



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, AZANGALALA & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 98 OF 2013

BETWEEN

AVIATION CARGO SUPPORT GROUP LTD.....APPLICANT

AND

ST. MARK FREIGHT SERVICES LIMITED.....RESPONDENT

(An application for extension of time to file and serve the record of appeal out of time in an intended appeal from Judgment of the High Court of Kenya at Nairobi (Havelock, J) delivered on 20th September, 2012

in

H.C.C.C. NO. 789 OF 2010)

RULING OF THE COURT

Aviation Cargo Support Limited, the applicant herein, went before a single Judge of this Court, **G.B.M. Kariuki, JA** asking that Judge under rule 4 of the Court's Rules, to enlarge time for it to enable it file and serve its record of appeal out of time. The application was made on the basis of five grounds expressed as follows:

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- a. *The Notice of appeal was lodged and served upon the respondent within the prescribed time.*
- b. *The appeal is arguable and with an overwhelming chance of success.*
- c. *The delay is not inordinate having been occasioned partly by the registry in the High Court Registry*

d. *The Respondent shall not be prejudiced by the application herein*

e. *It is in the interest of justice that the time for filing and serving the Record of Appeal be extended.*”

The applicant together with one **Sarah Wangui**, were sued by the respondent, **St. Mark Freight Services Limited**, for recovery of US dollars 74831.96 being the balance of the price of goods delivered to it at its request.

J.B. Havelock J, heard the suit and found that the applicant was liable to the respondent in the said sum. He therefore, on 26th September, 2012 entered judgment accordingly, in the said sum plus interest and costs. The applicant was aggrieved and therefore filed a Notice of Appeal timeously on 2nd October, 2012. But it did not file its record of appeal within the time prescribed by the Rules of this Court hence the application for extension of time to file and serve the record of appeal. As we have said, **G.B.M. Kariuki JA**, heard the motion and by his ruling dated and delivered on 14th February, 2014, the learned Judge refused to extend time as sought by the applicant thereby provoking this reference.

The learned single Judge found that the proceedings and the Judgment intended to be challenged on appeal were ready on 27th November, 2012 but for an unexplained reason were collected by counsel for the applicant on 19th December, 2012 and further that even after the collection of the proceedings and Judgment on 19th December, 2012, the motion to extend time was lodged on 13th of May, 2013 a period of nearly six months from the time the proceedings and judgment were ready for collection. The learned Judge found that that period was inordinate and had not been explained. The learned Judge was of the view that even where the intended appeal may be meritorious, if the delay is too inordinate and has not been explained, leave ought not to be granted. The learned Judge appreciated that the court in interpreting its rules should lean in favour of determining appeals on merit and *“thus facilitate access to justice by ensuring that deserving litigants are not shut out.”* The learned Judge was also alive to the overriding objective of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya as codified in Section 3B(1) of the said Act.

Having considered all those principles the learned Judge still came to the conclusion that he would not exercise his discretion in favour of the applicant.

We heard Ms Benbella, learned counsel for the applicant, as she urged the motion for extension of time to file and serve the record of appeal, but unfortunately she did not show us that in coming to the said conclusion the learned single Judge took into account an irrelevant matter, or that he failed to take into account a relevant matter or that he misunderstood the weight or bearing of the affidavit evidence before him, or that looked at on the basis of the evidence placed before him and the law, the learned Judge’s decision was plainly wrong. The learned single Judge considered the matter before him bearing in mind the relevant principles set out in numerous decisions of this court and nothing was shown to us by the applicant which would make us interfere with the Judge’s exercise of discretion.

The reference must therefore fail. We order that it be and is hereby dismissed with costs thereof to the respondent.

Those are our orders on this reference.

Dated and delivered at Nairobi this 29th day of May, 2015.

P.M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original

DEPUTY REGISTRAR