



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OTIENO-ODEK, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 78 OF 2015

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPLICANT

AND

PICKWELL PROPERTIES LIMITED.....RESPONDENT

(An application for extension of time to file and serve the Record of Appeal out of time in an intended appeal from the judgment of the High Court of Kenya

at Nairobi (Ogola, J.) dated 20th March, 2015

in

H.C.C.C No. 544 of 2011)

RULING

1. Before me is an application brought under **Rule 4** of the **Court of Appeal Rules (the Rules)** wherein the applicant seeks leave of this Court to file and serve the record of appeal out of time. I am conscious that the discretion under **Rule 4** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I also take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance. See Henry Mukora Mwangi -vs- Charles Gichina Mwangi Civil Application No. Nai. 26 of 2004 and Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486.

2. The respondent herein leased out the ground and mezzanine floor of its commercial building known as Shankardass House situate on L.R No.209/4283 (suit premises) to the applicant for a term of 12 years commencing on 15th December, 1993 to 14th December, 2005. Before the expiry of the tenancy, the applicant informed the respondent of its intention not to renew the lease. After the applicant vacated the suit premises a dispute arose culminating in the respondent filing suit in the High Court. The respondent sought *inter alia* unpaid rent for the period after the expiry of the lease up to 31st October, 2006 when the

applicant allegedly moved out of the premises and interest on delayed payment. The respondent claimed that pursuant to the tenancy agreement, the applicant was required to restore the premises to its original state; that the applicant agreed to pay Kshs. 13,500,000/= towards the restoration of the premises but instead only paid Kshs. 9,578,200/= hence the respondent sought the difference thereof. The applicant denied owing any monies to the respondent and counter claimed for refund of the rent deposit of Kshs. 12,766,223.40/= and Kshs. 9,578,200/= it had paid towards the restoration of the premises on the ground that the respondent had leased out the suit premises without carrying out any restoration.

3. The suit was disposed of by way of written submissions and on 20th March, 2013 the trial court entered judgment in favour of the respondent in the following terms;

“a. Interest on delayed rent for the period 1st July, 2005 to 30th December, 2005.

b. Rent for the period 1st January, 2006 to 31st October, 2006 at Kshs. 32,113,291/=.

c. Interest on delayed rent at 21% per annum from January, 2006 until filing of the suit.

d. Amount deducted from reinstatement sum of Kshs. 3,921,800/=.

e. Interest on a, b, c & d above at court rates until payment in full.

f. Costs of the suit. “

4. Aggrieved with that decision, the applicant lodged a notice of appeal on 21st March, 2013 and also sought certified copies of the proceedings from the Deputy Registrar of the High Court on even date. Since then the record of appeal has not been filed. This has prompted the present application for extension of time to file and serve the record of appeal out of time.

5. The grounds upon which the application is anchored is that by a letter dated 9th April, 2014, the applicant's former advocate was informed by the Deputy Registrar that the proceedings were ready for collection. However, before the proceedings could be collected the court file went missing and only resurfaced on 5th November, 2014. The parties had also been engaged in out of court negotiations aimed at resolving the dispute which collapsed on 11th February, 2012. The applicant asserts that intended appeal is arguable and unless the order sought is granted the applicant will suffer irreparable harm.

6. Mr. P.M. Munge, learned counsel for the applicant, reiterating the grounds in support of application, submitted that the delay in filing the record of appeal was not inordinate. On the arguability of the appeal, he faulted the trial court for determining the suit through submissions yet there were disputed facts which warranted for viva voce evidence; the trial court was faulted for ordering the applicant to pay interest of 21% on alleged delayed payments without any basis in law. In Mr. Munge's view, the respondent would not suffer any prejudice in the event the leave sought is granted because the principal amount Kshs. 60 million has already been paid to it; on the other hand, the applicant stands to suffer irreparable harm on account of colossal costs which are yet to be paid using depositors funds.

7. Mr. Wandabwa, learned counsel for the respondent, in opposing the application, submitted that time within which to file the record of appeal commenced running on 5th November, 2014 as confirmed by the Certificate of Delay; the applicant ought to have filed the record in January, 2015. He argued that no reasons had been advanced for the delay. Furthermore, there was no explanation for the delay of filing the current application after the alleged negotiations failed. Mr. Wandabwa argued that the trial court could not be faulted for disposing the matter through written submissions since the same was done with the consent of the parties. According to him, the applicant could not argue that it would suffer irreparable harm on account of paying costs having already acquiesced on the principal amount through payment of the same.

8. I have considered the application, submissions by counsel, the authorities and the law, Pursuant to

Rule 82 of the Rules, the applicant was required to lodge the appeal with 60 days of filing the notice of appeal. In computation of time within which to lodge an appeal **Rule 82** provides that any period certified by the Registrar as having been required to prepare proceedings should be excluded. In **Mariam Abubakar Ileri & another -vs- National Cereals & Produce Board Civil Application No. 9 of 2008** this Court held,

“In view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant's counsel, time prescribed for filing an appeal stopped running. The running of time resumed on or about 3rd September when copies of proceedings were delivered to the respondent.”

9. In this instant case, it is not in dispute that the applicant requested for proceedings on 21st March, 2013 and the copies thereof were ready for collection on 9th April, 2014. The applicant's contention that his then advocates could not collect the proceedings because the court file was missing is confirmed by the letter of the Deputy Registrar dated 17th October, 2014. The Certificate of Delay issued on 18th February, 2015 confirms that the missing court file was traced on 5th November, 2014. The Deputy Registrar certified that the period which was required to prepare and supply the proceedings was 25th March 2013 to 5th November 2014. Subject to excluding the court recess days, it is clear that time within which the applicant was required to file the intended appeal commence running on 5th November, 2014. The current application which was filed on 20th March, 2015 has been brought about after the lapse of the time within which the intended appeal could be lodged. In my view whether the delay is unreasonable ought to be determined with the explanation given for the delay.

10. The next issue that falls for my consideration is whether the explanation given by the applicant for the delay in lodging the appeal is reasonable and excusable. The applicant's contention that the parties herein attempted to settle the matter out of court but unfortunately the negotiations collapsed on 11th February, 2015 was never denied by the respondent. Consequently, I find that the applicant has given a reasonable explanation for the delay in filing the record from the time the proceedings were ready 5th November, 2013 to 11th February, 2015 when the negotiations collapsed. I arrive at this finding noting that court recess days ought to be excluded in the computation of time. That leaves the period between 11th February, 2015 and 20th March, 2015 when the application was filed. While I take note that there was no explanation given with regard to this period, I am of the considered view that from the time the negotiations collapsed to when the current application was filed there wasn't inordinate delay.

11. In my view whether or not the trial court acted properly in disposing the matter by way of written submissions as opposed to oral evidence and whether the trial court was justified in imposing the rate of 21% as interest on delayed rent payments are issues that warrant consideration by this Court in an appeal. Lastly, taking into account the prevailing circumstances of this case, I find that the applicant stands to be prejudiced in the event the leave sought is not granted more so, as the funds which would be disbursed for payment of costs which are colossal belong to depositors.

12. Having expressed myself as herein above, I exercise my discretion in favour of the applicant and allow the application. Accordingly, leave is granted to the applicant to file and serve the record of appeal within 21 days of this ruling. The costs of this application shall abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 17th day of June, 2016.

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR