, the respondent’s learned counsel submitted that the delay of nineteen days was not backed by valid reasons. He dismissed as “neither here nor there” the changes in the holder of the office of Managing Director of the applicant and offered that its Company Secretary should have advised it on all legal matters and was always aware of the consequences of delay. Counsel added that granting the current application would mean further delay for the respondent to receive his pension which would be prejudicial to him especially on the basis of “a frivolous appeal.” He cited the case of **RICHARD WANYONYI NAMISI & ANOR vs. JERRY WAKOLI & ANOR** Civil Application No. Nai. 216 of 2012 where my learned brother Gatembu J.A sitting in Eldoret restated the principles set out in **LEO SILA MUTISO vs. ROSE HELLEN WANGARI MWANGI** Civil Application No. Nai. 255 of 1997 which, in counsel’s view, the applicant had not satisfied. He urged me to dismiss the application with costs.

Making a brief reply, Mr. Lutta sought to distinguish the **RICHARD NAMISI** case (supra) on the basis that the application there was brought after a seven-month delay and the case involved an old land dispute while herein it was a mere eighteen days and the case involves a specific quantified sum of money that is already deposited in a joint interest earning account and therefore the respondent will suffer no prejudice. He rested by stating that the delay, though short, had been fully explained as the Company Secretary could not take any action to bind the applicant without authority. He appealed to my unfettered discretion.

I have given due consideration to this application, the grounds displayed, the rival affidavits and the learned submissions by counsel on both sides. The grant of an application for extension of time is at my discretion. It is a discretion that is wide and unfettered but to be exercised not per the dictates of caprice, whim or personal inclination, but in accordance with settled principles to the end that the discretion, which is a judicial one, is exercised in such a manner as to meet the ends of justice. There is now unanimity that the matters for consideration in an application such as the one before me include, as was stated in **LEO SILA MUTISO** (supra);

“first, the length of delay; secondly the reasons for 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”.

See also **KENYA AIRWAYS vs. KENYA AIRWAYS** [2003] KLR 486.

Applying those considerations to the instant application, the beginning point is that the delay was eighteen or nineteen days. There is contention as to whether that period of time is short or inordinately

long. The applicant naturally argues the former and the respondent the latter. Suffice is to say that in a delay of eighteen days does not, in and of itself, appear to me to be inordinate considering especially that the record of appeal has already been filed and served.

That a delay is not inordinate does not mean that an application for extension of time will automatically be granted. This is because the timelines set by the Rules do serve a salutary purpose of injecting certainty, uniformity and discipline in the conduct of litigation. Any delay, deviation or default must therefore call for an explanation. The explanation is required whether the delay be long or short. Indeed, a short but unexplained delay is more likely to fail while a longer delay, fully explained, may likely succeed in obtaining the court's favourable discretion.

The applicant herein has explained that it delayed in giving instructions for the filing of the appeal due to a gap in its internal decision-making process. The substantive Managing Director and CEO, Prof. Misoi, left the organization and a decision could not be made before a replacement was appointed. Whereas counsel for the respondent does not find that explanation 'reasonable', it seems to me that the applicant did suffer from a real handicap so that, even though the Secretary to the Board knew of the need for expeditious issuance of instructions, he did not consider himself possessed of the requisite authority to issue the relevant instructions. It is arguable that the applicant ought to have put in place mechanisms for a seamless, vacuum-free transition but I am unable to judge it on the basis of the ideal if, as was stated without controvert, its reality was different. I thus find that the delay has been explained on a reasonable basis to my satisfaction so that I hold that the delay was not only not inordinate, it was also excusable in the circumstances.

A favourable finding on those two considerations ought, to my mind, to suffice but I will also consider the issue of prejudice. There is no dispute that the decretal sum of Kshs. 1,150,623.40, which cannot be said to be colossal, was on 26th November 2013 deposited in a fixed deposit account with Equatorial Commercial Bank in the joint names of Lutta & Co. Advocates and J.M. Kimani & Co. Advocates, the parties respective advocates. It was for an initial period of 3 months at the interest rate of 11% per annum. I am prepared to take judicial notice that such deposits are amenable to roll-over instructions by the joint depositors so that the decretal sum will not be at the mercy of diminution by the forces of inflation.

Much as the respondent avers that a delay in the finalization of the appeal will lead to prejudice, I do not see any such prejudice and I would therefore rather have a just appellate determination of the matter rather than a rushed exclusion of the applicant from the seat of justice on account of a rather brief and well explained delay. It is exercising its undoubted right of appeal. That appeal as filed should be heard without undue delay.

In the result, I find merit in the motion and accordingly grant it. The costs shall abide the outcome of Civil Appeal NAK NO. 27 OF 2014.

Dated and delivered at Nakuru this 14th day of April, 2016.

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR