



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 84 OF 2015 (UR 71/2015)

BETWEEN

EASTLANDS THEATRE LIMITED 1ST APPLICANT

JAMES SAMUEL KINYANJUI 2ND APPLICANT

ANNE NJERI KINYANJUI 3RD APPLICANT

AND

KENYA NATIONAL CAPITAL CORPORATION LIMITEDRESPONDENT

(An application for extension of time within which to lodge the record of appeal against a Judgment/Decree of the High Court at Nairobi (Koome, J.) dated 30th October, 2009

in

H. C. C. No. 4640 of 1998)

RULING

By the motion dated 26th March 2015 the above-named applicants pray for an order that time be extended for them to file and serve a record of appeal against the judgment and decree of the High Court of Nairobi (M.K. Koome, J) dated 30th October 2009. The same is brought under Rule 4 of the Court of Appeal Rules and is premised on the following grounds appearing on its face;

(i) On 30th of October 2009 honourable Justice M.K. Koome delivered her judgment in Nairobi Milimani H.C.C. No. 4640 of 1988 in favour of the respondent herein.

(ii) Being dissatisfied with the said judgment the applicants through their advocates herein lodged the Notice of Appeal of 11th November 2009 and equally applied to the Deputy Registrar to furnish them with typed copies of the proceedings and judgment to enable them compile the Record of Appeal.

(iii) Despite several reminders and actual visits to the court registry it was not until 9th December

2014 that the applicants' advocates received the aforesaid copies of proceedings and judgment from the Deputy Registrar.

(iv) The Deputy Registrar however issued the applicants' advocates with a Certificate of Delay which did not comply with the provisions of rule 82 of the Court of Appeal Rules necessitating them to seek a compliant one.

(v) Ordinarily and in the absence of the defect in the Certificate of delay issued by the Deputy Registrar, the Record of Appeal should have been lodged before this Court by 27th January 2015, which would have been within 60 days after taking into consideration the time taken for preparing the proceedings and the judgment.

(vi) That it was not until 16th February 2015 that the fresh Certificate of Delay was subsequently issued, which was even after the time contemplated for lodging the record of appeal had expired.

(vii) The applicant's advocates have now compiled and prepared all the documents necessary for lodging the record of appeal hence the necessity to extend time within which the same can be done.

(viii) The applicants has every probability of success in the intended appeal.

(ix) No prejudice will be visited upon the respondent if this application is allowed.

In support of the application, the applicants' advocate Mak' Ogonya T.T. Tiego swore an affidavit on 26th March 2015 in which he expounded on those grounds. Indeed, in arguing the application, he relied on the grounds and the affidavit to state that he lodged a notice of appeal timeously on 11th November 2009 and simultaneously applied for copies of the proceedings and judgment. Despite several written reminders which he exhibited, it was not until 9th December 2014 that he received notification from the Deputy Registrar of the High Court that the same were ready. The Deputy Registrar also issued a certificate of delay but on perusing it, the deponent found it to be defective and he wrote to seek a rule-compliant one. A fresh certificate was eventually issued by the Deputy Registrar on 16th February 2015, by which date the time for filing the record had elapsed but he is now ready to file it. He avers that the applicants have an arguable appeal and that the respondent does not stand to suffer any prejudice as a consent was previously filed securing the decretal sum.

The respondent's case as captured in the replying affidavit sworn by Michi Kirimi Advocate and the submissions of **Mr. Makori** its learned counsel, is that whereas indeed the applicants applied for proceedings from the High Court which notified the parties that the said proceedings were ready on 24th November 2014, the applicants have nevertheless not demonstrated any or any good reason for not filing the record within time. It is deposed to that as a matter of practice the certificate of delay is prepared by the advocate who then forwards it to the Registrar of the High Court for signature and issuance. The respondent therefore blames the applicant for the initial defective certificate of delay issued by the High Court. It urges further that the applicants had the option of filing the record of appeal without the certificate of delay which they could, moreover, introduce by way of a supplementary record of appeal. They could also have filed the record of appeal and then sought to regularize the same by application but they failed to do so. The respondent contends that the delay in filing the record as inordinate and the application should be dismissed.

I have given this application anxious consideration, not least because I am concerned that some nearly seven years after the impugned judgment, no record of appeal has been filed although a notice of appeal was filed in time. Both parties agree, and it is clear from the material placed before me, that it took more than 5 years for the High Court to notify them that the proceedings requested were finally ready for collection. Such a lengthy delay, even in the face of various reminders by the applicants does the High Court no favours and is not an example of efficiency or responsiveness. This is to be said even as I take cognizance that there could have been personnel, infrastructural and other challenges militating against a

more efficient processing of proceedings.

Considering that the length of the delay and the explanation given for it are some of the matters I should consider in an application for extension of time at my discretion, which is wide and unfettered to enable the doing of justice between parties with each case being decided on the basis of its peculiar facts, I am not prepared to find, as urged by the respondent, that the delay herein is inordinate and blamable on the applicants. True, they may not have been paragons of virtue or angels of alacrity and industry but their conduct does not strike me as slothful, indolent or indifferent.

I note that further delay was occasioned by the time taken for the issuance of a proper certificate of delay after the first one was found to be defective, on which both parties agree. The respondent urges that as a matter of practice any defects in the certificate ought to be attributed to the applicant's own authorship. I am unable to accept that proposition in the face of a clear provision in the Rules that places the onus of certificate preparation upon the Registrar of the court below. It is he that signs and issues the document. He owns it. He is responsible for its contents be they fair or frail. I agree with the opinions expressed by this Court on this subject in, among other cases,

PAUL WANYONYI vs. SILVER STAR PARCELS LTD [2010] eKLR and **DANIEL NGANGA KANYI vs. SOSPHINAF COMPANY LTD & ANOR** [2005] eKLR placing responsibility for the certificate of delay on the Registrar.

Being satisfied that the delay, itself not inordinate in the circumstances, has been explained to my satisfaction, even though uneasily so, I now turn to the question of the level of prejudice that the respondent would suffer were the application to be granted these being the matters that ordinarily fall for consideration alongside, but not always, the chances of the intended appeal succeeding (See **MWANGI vs. KENYA AIRWAYS** [2003] KLR 486; **MURAI vs. WAINAINA** (No. 4) [1982] KLR 38 and **KENYA RAILWAYS CORPORATION vs. QUICKLUBES EA LTD** [2015] eKLR).

I am of the view that in the face of the statement on oath by the applicant's advocate that the decretal sum was secured by a consent filed between the parties, what prejudice would otherwise be suffered by keeping the litigation between the parties open thorough an appeal is greatly lessened. At any rate, an imposition of narrow timeliness would conduce to a speedier conclusion of the matter.

All things considered, therefore, I am inclined to and do allow this application. The applicants shall file and serve the record of appeal within **thirty (30)** days of the date hereof.

Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 14th day of October, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR