



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: NAMBUYE, JA ( IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI 276 OF 2014 (UR 207/2014)**

**BETWEEN**

**NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....APPLICANT**

**AND**

**GOLBO CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

**(Application for extension of time to file and serve the Notice of Appeal and Appeal, respectively, out of time against a Ruling of the High Court of Kenya at Nairobi (Waweru, J) Dated 9<sup>th</sup> July, 2014)**

**In**

**H.C.C.C. No. 92 of 2012)**

**\*\*\*\*\***

**RULING OF NAMBUYE, JA**

Before me is an application by way of notice of motion dated and lodged in this Court's Registry on the 27<sup>th</sup> day of October, 2014. It is erroneously indicated to be predicated on Rule 5 (2) (b) and Rule 20 of this Court's Rules. It seeks four (4) substantive reliefs namely:-

***“(1) That the proposed Appellant be granted leave to file a Notice of Appeal and to Appeal out of time against the whole Ruling of Hon. H.P.G. Waweru delivered on the 9<sup>th</sup> day of July, 2014.***

***(2) That this Honourable Court be pleased to define a time span within which to file the Record of Appeal.***

***(3) That the Notice of Appeal annexed hereto be deemed as duly filed and served.***

***(4) That this Honourable Court do order a stay of execution of the ruling made by this Honourable Court on the 9<sup>th</sup> day of July, 2014 pending the hearing and final determination of the Appeal.***

***(5) That the costs of this Application be in the cause.”***

It is grounded on the grounds in the body of the application and the supporting affidavit deposed by **Evans Ngibuini**.

In his submissions to Hon. Lady Justice **R.N.Nambuye, JA**, the applicant placed reliance on the content of the grounds in the body of the application and the supporting affidavit. He however abandoned prayer 4 for being premature. In summary, the applicant stated that the learned Judge had reserved the judgment with directions that it be delivered on 26<sup>th</sup> June, 2014 but was not delivered on this date. Directions were allegedly given that a fresh notice for the delivery of the pending judgment would be given. None was given to the applicant. The applicant thereafter made efforts to trace the file to know the position. It was not until 2<sup>nd</sup> September, 2014 that the applicant traced the said file and upon perusal is when the applicant learned that judgment had in fact been delivered on the 9<sup>th</sup> day of July, 2014. By the 2<sup>nd</sup> day of September, when the applicant learned of the delivery of the judgment, the time line stipulated in rule 75(2) of this Court's Rules for the lodging of a notice of appeal had lapsed but all the same the applicant put in a notice of appeal out of time. This is what the applicant has come to Court to regularize. The said rule reads:-

***“Rule 75(2) Every such notice shall subject to rule 84 and 97, be so lodged within fourteen (14) days of the date of the decision against which it is desired to appeal”***

On the basis of the above, the applicant contends that he is not at fault for not moving to comply with the above rule; the fault lay with the court in failing to notify them of the subsequent date set for the delivery of the judgment after it had been rescheduled; they are genuinely aggrieved by the High Courts judgment and they should therefore be accorded an opportunity to ventilate their grievances to the appellate forum; they have an arguable appeal as demonstrated by the content of the draft memo of appeal exhibited herein and lastly that they have given a reasonable explanation for the delay to warrant me grant them the relief sought. In opposition the respondent has filed a replying affidavit deposed by **Adan Intalo Ali** on the 11<sup>th</sup> day of December, 2014 and lodged in this Courts Registry on 11<sup>th</sup> December, 2014.

In summary, the applicant reiterated the content of its replying affidavit that it claimed Kshs.5, 34, 3232 from the applicant, the applicant filed no defence to that claim; the High Court rightly found that the said amount was owed. On the delivery of the judgment the respondent contended that indeed judgment had been scheduled for 20<sup>th</sup> June, 2014 on which date it was deferred to 9<sup>th</sup> July, 2014 on which date the applicant did not appear and judgment was delivered. Further that the intended appeal raises no trial issue and the applicant will suffer no prejudice if the relief sought is with held as the conduct of the applicant indicates clearly that all the applicant is interested in is to frustrate the respondent's enjoyment of the fruits of its judgment. On that account the respondent urged me to dismiss the application.

The applicant in his response urged that the record indicates clearly that the judgment was delivered in the absence of the parties. My jurisdiction has been erroneously invoked under rule 5 (2) (b) and 20 of this Court's Rules. It should have been invoked under rule 4 of this Courts Rules. Failure to so cite the correct rule of access to the seat of justice will not disentitle the applicant to a merit determination. Article 159 (2) (d) of the Kenya Constitution 2010 is invoked as a cure for that default. Rule 4 of this Court's Rules reads:-

***“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 of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the 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 parameters on the applicability of this rule have now been crystallized by case law. See the case of **Githiaka Versus Nduriri [2004] KLR67** wherein it was held *inter alia* that:-

***1. Under rule 4 of the Court of Appeal Rules, the Court is vested with a perfectly clear and unfettered discretion to extend the time limited by the Rules or its own decisions.***

**2. The Court's discretion under rule 4 of the Court of Appeal Rules, like all judicial discretions, is to be exercised judicially, that is to say, on sound reason rather than whim, caprice or sympathy.**

**3. In the exercise of its discretion, the Court's primary concern should be to do justice to the parties. The Court should, among other things, consider:-**

***The length of the delay in lodging the notice and record of appeal;***

***Where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;***

***Whether or not the intended appeal is arguable;***

***The prejudice to the respondent if the application is granted;***

***The public importance, if any, of the matter; and***

***Generally the requirements of the interest of justice in the case.***

I have applied the above principles to the rival arguments herein, and I proceed to make the following findings in the disposal of the application under review.

(1) The application is contested. The general rule is that whether contested or not an applicant seeking relief under rule 4 of this Court's Rules has to bring himself/herself/itself within the threshold set by the case law set out above before earning a relief under this Rule.

(2) The applicant has placed blame onto the court for failure to notify it of the subsequent date for the delivery of the judgment. It has been the applicants' argument that in fact delivery of judgment had been reserved for 20<sup>th</sup> June, 2014 on which day there was no delivery but directions given that further notice would be given. There is however no backup facts to support this assertion. This could have been achieved by the applicant exhibiting a record of the proceedings to show that judgment was reserved on 20<sup>th</sup> June, 2014 for delivery on 9<sup>th</sup> July, 2014. The applicant should also have exhibited documents to show that it had been diligent and in fact made frantic efforts from 20<sup>th</sup> June, 2014 to 2<sup>nd</sup> September, 2014 to know when the judgment was to be delivered next on the one hand and on the other hand that it was not until 2<sup>nd</sup> September, 2014 when it stumbled on the judgment already delivered on 9<sup>th</sup> July, 2014. There is no letter of protest to the Registrar of the Court protesting at the Courts failure to notify it firstly of the rescheduled date of the delivery of the judgment and secondly the delivery of the judgment.

(3) A letter of protest aforementioned regarding would have gone on along way to add weight to the applicants self defene allegations.

(4) I note that the applicant has applied for the supply of the record of proceedings for purposes of appeal vide their letter of 17<sup>th</sup> September, 2014 addressed to the Deputy Registrar High Court of Kenya at Nairobi. This was in a period of fifteen (15) days after the alleged discovery of the delivery of the judgment in their absentia. This is a demonstration of the applicants serious intention to appeal against the decision in respect of which it seeks an extention of time within which to comply. The applicant also made efforts and put in a notice of appeal out of time, though without leave and now seeks leave of court to regularize it.

(5) The respondent has urged that since the High Court ruled that the applicant had no defence the applicant's appeal is not available and that the High Court was right in ruling that the applicant had admitted the claim. My response to this assertion is that the arguability or otherwise of the intended appeal is merely a possible consideration under rule 4 of this Court's Rules applications. It is not a

mandatory requirement. There is therefore no need for me to determine at this juncture as to whether the appeal is arguable or not.

(6) It is a period of three (3) months and sixteen (16) days from the date of the delivery of the judgment on 19<sup>th</sup> July, 2014 to 27<sup>th</sup> day of October, 2014 when the application under review was filed. From the 2<sup>nd</sup> day of September, 2014 when the discovery of the delivery of the judgment was made to the 27<sup>th</sup> day of October, 2014 when the application under review was lodged. It is a period of one (1) month and twenty five (25) days.

The question I wish to pause to myself is whether the applicants application has met the thresh hold set by Rule 4 of this Court's Rules to warrant me to grant them the relief sought. The applicants failure to exhibit the record of proceedings to show that the ruling was not deferred on 20<sup>th</sup> June, 2014 to 9<sup>th</sup> July, 2014 but it was to be delivered on notice; lack of proof of efforts made to keep track of the delivery of the judgment; lack of protest at the court's failure to notify him of the delivery of the judgment; and failure to demonstrate that indeed it was not until the 2<sup>nd</sup> day of September, 2014 when it learned of the delivery of the judgment and failure to explain why it took one (1) month twenty five (25) days to present the application under review notwithstanding the applicants move to apply for proceedings as a show of its seriousness of an intention to seek a second opinion on appeal and its move to lodge a notice of appeal albeit out of time, all go to impact positively on the applicant's assertion that it is a genuinely aggrieved and serious seeker of appellate justice. This coupled with the failure of the learned Judge to indicate on the body of the Judgment who attended court during the delivery of the judgment is sufficient proof that the applicant may very well be right that it had no advance notice of the delivery of the Judgment. I also find that no prejudice will be suffered by the respondent if the applicant is given a chance to exercise its undoubted right of appeal considering that granting such a relief under rule 4 of this Court's Rules can never be an automatic impediment to the respondents enjoyment of its fruits of judgment. In the result, all that I can do for the applicant at this juncture is simply to extend time within which to comply.

In the result, I proceed to make the following orders.

- (1) The applicant be and is hereby granted leave of court to lodge and serve a notice of appeal within fourteen (14) days of the date of the delivery of this ruling.
- (2) Thereafter parties to proceed according to law.
- (3) Costs of the application to the respondent to be agreed or assessed.

**Dated and Delivered at Nairobi this 23<sup>rd</sup> day of January, 2015.**

**R.N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original**

**DEPUTY REGISTRAR.**