



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: P.M. MWILU, J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 279 OF 2014**

**FURSYS (K) LIMITED ..... APPLICANT**

**VERSUS**

**SYSTEMS INTERGRATED LIMITED**

**T/A SYMPHONY LIMITED .....RESPONDENT**

*(An Application for extension of time to lodge the Appeal against the Judgment of the High Court of Kenya at Nairobi (Justice Erick Ogola) dated 19<sup>th</sup> March 2013*

*in*

*Civil Case No. 1237 of 2002)*

**RULING**

1. On the 19<sup>th</sup> day of March, 2013, E.K.O. Ogola J. delivered the judgment dated the same date in which he dismissed the Plaintiff's suit and the defendant's counterclaim as not having been proved. Each party was ordered to bear their own costs.
2. The Plaintiff was dissatisfied with that outcome and its then advocates M/s Mungai Kalande & Company Advocates had the Notice of Appeal dated the 27<sup>th</sup> March, 2013 filed herein on 28<sup>th</sup> March 2013, quite within the requisite time. But not so the Record of Appeal, and hence the motion now under consideration, which motion is expressed to be brought pursuant to the provisions of **sections 3A and 3B** of the **Appellate Jurisdiction Act** and

Rules 4 and 82 of the Court of Appeal Rules, seeking that this Court do extend the time for filing of the Appeal, and make any further orders in the interests of justice. He prays that the costs of the application be in the cause.

3. That Motion is brought on the grounds that the applicant has an arguable appeal as set out in the draft Memorandum of Appeal; the Applicant's constitutional right to property will be infringed as goods worth US\$43,528.14 were delivered and not paid for by the Respondent which amounts to unjust enrichment; the respondent should not be allowed to benefit from breaching its contractual obligations and unjustly enrich itself; the delay in filing the Appeal was occasioned by the delay by the High Court in confirming to the applicant's former advocates that the proceedings were ready for collection; the applicant's previous advocates upon receipt of the proceeding exercised a

lien on the applicant's file on account of a dispute over legal fees; the dispute over legal fees also occasioned the delay in former advocates transmitting the relevant documents to the current advocates of the applicant to enable them file an application for extension of time; **Article 159** of the Constitution requires that matters be heard on the basis of substantive justice and that the applicant seeks to have its appeal heard on substantive justice and should not be penalized on account of his counsel detaining the file after collecting the proceedings and in failing to release the same on account of a dispute on fees.

4. The application is supported by the averments in the affidavit of the applicant's managing director one, Byung Tae Kim in which is repeated pretty much what is stated in the grounds on which the motion is based.
5. Opposing that motion, the Group Executive Chairman of the respondent Mr. Horatius Da Gama Rose deposed in his replying affidavit that although the typed proceedings were ready for collection from court on 9<sup>th</sup> July 2013, the same were not collected until 17<sup>th</sup> February, 2014 and as there was no certificate of delay explaining when the proceedings were ready for collection, the deponent described the motion as an afterthought, as even the motion under consideration seeking to extend time was itself not filed soon after the lapse of time on 28<sup>th</sup> September 2013. It is further stated that no plausible reasons for the delay are advanced and even what is given is contradictory, and the cash crush given as reason is dismissed as unmerited, lame and unacceptable. The deponent described the delay as inordinate and not satisfactorily explained, and therefore the interests of justice require that the motion be dismissed.
6. At the hearing of the motion Mr. Gichuhi, learned counsel for the applicant re-emphasizing the grounds on which the motion is based and the averments in the affidavit in support of the motion, submitted that the delay of about eight months was adequately explained and further that the applicant had an arguable appeal as evidenced by the draft memorandum of appeal, adding

that even if some chairs were faulty, the trial court did not make a determination on the state of the remaining ones and that a party should not be deprived of its property, for which proposition counsel relied on the provisions of **Articles 40** and **159** of the Constitution. Mr. Gichuhi submitted that the exercise of judicial discretion should be dependent on the prejudice to be suffered and he did not see any prejudice that the respondent would suffer. On this issue of prejudice counsel cited for support the authority of **Daima Bank Ltd. (In liquidation) V Prof. David M. Ndeti 2010eKLR**. Mr. Gichuhi submitted that the application should be followed so as to enable the respondent to pursue its counterclaim by way of a cross-appeal.

7. On the authority of **Peter A. Mumia & 3 others V Mary Anyango Ameka & Another [2011]**, Mr. Gichuhi told me that impecuniosity is not a reason to deny a party access to justice. Urging that the court should promote the overriding objective, counsel prayed that the motion be allowed because notice demands that the appeal be heard on its merits.
8. On his part Mr. Gachoka learned counsel for the respondent whilst admitting that the court's jurisdiction is unfettered, submitted that the same must be exercised judiciously. He posed two questions; was delay inordinate, and is it reasonably explained? He answered the former in the affirmative and the latter negatively. He submitted that since there was an admission that proceedings were collected on 17<sup>th</sup> February 2014 and no filing was done until 30<sup>th</sup> October, 2014, that delay was inordinate and unexplained. Dismissing the issue of the applicant suffering a cash crush as alleged, counsel submitted that in fact the applicant was at the material time filing another case and bidding for a tender valued at Kshs.249,434,381/24. Counsel added that bringing **Article 40** of the Constitution to this application would not aid the applicant as the same was inapplicable to the matters in issue. As for **Article 159** of the Constitution, Mr. Gachoka submitted that where a party has failed to follow procedures set out in law, that party cannot hide behind that Article. Counsel added that there must be an end to litigation and that is part of the purpose of the overriding objective as laid out in the authority of **City Chemist (NBI) & Another V Oriental Bank Limited Civil Application no. Nai 302 of 2008**.

9. Mr. Gachoka was of the further view that; every party is entitled to enjoy the fruits of its judgment, adding that the mere win of a case is enough fruit of judgment, adding further that they need not cross-appeal as they are satisfied with the judgment rendered, and any delay causes prejudice to the respondents. Stating that the applicant does not have an arguable appeal, the presence of which would nevertheless not change things, counsel urged that this application be disallowed.
10. The path of principles upon which a court considering extension of time under rule 4 is to be bound by is a well smooth beaten one, the law in that regard being well settled. The court in such circumstances has unfettered discretion, the only obstacle to the exercise of such unfettered discretion being injudicious exercise of a judge's own whim or being capricious. In the case of **Major Joseph Mweteri Igweta V Muhura Methare & Attorney General civil Application No. Nai. 8 of 2008**, unreported, this Court stated as hereinbelow;

***“The application made under rule 4 of the rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed, and the resources of the parties which might, in particular, be relevant to the question of prejudice. The factors are not to be treated as passport to parties to ignore time limits since an important feature in deciding that time limits were there to be observed and justice might seriously be defeated if there was laxity in respect of compliance to them.”*** (emphasis provided)

11. Each case, naturally depends on its own unique circumstances, no set factors being exhaustive criteria as the discretion of the judge is not to be fettered.
12. The above being the case, let me first deal with the aspect of delay. It is beyond debate that after judgment was delivered on 19<sup>th</sup> March, 2013 and the applicant being dissatisfied, Notice of Appeal was filed on 28<sup>th</sup> March, 2013 and, a day earlier on 27<sup>th</sup> March 2013, a letter was written by the applicant's previous advocates to the Deputy Registrar of the High Court calling for certified proceedings and judgment. That letter was stamped received at the Registry on 28<sup>th</sup> March, 2013. Reminders to that letter were written on 19<sup>th</sup> August 2013; 6<sup>th</sup> December 2013, and 3<sup>rd</sup> February 2014. The Deputy Registrar's letter of the 9<sup>th</sup> July 2013 advised that the proceedings requested for were ready for collection upon payment of Kshs.4,740/= . The same were collected on 19<sup>th</sup> February 2014 upon due payment being made. There was no attempt whatsoever to explain the delay between 9<sup>th</sup> July 2013 and 19<sup>th</sup> February 2014, a period of some seven (7) months, in which case an attempt to transfer blame to the Registrar of the Court is ineffectual.
13. There is similarly no debate at all that the motion seeking an extension of time was filed on 30<sup>th</sup> October, 2014 – a delay of another eight (8) or so months from 19<sup>th</sup> February 2014. And what is the explanation of this latter delay as given by counsel? Counsel, in the grounds in support of the motion called it ***“the inordinate delay by the High Court in confirming to the applicant's former advocates that the proceedings were ready for collection.”*** Surely that cannot be. The time between the date the Registrar advised of the readiness of the proceedings, to wit 9<sup>th</sup> July 2013, and the date of collection is some seven (7) odd months as already stated above. Added to the further eight (8) months from the date of collection to the date of filing makes a total delay of fifteen (15) months. The explanation given for the delay from 19<sup>th</sup> February 2013 is that the former advocates laid a lien on the file until their legal fees were paid. If that be the case, then it was not shown to be the case, that is to say, there was no evidence of the same. On the contrary what clearly comes out of the applicant's former advocates' letter of the 26<sup>th</sup> August, 2014 annexed to the motion under consideration is that, those advocates long surrendered the original

file to the applicant. Sample this;

***“The client was immediately informed when we collected the proceedings which we paid for and collected on 19<sup>th</sup> February, 2014 . Kindly note that we had surrendered our original file containing all the original documents to the client at their request hence the said original letter dated 9<sup>th</sup> July 2013 should be in the client’s possession.”***

14. And right there the applicant roasts self in own oil, so to say. It is its own document/annexture that goes to ruin any attempt at a plausible explanation for the long delay of eight months. Coupled with the fact of the length of that delay of eight months and the apparent not so honest an attempted explanation for the delay, this court’s favourable exercise of judicial discretion to the applicant is curtailed.

15. The explanation of cash crush, unsupported by the amounts required to be paid to the former advocates or the deposit to the current advocates, and partly destroyed by the tender involving millions of Kenya shillings by the applicant, and not supported by any financial statements cannot be taken seriously in the circumstances of this case, and it definitely does not call for the favourable exercise of my discretion. I am not persuaded that the applicant was impecunious and accordingly I withhold my discretion to extend time on that score alone. I find the delay(s) inordinate and the explanations proffered utterly lame and unacceptable and I reject them as such.

16. The applicant has had the aid of two separate legal representation both of whom did not timeously act to protect its interests and there will be no hiding behind **Article 159** of the Constitution, as I do not find that following timelines set by law for the doing of something, and non-explanation of the delay in failing to do that something, is a technicality such as described in **Article 159(2)(d)** of the 2010 Constitution. Nor do I accept that **Article 40** of the said Constitution is in play in this case as the applicant’s case was found to be unproved by the evidence led on trial, and although a mini trial of the appeal is not to be undertaken in the determination of this motion, the arguability of such appeal having not been exhibited and the same nonetheless not being a paramount ground for extension of time in the absence of explanation for delay, I am nevertheless not persuaded that the exercise of my unfettered discretion in favour of the applicant is earned. The overriding objective principle is of course to ***“facilitate the just expeditious, proportionate and affordable resolution of appeals ---”***

(emphasis added), and not to deny a successful litigant the fruits of judgment, but to bring litigation to an end. That principle cannot be called upon to aid an unexplained inordinate delay.

17. I have said enough to show that I find the delay herein was inordinate and not satisfactorily explained and accordingly the motion dated 28<sup>th</sup> October, 2014 and filed herein on 30<sup>th</sup> October, 2014 is dismissed with costs.

**Dated and Delivered at Nairobi this 6<sup>th</sup> day of March, 2015.**

**P. M. MWILU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

