



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM : OKWENGU, JA)

CIVIL APPLICATION NO. NAI. 215 OF 2015

KENYA AGRICULTURAL AND LIVESTOCK

RESEARCH ORGANIZATION APPLICANT

VERSUS

STEPHEN NGARUIYA KANYANJARESPONDENT

(Being an application for extension of time within which to appeal against the judgments of the

High Court of Kenya delivered on 3rd July, 2012 before Hon. Lady Justice M.A Ang'awa

and on 5th March, 2015 by (Hon. Onyancha, J)

in

Civil Appeal No. 230 of 2008

RULING OF THE COURT

[1] By a Notice of Motion dated 12th August, 2015, **KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION** (*herein the applicant*) moved this Court for extension of time within which to file a Notice of Appeal, and leave to file Notice of Appeal out of time in respect of two Judgments. The first is the judgment delivered by the High Court (Ang'awa, J) on 3rd July 2012 in regard to an appeal against the judgment of Senior Resident Magistrate delivered on 10th April, 2008 in CMCC No. 13558 of 2004 in Milimani Commercial Courts. The second judgment is one delivered by the High Court (Onyancha, J) on 5th March, 2015 also in Civil Appeal No. 230 of 2008. Although entitled judgment, the latter is in actual fact a ruling in regard to a request by the parties in Civil Appeal No. 230 of 2008 for interpretation of the High Court's decree issued on 3rd July 2012 pursuant to the judgment of Ang'awa, J.

[2] The grounds upon which the applicant's motion is anchored as indicated on the face of motion, and the affidavit in support sworn by Festus Ouma Bolo the applicant's Senior Administrative Officer, are briefly: that the applicant was not aware of the appeal proceedings in the High Court as their advocate never communicated the same to them; that the applicant only became aware of the High Court

proceedings when it was served with a proclamation in execution of the decree of the High Court on 23rd July 2015; that on 27th July 2015 the applicant sought the services of his current advocate and it was then that the applicant learnt of the appeal and the two judgments; that the applicant is aggrieved by the two decisions of the High Court and believes that it has an arguable appeal as the decision goes against the weight of the evidence and the applicant was also condemned and heard. The applicant therefore urges the Court to extend time for it to file the Notice of Appeal, and also grant it leave to appeal.

[3] The applicant explains that it did file an application in the High Court on 28th July, 2015, and obtained an order for stay of execution for thirty (30) days, and that it later withdrew the application on 12th August 2015 upon realizing that the High Court lacked the power to grant the orders it sought for extension of time. The applicant is apprehensive that unless the application is granted, its intended appeal is likely to be rendered nugatory as the respondent has already initiated the process of execution and attached an ambulance that normally transports the applicant's staff to hospital; that the decree as contained in the proclamation is for a sum of Kshs. 5,400,200.00; that the amount is substantial; and that the execution is likely to cripple the applicant's operations.

[4] Further, the applicant maintains that the respondent is a retiree whose source of income is unknown and that he may be unlikely to have the means to refund the decretal sum in the event the applicant's appeal succeeds. Finally, the applicant asserts that it is a Government entity with perpetual succession, and that it is ready and willing to provide any security for the due performance of the decree as the Court may be order.

[5] The application was opposed through a Replying Affidavit sworn by the respondent **STEPHEN NGARUIYA KANYANJA**. In the affidavit the respondent maintained that the advocates who had brought the Notice of Motion on behalf of the applicant were not properly on record as there has never been a notice of change served on the respondent's advocate; that the applicant's former advocate J M Majiwa & Company were not only on record in the High Court but also corresponded with the respondent's advocates regarding the conduct of the High Court Civil Appeal; that the applicant has not shown any valid reasons why he should be given another chance to appeal; that the applicant is abusing the court process as it has filed an application in High Court Civil Appeal No. 230 of 2008 seeking similar orders as now sought in this motion; that the attempt to withdraw the motion in the High Court has not been successful as the withdrawal has not been adopted by the court; that this court does not therefore have jurisdiction to entertain the motion as a similar application in the High Court is still being actively prosecuted.

[6] During the hearing of the application, Mr. Benson Milimo appeared for the applicant whilst Mr. Ntogaiti appeared for the respondent. In his submissions Mr. Milimo reiterated the grounds put forward by the applicant as above-stated.

He explained that the applicant's motion for leave was filed on 13th August, 2015, immediately after the High Court application was withdrawn. He urged the court not to visit the failure of the applicant's former advocate on the applicant as the applicant has a genuine appeal, a draft memorandum of which has been availed. Mr. Milimo relied on **Del Monte Kenya Limited – vs – Patrick Njuguna Kariuki [2014] eKLR**; and **Gabriel Osimbo –vs – Chrispus Mandare [2015] eKLR**.

[7] In opposing the motion, Mr. Ntogaiti submitted that the applicant has exhibited inordinate delay as the application was filed on 13th August 2015, long after the judgement that was delivered on 5th March 2015. He maintained that no plausible explanation had been given for the delay to justify the exercise of the Court's discretionary powers in favour of the applicant. As regards the ruling concerning the interpretation of the High Court's judgment, Mr. Ntogaiti made reference to a letter from the applicant's former advocate requesting for interpretation of the court's judgment. He added that the notice of the judgment was forwarded to the applicant's former advocate and if there was professional negligence on the part of the applicant's former advocate, the same should be dealt with in a different forum.

[8] As regards the probability of the success of the appeal, Mr. Ntogaiti argued that the judgment of the

High Court was well reasoned and that the applicant had not raised any arguable issues. He added that a second appeal would only occasion injustice to the respondent who is a sickly elderly man. In support of his submissions, counsel relied on ***Aviation Cargo Support Limited – vs – St. Mark Freight Services Limited*** [2014] eKLR; and ***Paul Musili Wambua – vs – Attorney General & 2 Others*** [2015] eKLR.

[9] This being an application for extension of time that was argued before me as a single judge under **Rule 47(1)** of the Court rules, the case of ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)***, outlines the general principles for determining such an application as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

[10] With these principles in mind, I have given careful considerations to the submissions made by both counsel and the authorities cited. The first issue that is for determination is whether the applicant’s current advocates are properly on record. It is apparent that the applicant was represented by the firm of Majiwa & company advocates in the subordinate court and in the High Court. However Millimo, Muthiomi & Company Advocates filed the motion before us on behalf of the applicant. The question is whether there was a need for a notice of change to be filed by Millimo, Muthiomi & Company Advocates.

[11] **Rule 22** of the Court of Appeal Rules that deals with appearances provides that a party to any proceedings in the Court may appear in person or by advocate. This means that appearance is not limited to the advocates who represented the party in the court from which the appeal emanates. The appeal proceedings before this Court are separate proceedings in regard to which fresh instructions are necessary. The presumption that the same advocates must represent a party before this Court has therefore no legal basis. Indeed Rule 23 of the Court of Appeal Rules that provides for change of advocates states:

23.Change of advocate

(1) Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar notice of the change and shall serve a copy of such notice on the other party or on each other party appearing in person or separately represented, as the case may be.

[12] In my view such a change would only be necessary if a party wishes to change from an advocate who is already appearing for him in this Court. That is not the case herein and I would accordingly overrule the respondent’s objection and rule that the applicant’s advocates are properly on record.

[13] The judgment of the High Court (Anga’wa J) was delivered on 3rd July 2012 and the ruling (Onyacha J) delivered on 5th March 2014. Therefore the application for extension of time having been filed on 13th August 2015, it was brought more than 3years after the judgment and more than one year after the ruling. Although the applicant maintains that the delay was due to its unawareness of the appeal in the High Court, it is evident that M/s. J M Majiwa & Co represented it in the High Court. This was the same firm that appeared for the applicant in the lower court. The applicant’s excuse that the counsel never informed it of the proceedings in the High Court does not provide an acceptable excuse for the delay. This is because J M Majiwa & Co Advocates was an agent of the applicant. The participation of the firm in the proceedings was on behalf of the applicant. If the advocate failed in discharging the duty of keeping his principal informed, that is a matter between the advocate and the applicant, and the respondent, a third party who relied on the agent’s ostensible authority ought not to be prejudice by the agent’s action.

[14] I find that unlike ***Gabriel Osimbo –vs – Chrispus Mandare*** (*supra*) where the delay was only 14

days and due to the illness of the applicant, the period of delay herein of three years and one year respectively, was inordinate and the applicant has not given any good reason to justify the extension of time, either for filing the Notice of Appeal against the Judgment of 3rd July 2012 or that of 5th March 2015. Moreover, the applicant has not demonstrated that the intended appeal against the judgment of 3rd July 2012 has any chances of success, as he has not shown any possible ground against that judgment. The applicant's assertion that the rules of natural justice were breached, cannot hold as it is evident that the applicant's counsel was heard. Further, the contention that the respondent's means of income is unknown is not sufficient to justify denying the applicant the fruits of a judgment that has been made in his favour.

[15] The applicant relied on Section 3A of the Appellate jurisdiction Act. Nonetheless, that section provides the overriding objective of the Act obligating this Court to facilitate the just, expeditious, proportionate and affordable resolution of the appeals. As stated in **City Chemist (Nbi) & Anorther -v- Oriental Bank Limited, Civil Application No. Nai 302 of 2008:**

“The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court.”

[16] In the circumstances of this case, the overriding objective cannot act in the applicant's favour as the respondent obtained a lawful judgment in the High Court, and the applicant squandered its opportunity to appeal against that judgment. It would neither be fair nor just to tamper with the judgment, or to prolong litigation in this matter by allowing the application.

[17] I find that the applicant has not established any circumstances that would justify the exercise of my discretion in its favour. Consequently, I decline to exercise my discretion in the applicant's favour and do dismiss the motion with costs. Those shall be the orders of the court.

Dated and Delivered in Nairobi this 4th day of December, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR