



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: J. MOHAMMED, J.A. (IN CHAMBERS)
CIVIL APPEAL (APPLICATION) NO. 306 OF 2014

BETWEEN

KENYA RAILWAYS CORPORATION.....APPLICANT/APPELLANT

AND

QUICKLUBES E.A. LIMITED.....RESPONDENT

(An application for extension of time to file the Memorandum and Record of Appeal being an appeal from the judgment of the High Court at Nairobi (Mabeya, J) dated 28th day of September, 2012

in

HCCC NO. 551 OF 2009)

RULING

This is an application by way of Notice of Motion application dated *3rd November, 2014* brought pursuant to *Rule 4 of the Court of Appeal Rules* (the Rules). The applicant seeks the following orders:

- “1. The Honourable Court be pleased to grant the applicant/appellant an extension of time within which to file its Memorandum and Record of Appeal.*
- 2. The draft Memorandum and Record of Appeal annexed hereto be deemed as duly filed and properly on record.*
- 3. Any other Orders this Honourable Court may deem fit.”*

The grounds upon which it relies on in support of its application are that: being dissatisfied with the entire judgment of the High Court (Mabeya, J), it is desirous of appealing against it and has consequently filed a notice of appeal; that the respondent has filed an application seeking orders that the said notice of appeal be marked as withdrawn, which application may be fixed for hearing at any time; that the decretal sum is substantial and the applicant being a state corporation, funded from the public coffers will be highly

prejudiced if it is not allowed to prosecute its appeal wherein it has raised arguable grounds of appeal; that there has been a delay in obtaining the typed proceedings of the trial court as well as the certificate of delay and that it is only just and expedient under the circumstances to grant an order extending time within which the applicant may file the memorandum and record of appeal.

The genesis of this application is that by a lease agreement dated 20th December, 2002, the respondent let from the applicant the applicant's premises known as L.R No. 12180 Railway Shed Supplies Yard measuring 63,372 m² (subject property) for a term of 10 years from 1st September, 2002. The lease had a renewal clause for a like period. The respondent averred that on 16th May, 2009, the applicant violently evicted it from the subject property whereby the respondent claimed to have suffered loss amounting to KShs.61,787,000/=. The respondent therefore sought inter alia, a declaration that it was a protected tenant under **Chapter 301 of the Laws of Kenya**; a declaration that its eviction was illegal, unlawful and in breach of **Chapter 301 of the Laws of Kenya**; special and general damages for unlawful eviction and loss of goodwill and costs of the suit and interest from the date of eviction until payment in full. The applicant denied being indebted to the respondent.

The High Court in its judgment dated 28th September, 2012, held in favour of the respondent. The learned Judge held *inter alia* that the respondent had proved its case on a balance of probability; that the respondent was not a protected tenant under **Chapter 301 of the Laws of Kenya**; that the respondent's eviction by the applicant was illegal and unlawful and awarded special damages of KShs.27,106,500/=; general damages of KShs.2,000,000/= and costs of the suit together with interest thereon from the date of the judgment until payment in full. It is that decision that the applicant intends to appeal against.

At the hearing of the application, learned counsel Mrs McAsila, appeared for the applicant and submitted that the application before this Court sought extension of time to file the Memorandum and Record of Appeal; that the supporting affidavit details grounds of application mainly that delay was not intentional and was mainly due to delay in issuance of the proceedings by the court registry. Further that the Certificate of Delay was issued on 4th September, 2014 by which time the respondent had already made an application on 19th August, 2014 to have the Notice of Appeal struck out.

Counsel submitted that the decretal sum is currently held in a joint fixed account in the names of counsel for both parties; that the Record of Appeal already having been filed, the respondent will not suffer any prejudice; and that the merits of appeal were clearly stated in the Memorandum of Appeal. Counsel referred to the applicant's list of authorities filed on 11th December, 2014.

Counsel argued that **Sections 3A of the Appellate Jurisdiction Act & 53B** and **Article 159 of the Constitution** seek to have courts hear matters on merit rather than to strike them out on technicalities. She urged the single Judge to allow the application as prayed.

Learned counsel, Mr Wandago, appeared for the respondent. He submitted that he strongly opposed the application and relied on the respondent's replying affidavit filed on 3rd December, 2014 and their list of authorities filed on 16th December, 2014. Counsel submitted that the reasons for opposing the application are: that the Certificate of Delay was issued on 4th September, 2014, while the record of appeal and the present application were filed on 3rd November, 2014, two [2] months after the issuance of the Certificate of Delay yet no explanation has been given by the applicant for the delay of two [2] months to prepare the record of appeal and file the present application; that the impugned judgment was delivered on 28th September, 2012, while the applicant filed the Notice of Appeal, twenty one [21] days after judgment was delivered without leave of the court; that the applicant took three [3] weeks to pay for and collect the proceedings on 3rd July, 2014; that after collecting the proceedings and the certificate of delay, the applicant delayed by another two [2] months to file this application without offering an explanation for the delay.

Counsel further submitted that the circumstances of this case are that the applicant by its own admission, forcefully evicted the respondent from its own business premises. He submitted that the respondent's

directors were having difficulties paying school fees for their children and are, therefore, anxious for the matter to be heard and determined expeditiously in view of the fact that the decretal sum is being held in a joint fixed account in the names of both counsel.

Counsel argued that the respondent will, therefore, suffer prejudice if this application is allowed.

I have considered the application, the affidavits on record, list of authorities and submissions by counsel and the law. The discretion that I am being called upon to exercise in this application is under **Rule 4 of the Rules** which provides:

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court, for doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The principles guiding the court on an application for extension of time premised upon **rule 4 of the Rules** are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are clear. See **MUTISO V MWANGI, CIVIL APPLN NO. 255 OF 1997 (UR)**, **MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486**. See also **FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332/04 (unreported)** where this court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In **MWANGI V KENYA AIRWAYS LTD, (2003) KLR 48**, the court having set out matters which a single judge should take into account when exercising the discretion under **Rule 4**, it held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

I note that the impugned judgment was rendered on 28th September, 2012.

There is no evidence of the follow up of the proceedings from the date of delivery of the judgment, seeking to find out when the same would be ready for collection.

I further note that the applicant delayed in paying for filing and collecting of the proceedings by three [3] weeks and delayed further in obtaining the Certificate of Delay by three [3] months.

It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case **M/S PORTREITZ**

MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in MONICA MALEL & ANOR V R, ELDORET CIVIL APPLN NO. NAI 246 OF 2008, stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

It should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in HAYWOOD V COPE, (1858) 25 BEAV 140:

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”

On the application of the overriding objective, I agree with Omolo JA, in his ruling in the case of JAMES NJUGUNA V FRANCIS NGAMBI RUKOMIA & THREE OTHERS, (2010) e-KLR where he stated in relying on the CITY CHEMIST (NRB) & ANOTHER V ORIENTAL COMMERCIAL BANK LTD, CIVIL APPLN NO. NAI 302 OF 2008 (UR 99/2008):

“The new thinking brought in by sections 3A and 3B, does not “totally uproot well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

In conclusion, I find that there are no special circumstances demonstrated by the applicants for me to exercise my discretion in their favour. The result is that I dismiss the Notice of Motion application dated 3rd November, 2014, with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of January, 2015.

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR