



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, J.A (IN CHAMBERS))

CIVIL APPLICATION NO NAI 284 OF 2014

BETWEEN

WAMBUGU, MOTENDE & CO. ADVOCATES.....APPLICANT

AND

KAJULU HOLDINGS LIMITED.....1ST RESPONDENT

LALJI KARSAN RABADOA.....2ND RESPONDENT

ARVIN JADVA RABADIA.....3RD RESPONDENT

CHANDRAKANT LALJI RABADIA4TH RESPONDENT

(an application for extension of time to file, and serve a notice of appeal, and appeal out of time against the ruling of the High Court of Kenya (Havelock, J.) delivered on 24th April 2014

in

Misc. Application Ni 655 of 2012)

RULING

The genesis of this application is a disagreement between Wambugu, Motende & Co. Advocates, hereinafter referred to as the applicant, and Kajulu Holdings Ltd, the 1st respondent herein, who was at one time a client of the applicant. In the course of the applicant representing the 1st respondent in some conveyancing transaction, the applicant and the 1st respondent disagreed.

Consequently, the applicant filed a bill of costs for taxation before the Deputy Registrar of the High Court. The respondents objected to that bill, and the Deputy Registrar upheld the objection, prompting the

applicants to file a reference of that decision under paragraph II of the Advocates Remuneration Order. That reference was dismissed by Havelock J. in a ruling made on the 24th April 2014. The applicant claims that it became aware of that ruling on the 21st August 2014 when the respondents served them with a bill of costs and a notice to tax the same.

As time for filing of a notice of appeal has since expired, the applicant has approached this Court by way of a Notice of Motion predicated under Rule 4 of this Court's rules in which it seeks orders granting leave to file a notice of appeal, and to appeal out of time against the ruling of High Court, and further an order staying the taxation of the respondent's bill of costs dated 23rd May 2014 pending the hearing of the intended appeal.

Mr Ngige, learned counsel, for the applicant alleged that in the High Court, the learned judge had indicated that it would deliver the ruling in the application on notice, but the firm was never served with a notice and as such, there was no representative present during the delivery of the ruling. They therefore could not seek leave to appeal the decision before the learned judge. He urged me to exercise my discretion and grant leave to file a notice of appeal, as well as enlarge the time within he can file his appeal.

Mr Amuga for the respondents, on his part opposed the application. He argued that the application is incompetent because under Rule 11(4) of the Advocates Remuneration Order, any party who is aggrieved with the decision of a judge on a reference cannot appeal to the Court of Appeal without leave. He submitted that like any other decision of the High Court where an appeal does not lie as of right, leave to appeal cannot be granted in the first instance by the Court of Appeal.

Mr Amuga further argued that notice of delivery of the ruling was dispatched to both advocates on the 10th April 2014. He submitted that even if the applicant's explanation that they only got to know of the ruling on 21st August 2014 was to be believed, the delay between that date and the 5th November 2014 when the applicant filed the present application is unexplained.

Mr Amuga's concluding submission was that the application should fail because the intended appeal has no chances of appeal because both the opinions of the taxing master and the learned judge was correct.

I have carefully considered the application as well as the rival submissions of the parties before me. I am cognisant that the parameters under which this Court can exercise jurisdiction under Rule 4 follow a well beaten path. In *Githiaka Versus Nduriri [2004] KLR67* they were aptly set out as follows:

“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.”*

It is with these considerations in mind that I will now proceed to determine

this application. Rule 11 (4) of the Advocates Remuneration Order provides that:

“Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.” (Emphasis mine)

That rule clearly spells out that an aggrieved party can only appeal to this Court **after** obtaining leave from the judge who made a determination on the reference. In the present application, the applicant made no such step in the High Court, and as a result, this Court cannot grant him leave in the first instance.

Even if I was so minded to grant leave to file the notice, I am not satisfied that the applicant has properly explained the delay. Perhaps it is true, as he alleges, that he only got to know of the ruling made against him on the 21st August 2014. However, this does not explain why there was such a delay in bringing the present application. There is absolutely no indication of what follow up the applicant took in the High Court to get a copy of the ruling which he says that he got over a month later, on the 25th September 2014. One would expect to see letters to the Deputy Registrar of that court requesting copies of the ruling, or asking for help in tracing the Court file.

In addition, there was no explanation offered as to why there was a further delay between the 25th September 2014 and the 5th November 2014; that is a period of over one month that is totally unexplained. It is trite law that a party seeking this Court’s discretion must explain to the court the reasons for the delay. In *Waweru & Another v Kirori* [2003] KLR 448 this Court dealing with an application such as the one now before me stated that:

“...Although the Court has unfettered discretion an applicant must explain to the satisfaction of the Court what lead to the delay.”

Here, there has been no explanation whatsoever, and as such, I have no basis upon which to exercise my discretion to the benefit of the appellant. Mr Ngige sought refuge under section 3A of the Appellate Jurisdiction Act, which enjoins the Court to ***“facilitate the just, expeditious, proportionate and affordable resolution***

of the appeals” and argued that under that section, this Court could grant the orders sought.

While it is true that the Court must strive in all its determination to give effect to the overriding objective, it has been stated time and again in this Court that such the overriding objective cannot be used to displace the rules within which the Courts operate. See *City Chemist (Nrb) & Another v Oriental Commercial Bank Ltd, Civil Application No. Nai 302 of 2008 (UR 99/2008)* where the Court

expressed itself in the following manner:

“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 the circumstances of this application, the overriding objective would be of no aid to the applicant. In fact, that the applicant has failed to explain the delay in bringing this application only serves to show that he is not entitled to the order of extension of time. I agree with Waki J.A. who stated in ***Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR (Civil Application 15 of 2011)***

stated that an unexplained delay, which in that case was four months, only serves to militate against the overriding objective and the principles of extension of time.

In the circumstances, this application is without merit and cannot lie. I hereby order it dismissed with costs to the respondents.

Dated and delivered at Nairobi this 6th day of March, 2015

M. WARSAME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR,