



IN THE COURT OF APPEAL
AT NAIROBI
(CORAM; WARSAME, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO 253 OF 2015

BETWEEN

SANJIVAN MUKHERJEEAPPLICANT

AND

KARACHIWALLA NAIROBI LIMITED.....RESPONDENT

(an application for leave to file an notice of appeal and the record of appeal out of time against the judgment and decree of the High court of Kenya at Nairobi (Havelock, J.) dated 7th August 2014

in

H.C.C.C No 113 of 2012)

RULING

The applicant seeks the benefit of my unfettered discretion to extend the time within which they can file a notice of appeal and record of appeal against the decision of Havelock J which was delivered on 7th August 2015. The power to extend time under rule 4 of the Court of Appeal rules is an exercise in discretion. That discretion must be exercised judiciously and without caprice. In exercising my unfettered discretion, the factors that I may take into consideration include the length of the delay, the reason for the delay, and possibly, the arguability of the intended appeal. As has been stated by this Court on numerous occasions, the discretion under rule 4 of this Court’s rules is unfettered and as such, there is no limit to the number of factors that I may take into consideration.

The decision against which the applicant intends to appeal against was delivered on 7th August 2014. According to the applicants, the judgment was initially to have been delivered on 8th July 2014 but when they attended court it was indicated that the judgment would be delivered on notice. Mr. Khaseke, learned counsel for the applicant, claims that he never received notice of the judgment, and only became aware of delivery of the judgment on 3rd September 2014 when he was served with a draft decree to approve. Thereafter, on 12th September 2014, the applicant filed a notice of appeal in the High Court which was eventually struck out on 2nd October 2015 for being out of time. The applicant has now brought this application to try and salvage his position so that he can be allowed to appeal out of time.

The respondent has opposed the application. Through its learned counsel, Mr. Hira, the respondent

submits that this application is an abuse of the court process; that the notice of appeal filed before the High Court was out of time; and that the applicant took too long to regularize the position by bringing this application over one year after delivery of the judgment.

I have noted that the explanation given by the applicant for the delay in filing the notice of appeal is not disputed by the respondent, and therefore, the delay has been satisfactorily explained. From the material before me, it is apparent that immediately the applicant got knowledge of the decision against him, he filed a notice of appeal in the High Court. In view of the fact that the applicant has always expressed an intention to appeal the decision of the High Court, I hold the opinion that the respondent will not be prejudiced should I grant the orders sought in this application. For these reasons, and in the interest of justice, I am inclined to grant the applicants motion in the following terms:

- a. The applicant is granted fourteen days within the date of this ruling to file and serve a fresh notice of appeal;
- b. The record of appeal shall be filed within 30 days of service of the notice of appeal
- c. The costs of this application shall abide the outcome of the intended appeal.

Orders accordingly.

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

M. WARSAME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mwk