



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 1 OF 2016

BETWEEN

HAKIKA TRANSPORTERS SERVICES LTD.....APPLICANT

AND

ALBERT CHULAH WAMIMITAIRE.....RESPONDENT

(Application for leave to file a Notice and Record of Appeal out of time against the judgment and decree of the High Court, (Omolo, J.) dated 8th October 2015

in

HCCC No. 214 of 2011)

RULING

Before me is an application by the applicant, ***Hakika Transporters Services Ltd*** seeking extension of time, principally under ***Rule 4 of the Court of Appeal Rules***, to file and serve a notice and record of appeal against the judgment of the High Court at Mombasa (***Omolo, J.***) dated 8th October 2015.

By that judgment, the learned judge entered judgment for the respondent, ***Albert Chulah Wamimitaire***, for ***Kshs 2,770,000.00*** being compensation for a house without land and loss of income for one year. It was the respondent's case that his house on ***Plot No. L.R. 267/Mainland North***, was damaged or rendered inhabitable by the applicant once it purchased the land upon which the house was built.

From the affidavit sworn by ***Mr. Isaac Onyango, Advocate*** on 18th December 2015 in support of the application; the replying affidavit of the respondent sworn on 17th May 2016; and the submissions of learned counsel for both parties, the circumstances leading to this application are not in dispute. Upon conclusion of the hearing of the suit, the High Court set the same down for mention on 2nd July 2015 for purposes of fixing a date for judgment, which was set for 23rd September 2015. On the scheduled date, the advocates were advised to take the judgment on 1st or 2nd October 2015 and on the 1st October 2015 they were advised that the judgment would be delivered on notice.

The applicant contends that its advocates never received the promised notice and that they only learned of

the judgment on 10th November 2015 when they received a letter dated 4th November 2015 from the respondent's advocates forwarding a draft decree for approval. On 16th November 2015 the applicant's advocates wrote to the Deputy Registrar of the High Court seeking handwritten copies of the judgment and proceedings for purposes of appealing the judgment. There is evidence on record that on 23rd November 2015, they paid for the documents they had sought and that earlier on 20th November 2015, they had lodged a notice of appeal and paid for it vide **Receipt No. 7156045** of even date. The Deputy Registrar however did not endorse the Notice of Appeal until 4th December 2015, the applicant explained, because he or she was out of office for that period.

On 18th December 2015 the applicant's advocates prepared and dated the motion now before me for extension of time, but the same was not filed until 2nd February 2016, the applicant explained, due to the intervening Court recess. It is also necessary to point out that in their letter to the respondent's advocates dated 30th November 2015 returning the draft decree, the applicant's advocates reiterated that the judgment was delivered without notice to them.

Urging the application, Mr. Onyango, learned counsel, submitted that the failure to lodge the notice of appeal on time was adequately explained; that the delay in making the application was not inordinate; that the applicant had a constitutional right of appeal which by dint of **Article 159** of the Constitution and the overriding objective in **sections 3A and 3B** of the **Appellate Jurisdiction Act** ought to be given full effect; and that the applicant stood to suffer greater prejudice that the respondent should the extension of time be denied. Relying on a draft memorandum of appeal, counsel submitted that the applicant's intended appeal was arguable, raising among other issues whether the learned judge erred by not determining all the issues; by shifting the burden of proof to the applicant; by misapprehending the applicant's case and the evidence adduced; and by sustaining a claim that was founded on an illegality.

Lastly counsel relied on, among others, **Next Generation Communication Ltd v George M. Kirungaru, CA. No. 98 of 2014**; **Joseph Wanjohi Njau v Benson Maina Kabau, CA. No. Nai 97 of 2012** and **Oshwal Academy (Nairobi) & Another v Induvishwanath, CA. No. Nai 79 of 2011** regarding the nature and exercise of the Court's jurisdiction to extend time.

Mr. Tadayo Muyala, learned counsel for the respondent opposed the application. While not disputing the facts as set out above, he nevertheless argued that there was no proper explanation preferred for the delay in filing the notice of appeal timeously and that the applicant's lack of notice regarding the date of delivery of the judgment was not a good reason for extension of time. Counsel also challenged the competence of the affidavit in support of the application, contending that the same was irregularly sworn by the advocate in lieu of an officer of the applicant. Lastly counsel submitted that the respondent, who has a decree in his favour, stood to suffer prejudice by being kept away from the fruits of his judgment, taking into account the fact that the litigation had already taken 5 years.

Relying on **Mongira & Another v Makori & Another [2005] 2 KLR 103** and **Njogu Macharia v. Paul Wairuri Mwangi, CA No. 110 of 2006**, counsel submitted that an applicant in an application for extension of time is obliged to offer explanation for delay and that section 3A of the Appellate Jurisdiction Act does not automatically aid applicants.

I have duly considered the application, the supporting and replying affidavits, the submissions of counsel and the authorities relied upon. It cannot be gainsaid that the discretion of the Court to extend time under rule 4 of the Court of Appeal Rules, is wide and unfettered. Subject to the requirement that the discretion be exercised judiciously, the power of the Court to extend time is otherwise unbounded. In **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, CA. No. Nai. 255 of 1997**, the Court considered some of the factors that guide the Court in the exercise of its discretion and stated:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the 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”.

It must be emphasized that the considerations above do not constitute a closed catalogue. As **Lakha, JA** stated in **Tononoka Steels Ltd v. The PTA Bank, CA No. 295 of 1998, Lakha, JA:**

“It is, of course, undesirable and indeed dangerous to enumerate all the cases in which the Court will exercise its discretion under rule 4 of the Rules. Broadly speaking, my view of the matter is that unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should, in so far as it may be reasonable, prefer, in the wider interests of justice, to have a case determined on its merits.”

As I have indicated above, the facts upon which the application is founded have not been controverted or otherwise challenged. I will therefore take it that the applicant had candidly and satisfactorily explained that the failure to lodge the notice of appeal on time was occasioned by delivery of the judgment without notice, and that by the time it learnt of the judgment, the period for filing the notice of appeal had already expired. The evidence on record showing the efforts that the applicant made to obtain a copy of the judgment; to get instructions; to file a notice of appeal, albeit out of time; and to file this application for extension of time is not consistent with a dilatory party or one who deliberately wishes to delay this matter. I am satisfied that in the circumstances of this application, the delay is not inordinate.

The applicant has also attached to its application a draft memorandum of appeal, which sets out the issues that it intends to pursue in the intended appeal. I am satisfied that far from being idle or frivolous, the issues suggest an arguable appeal, which the applicant ought to be afforded an opportunity to argue fully in this Court. In any event, I must avoid, as a single judge, purporting to determine with finality at this stage, the merits or demerits of the intended appeal. (See **Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No 227 of 2015**).

The objection raised by the respondent regarding the affidavit supporting the application is not a sufficient reason to deny this application. The deponent advocate has deponed to facts strictly within his knowledge as regards the fixing of the date for judgment, the subsequent deferment, the ultimate delivery of the judgment without notice, and the efforts that he made to file the notice of appeal upon learning of the delivery of the judgment. In **Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015**, this Court expressed the principle as follows:

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

Ultimately I am satisfied that applicant has made out a case deserving an order for extension of time. I accordingly allow the motion dated 18th December 2015 and deem the notice of appeal lodged on 4th December 2015 to have been lodged in time. The applicant shall file and serve the record of appeal within 21 days from today. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

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

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR