



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J. OTIENO-ODEK J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 260 OF 2015 (UR 219/2015)

BETWEEN

CYRUS SHAHALAGA JIRONGO.....1st APPLICANT

CYPERR ENTERPRISES LIMITED.....2nd APPLICANT

OFF-SHORE TRADING COMPANY.....3rd APPLICANT

AND

EMRIS INVESTMENT LIMITED.....RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal against the Ruling and Order of the Environment and Land Court at Nairobi (M. Githumbi, J.) dated 6th February 2015

in

ELC Case No. 932 of 2013)

RULING

1. By Notice of Motion dated 23rd October 2015, the applicants seek an order for extension of time to file and service a Notice of Appeal against the ruling by the Environment and Land Court at Nairobi (M. Githumbi, J.) dated 6th February 2015. The application is brought under **Rule 4** of this Court's Rules.

2. To appreciate the grounds in support of the application and opposition thereto, it is necessary to state the pertinent facts in issue. By a Plaint dated 17th July 2013, the respondent filed suit against the applicants for the sum of Kshs.32,000,000/= plus interest and costs thereon. The applicants entered appearance on 26th July 2013 but did not file any defence. An interlocutory judgment in default of defence was entered against the applicants on 16th August 2013. By a Notice of Motion dated 8th November 2013, the applicants moved the Environment and Land Court to set aside the interlocutory judgment and all consequential orders. The motion was heard *inter partes* and on 15th July 2014, the trial court made an order that ruling will be delivered on 17th October 2014. The ruling was not delivered as scheduled and it was directed that the ruling would be delivered on notice.

3. A ruling dated 6th February 2015 was delivered; no notice of delivery was served on either party and all parties did not know of the existence of the ruling till several months later. The respondent's advocates wrote a letter dated 26th August 2015 to the trial court registry inquiring about the status of the ruling; the respondent learnt that the ruling had been delivered on 6th February 2015 and proceeded to extract a decree and warrant of attachment against the applicants. The applicants came to learn about the ruling on 5th October 2015 upon perusal of the court record and thereafter the applicants filed a Notice of Appeal dated 9th October 2015 and served the same on the respondent on 16th October 2015.

4. Based on the facts stated above, the applicant has made the instant application for extension of time to file and serve the Notice of Appeal and that the Notice of Appeal dated 9th October 2015 be deemed as duly filed and served within time.

5. The grounds on the face of the application and as deposed in the supporting affidavit are that the applicants are aggrieved by the ruling dated 6th February 2015 and intend to appeal against the same; that the Notice of Appeal was filed out of time for the reason that the trial court delivered the ruling on 6th February 2015 without notice to the applicants or their advocate on record; that the applicant became aware of the ruling on 5th October 2015 on perusal of the court file by which the time the period prescribed for filing and serving the Notice of Appeal had expired; that the applicant has timeously filed the present application without inordinate delay; that no prejudice will be suffered by the respondent; that a Notice of Appeal dated 9th October 2015 was filed at the Environment and Land Court.

6. The respondent in opposition filed a replying affidavit deposed by **Mr. Isaac Adan Dabaso**. The opposition is premised on the ground that the instant application is fatally defective and incompetent as the applicants have not invoked **Rule 42** of the Rules of this Court; that there is no proper Notice of Appeal filed in this matter as no such notice has been lodged at the Court of Appeal registry to invoke its jurisdiction to entertain the instant application; that the applicants did not obtain leave of the Environment and Land Court under **Order 43 (rules 1 and 2)** of the **Civil Procedure Act and Rules** to file the present application or appeal; that the applicants have not obtained leave from this Court under **Order 43 (rule 3)** of the Civil Procedure Act and Rules; that the present application was not filed timeously and there is an unexplained delay of 18 days from 5th October 2015 to 23rd October 2015 when the present application was filed; that there is no annexed draft memorandum of appeal to enable this Court to interrogate whether the intended appeal has any chance of success; that the applicants moveable property have been attached and the instant application has been overtaken by events; that the applicants have unequivocally admitted liability in writing by letter dated 6th November 2015 and have requested to be allowed to liquidate the decretal sum by installments.

7. At the hearing of the application, learned counsel Mr. Bernard Koyyoko appeared for the applicants while learned counsel Mr. Mutembei Marete appeared for the respondent.

8. Counsel for the applicants reiterated the grounds in support of the application emphasizing that the ruling was delivered without notice and the delay between 6th February to 23rd October 2015 was not due to any fault or negligence on the part of the applicants; that the trial court misdirected itself and erred in the exercise of discretion in the ruling delivered; counsel cited the case of **Ngoso General Contractors Limited -v- Gichunge (2005) 1 KLR 737** where it was held that there was a misdirection by the High Court on a matter of law in failing to consider that the appellant was absent when judgment was delivered and had not been served with notice of delivery of the judgment.

9. The respondent submitted that the interlocutory judgment entered against the applicants was a judgment in default of defence not judgment in default of appearance; that there is distinction between the two because if judgment is entered in default of appearance, no leave to appeal is required but if judgment is entered in default of defence, leave of the trial court or this Court is required pursuant to Order 43 Rules (1) and (2) of the Civil Procedure Act and Rules; that in the instant case, the applicants have neither obtained leave of the trial court nor leave of this Court to lodge an appeal; that the present application does not invoke Order 43 Rule 3 of the Civil Procedure Act and Rules to seek and obtain leave of this

Court to lodge an appeal.

10. The respondent submitted that the ruling to be appealed against was delivered on 6th February 2015 and there has been inordinate delay of 8 months and 17 days in filing the present application on 23rd October 2015. Counsel submitted that execution process against the applicants was at an advanced stage and the applicants have unequivocally admitted indebtedness to the respondent. It was submitted that the case of ***Ngoso General Contractors Limited (supra)*** cited by the applicants was distinguishable because notice of delivery of judgment was given to one party and not the other but in the present case no notice of delivery of the ruling was served on all parties; that the judgment in ***Ngoso case*** bore no date and this is not so in the present ruling. The respondent urged that the present application should be dismissed with costs. In a brief response, counsel for the applicants submitted that no leave to appeal is required under ***Order 43 (1) (1) (g)*** of the Civil Procedure Act and Rules as read with ***Order 10 rule 11*** of the Civil Procedure Rules. That under Rule 75 (1) and Rule 76 of the Court of Appeal rules, the place to file the Notice of Appeal is the registry of the trial court and there is no requirement that the applicant is to lodge the Notice of Appeal at the Court of Appeal registry. I concur and find that the proper registry to lodge and file a Notice of Appeal is the trial court registry.

11. I have considered the application and the affidavit in support thereof as well as the replying affidavit and the judicial authority cited. In ***Wasike - v- Swala (1984) KLR 591***, the factors to be taken into account concerning applications under ***Rule 4*** are stated as:

a. length of delay,

b. reasons for the delay,

c. the chances of the appeal succeeding if the application is granted and

*d. the degree of prejudice to the respondent if the application is granted. (See also *Leo Sila Mutiso -v- Rose Hellen Wangari, Civil Application No. NAI 255 of 1997*).*

12. A ground of opposition urged by the respondent is that the applicants did not obtain leave to appeal pursuant to ***Order 43 (rules 1 and 2)*** of the Civil Procedure Act and Rules. Conversely, the applicants contend that leave is not required to file an appeal against an interlocutory judgment entered in default of defence. ***Order 43 Rule 1 (1) (g)*** stipulates that an appeal shall lie as of right from an order made pursuant to ***Order 10 rule 11*** (setting aside judgment in default of appearance). ***Order 10 rule 10*** provides that the provisions of ***rules 4 to 9*** of the said order shall apply where any defendant has failed to file a defence. ***Rules 4 to 9*** empower the trial court to enter interlocutory judgment when a defendant fails to file a defence. The issue of leave or no leave to appeal is a substantive point of law suitable to be urged before a three judge bench in the intended appeal. Before me, the issue is whether or not to grant extension of time. It is my considered view that the respondent is at liberty to canvass the issue of leave in the substantive appeal. The respondent referred to ***Section 75*** of the Civil Procedure Act and I am of the view that the Section is inapplicable as it relates to arbitral awards.

13. In an application for extension of time, the substance is to place sufficient material before the single judge in explanation of the reasons for delay in filling the notice or record of appeal within time. In the case of ***Paul M. Waweru & 2 others [2003] KLR 361***, it was stated:

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under Rule 4 of the Rules of this Court. All that the applicant is required to do is to place sufficient material before the learned Judge explaining the reasons for what was clearly an inordinate delay.”

14. I am aware that the discretion I have to exercise under the Rules of this Court is unfettered. There is also a duty now imposed on the Court under ***Sections 3A and 3B*** of the ***Appellate Jurisdiction Act*** to ensure that the overriding objective of civil litigation is the just, expeditious, proportionate and affordable resolution of disputes before the Court.

15. The respondent has urged that the instant application is incompetent because no draft memorandum of appeal had been attached to the application. In **Kiramburi -v- Githinji (1986) KLR 405 at 408**, the issue was considered and the court observed that it is important to give full information and a sufficient statement of the nature of the judgment and reasons for desiring to appeal against it to enable the court determine whether or not a refusal of the application would appear to cause injustice. I have perused the instant application particularly paragraph 15 of the affidavit in support thereof which itemizes the arguable grounds in the intended appeal. It is deposed that the trial court failed to consider the principles to be applied in applications for setting aside default judgment; that the court failed to appreciate that the judgment on record was irregular; that the court failed to consider the merits of the defence on record. I am satisfied that *prima facie* sufficient grounds have been given to be urged in the intended appeal as to whether the trial court properly exercised its discretion in declining to set aside the interlocutory judgment.

16. The trial court made an order that the ruling was to be delivered on notice and no notice was served on either party. Even the respondent was not aware that the ruling had been delivered on 6th February 2015. I am persuaded and guided by the decision in **Ngoso Case** and I am satisfied that the applicants have provided a good explanation for the delay in filing the present application and lodgment of the Notice of Appeal. I note the dicta in **Charagu -v- Kaguru (1986) KLR 443** where despite the delay of 2 months from the day when the Notice of Appeal was due, the court exercised its discretion in favour of the applicant. In the present case, the delay is for 18 days and I am satisfied that a sufficient explanation for the delay has been given.

17. The respondent further urged this Court to find that the applicant's advocate was indolent to the extent that no letter was written to the trial court registry to inquire into the status of the ruling that was to be delivered on notice. I note that even the respondent's advocate only wrote to the registry on 26th August 2015. In **Murai -v- Wainaina (No. 3) (1982) KLR 33** it was held that an advocate's *bona fide* mistake, but not inordinate delay on the advocate's part, may amount to sufficient cause. Guided by the foregoing dicta, I am satisfied that the failure by the applicants advocate to write to the court registry is not fatal as the obligation to give notice for delivery of the ruling was upon the trial court registry and not upon the parties or their advocates.

18. On the respondent's submission that the present application does not invoke or cite ***Rule 42*** of the Rules of this Court, I am reminded of the dicta in **D.T. Dobie & Co. (K) Ltd. -v- Muchina (1982) KLR 1**, where this Court stated that a court of justice should aim at sustaining a suit rather than terminating it. In **Microsoft Corporation -v- Mitsumi Computer Garage Ltd. & Another (2001) KLR 470** it was stated that

“rules of procedure are the handmaidens and not mistresses of justice. They should not be elevated to a fetish...Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.” I am further guided by the Supreme Court dicta in **Nicholas Kiptoo arap Korir Salat -v- IEBC & 7 Others, S.C. Petition No. 23 of 2014** where the Court invoked the provisions of ***Article 159 (2) (d)*** of the Constitution that justice is to be administered without undue regard to procedural technicalities. I hereby invoke ***Article 159 (2) (d)*** of the Constitution and ignore the procedural lapse in citing ***Rule 42*** of the Rules of this Court.

19. The totality of the foregoing is that I find the grounds in support of the application have merit and I hereby exercise my discretion and grant the applicants extension of time to file and service Notice of Appeal against the ruling by the Environment and Land Court at Nairobi (M. Githumbi, J.) dated 6th February 2015. The applicants shall file and serve a new Notice of Appeal within 30 days of the date of this ruling. Each party shall bear his/its costs in the application.

Dated and delivered at Nairobi this 4th day of December, 2015

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR