



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: D. MUSINGA, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 61 OF 2016 (UR 57/2015)**

BETWEEN

PHOENIX PROPERTIES LIMITED.....APPLICANT

AND

DUVESHKUMAR PATEL.....1<sup>ST</sup> RESPONDENT

EQUIP AGENCIES LIMITED.....2<sup>ND</sup> RESPONDENT

*(Being an application for leave to serve the notice of appeal dated 19<sup>th</sup> December, 2014 and lodged on 23<sup>rd</sup> December, 2014 against the ruling and order of the High Court of Kenya at Nairobi (Nyamweya, J.) dated and delivered on 19<sup>th</sup> December, 2014 out of time*

*in*

*H.C.C.C. No. 836 of 2014 (Formerly Civil Case No.1227 of 2003))*

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**RULING**

1. The applicant's application dated 10<sup>th</sup> March, 2015 seeks the following orders:-

***“1. That this honourable court be pleased to grant leave to the applicant to serve the notice of appeal dated 19<sup>th</sup> December, 2014 and lodged on 23<sup>rd</sup> December, 2014 from the ruling and order of the High Court (Nyamweya, J.) delivered on 19<sup>th</sup> December, 2014 in Nairobi High Court Elc Case No. 836 of 2014 (formerly Civil Case No. 1227 of 2003) Equip Agencies Limited & Another versus Pheonix Properties Limited upon the 1<sup>st</sup> respondent herein, Diveshkumar Patel out of time;***

***2. That the Notice of Appeal served on the firm of Gichuki Kingara & Co. Advocates for the 1<sup>st</sup> respondent herein, Diveshkumar Patel on the 18<sup>th</sup> February, 2015 be deemed as properly served;***

***3. That the applicant be at liberty to apply for further orders and/or directions as the honourable court may deem fit and just to grant; and***

**4. That the costs of and incidental to this application be provided for.”**

2. An affidavit in support of the application sworn by **Kenvine O. Ouma**, an advocate in the firm of Ochieng', Onyango, Kibet & Ohaga Advocates, who are on record for the applicant, sets out not only the background to the application but also the grounds upon which the application is premised.
3. The ruling sought to be appealed from was delivered by Nyamweya, J on 19<sup>th</sup> December, 2014. The applicant was aggrieved by the ruling and instructed its advocates to appeal against it. On the same day the applicant's advocates prepared a notice of appeal and filed it on 23<sup>rd</sup> December, 2014.
4. The notice of appeal was served upon the 2<sup>nd</sup> respondent's advocates on 13<sup>th</sup> January, 2015. Inadvertently, the notice was not served upon the advocates for the 1<sup>st</sup> respondent, apparently because the 1<sup>st</sup> respondent had not participated in the High Court application that is the subject matter of the intended appeal. The applicant's advocates realized that mistake when on 17<sup>th</sup> February, 2015 they were served with an application by the 2<sup>nd</sup> respondent seeking to strike out the notice of appeal for the reason that it had not been served on all the parties directly affected by the appeal in terms of **rule 77(1) of the Court of Appeal Rules**.
5. On 18<sup>th</sup> February, 2015 the applicant's advocates served the notice of appeal upon the 1<sup>st</sup> respondent's advocates. Shortly thereafter the applicant filed this application. Mr. Kenvine Ouma made brief submissions in line with the affidavit sworn in support of the application.
6. The 1<sup>st</sup> respondent did not file a replying affidavit to the applicant's motion. However, **Mr. Muraya Njenga**, learned counsel for the 1<sup>st</sup> respondent, opposed the application. He submitted that the applicant had violated the provisions of rule 77 and the delay in serving the notice of appeal upon him was inordinate.
7. The 2<sup>nd</sup> respondent filed a replying affidavit that was sworn by the 1<sup>st</sup> respondent, a director of the 2<sup>nd</sup> respondent company. The 2<sup>nd</sup> respondent is represented by M/s Odera Obar & Company Advocates. The said advocates, though served with a hearing notice, did not attend court on 14<sup>th</sup> September, 2016 for the hearing of the applicant's application. The 2<sup>nd</sup> respondent argued that there was no good reason for the delay in filing of the application for extension of time. They also argued that the intended appeal has no good chances of success.
8. I have considered the affidavits on record as well as submissions by counsel. In an application for extension of time to file an appeal, the Court exercise its unfettered jurisdiction. The discretion however, must be exercised judicially.
9. This Court has severally pronounced itself on the factors that have to be taken into account in an application of this nature. They include, the length of the delay; the reasons for the delay; the likelihood of success of the intended appeal; and the degree of prejudice that is likely to be occasioned to the respondent if the application for extension of time is granted. See **SHAH versus SOUTHERN CREDIT BANKING CORPORATION LTD [2008] KLR 173**.
10. In considering the length of the delay, the period between 21<sup>st</sup> December to 13<sup>th</sup> January has to be excluded. From 14<sup>th</sup> January to 18<sup>th</sup> February, 2015 when the notice of appeal was served upon the 1<sup>st</sup> respondent is a period of 36 days. When the statutory period of 14 days for filing of a notice of appeal is excluded, there was a delay of 22 days. In my view, the particular circumstances of this matter, that delay was not inordinate.
11. The reason for the delay as explained by Mr. Ouma in his affidavit is satisfactory. It would be unjust to punish an innocent party for an inadvertent mistake of counsel.

12. I have looked at the draft memorandum of appeal and I am satisfied that the intended appeal is arguable.

13. Lastly, the respondents did not demonstrate that they shall suffer any prejudice if the application is extension of time is granted. Consequently, the applicant's application dated 10<sup>th</sup> March, 2015 is granted in terms of prayers 1 and 2 thereof. I further direct that the record of appeal be filed and served within sixty (60) days from the date hereof. The applicant shall bear the costs of the application.

***Dated at Nairobi this 16<sup>th</sup> day of September, 2016.***

**D. MUSINGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**