



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, PCA (IN CHAMBERS))

CIVIL APPLICATION NO. 288 OF 2013 (UR 208/2013)

BETWEEN

KENYA REVENUE AUTHORITY.....APPLICANT

VERSUS

TRADEWISE AGENCIES LIMITED..... 1<sup>ST</sup> RESPONDENT

CONSOLIDATED BANK OF KENYA.....2<sup>ND</sup> RESPONDENT

*(Being an application for extension of time to file and serve a Notice of Appeal and Record of Appeal from the judgment of the High Court of Kenya at Nairobi (G.V. Odunga, J.) dated 2<sup>nd</sup> August, 2013*

in

*H.C. JUDICIAL REVIEW 350 OF 2012)*

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RULING

1. This notice of motion is taken out under Rule 4 of the Court of Appeal Rules (**the Rules**), by Kenya Revenue Authority (**the applicant**) seeking extension of time -
  - a. To file and serve a Notice of Appeal, and
  - b. To file and serve Memorandum and Record of Appeal
2. The ruling against which the applicant wishes to appeal was given by **Odunga, J.** in the High Court on the 2<sup>nd</sup> August, 2013. Under the Rules, the Notice of Appeal should have been filed within 14 days from the date of the ruling, that is to say not later than the 17<sup>th</sup> August, 2013. This was not done. In the grounds in support of the application, it is stated that a Notice of Appeal was prepared by the 14<sup>th</sup> August, 2013 and given to a court clerk to file in Court. For some reasons, the court clerk did not file the Notice of Appeal and this only came to light on the 23<sup>rd</sup> September, 2013 during a routine inspection by the Advocate who was handling the matter. It is also said that the failure to file the Notice of Appeal was an inadvertent mistake on the part of the clerk.

3. The affidavit in support of the application is sworn by Charles Nyakundi Murwoki who says that he is a court clerk in the applicant's organisation which I take to mean the Kenya Revenue Authority. In paragraph 4 he depones that the advocate on record gave him a Notice of Appeal on the 14<sup>th</sup> August, 2013 together with a request for proceedings to file in Court. In paragraph 6 he states that due to unforeseen circumstances he ran out of time and did not file the documents the same day. When he returned to the office, he filed the documents away. The following day, on the 15<sup>th</sup> August, 2013, he went on leave and did not return to the office until the 9<sup>th</sup> September, 2013. He goes on to say in paragraph 8 that:

***“On 23<sup>d</sup> September, 2013, as the applicant’s advocate on record was reviewing the files slated for appeal, he noticed the error and brought it to my attention. I have since filed the Notice of Appeal...”***

4. Although Mr. Murwoki says the discovery was made by the advocate on record for the applicant, he does not identify him by name. In paragraph 4 of his affidavit, he depones that the same advocate on record handed to him a Notice of Appeal on the 14<sup>th</sup> August 2013, to file in Court. That particular Notice of Appeal was presumably dated and signed by the advocate on record. A copy of that particular Notice of Appeal is not annexed to Mr. Murwoki's affidavit. The only Notice of Appeal annexed to the affidavit is dated the 25<sup>th</sup> September, 2013 and signed by Mr. Nyaga as advocate for the applicant in this application. It is the same Mr. Nyaga who appeared before me to argue this application.
5. Mr. Nyaga submitted that the intended appeal raises important issues of law and that the matter is also of public interest. He also submitted that the appeal has good prospects of success. That is basically the same position taken by Mr. Murwoki in paragraphs 10, 11 and 12 of his affidavit. Like his clerk, he also says no prejudice will be caused to the 1<sup>st</sup> Respondent (Tradewise Agencies Limited) if the application is granted.
6. Mr. John Nyoro Wairumbi, a director of Tradewise Agencies Limited (TAL) swore an affidavit dated the 8<sup>th</sup> November, 2013 opposing the application. In paragraph 3(d) he depones:

***“3(d). The Court Clerk of the Applicant is not an officer of this Honourable Court. There is no affidavit by the Advocate and the Clerk’s affidavit alone cannot invoke the discretion of this Honourable Court” (emphasis added).***

7. Ms. Mbabu for the 1<sup>st</sup> respondent opposed the application. She submitted that the supporting affidavit should have been sworn by the advocate on record, not by a clerk who describes himself as a court clerk in the applicant's organization. I think there is considerable merit in this submission because Mr. Nyaga made no attempt at all to explain why he chose to get the clerk to swear the affidavit rather than doing it himself. Because of that failure, Ms. Mbabu contended that the delay in taking steps to lodge the Notice of Appeal has not been explained and consequently there is no basis upon which the Court can properly be asked to exercise its discretion in favour of the applicant.
8. Under Rule 4 of this Court's Rules, I have unfettered discretion to extend the time limited for anything under the Rules. This discretion, like all other judicial discretion, must be exercised on sound reason, and not on whim, caprice or sympathy. See **Githiaka v Nduriri [2004] 2 KLR 67 at 70.**
9. In spite of the several authorities cited by Mr. Nyaga, I am afraid I have to agree with Ms. Mbabu's submission that the applicant has failed to explain the delay in taking the necessary steps. Mr. Nyaga as the advocate on record and with the conduct of the case should have sworn an affidavit to confirm that he did indeed prepare a Notice of Appeal on the 14<sup>th</sup> August, 2013 and gave it to Mr. Murwoki with instructions to file in Court. Mr. Murwoki states categorically in paragraph 3 of his affidavit that the Notice of Appeal had to be filed on or before the 17<sup>th</sup> August, 2013. That particular Notice of Appeal, if it existed at all, must have been dated and signed by Mr. Nyaga before being filed in Court.
10. If the story of Mr. Murwoki is to be believed, and I have to say at once that I do not believe it, he should have annexed a copy of that Notice of Appeal to his affidavit. The only Notice of Appeal

filed in this case is the one dated the 25<sup>th</sup> September 2013 and signed by Mr. Nyaga, the advocate for the applicant. I have no hesitation in coming to the conclusion that Mr. Murwoki's affidavit was contrived to lend credibility to his claim that the failure to file the Notice of Appeal was unintentional. If there was an affidavit from Mr. Nyaga, the existence of such a notice would not have been left in doubt. That notice should have been filed between the 14<sup>th</sup> and the 17<sup>th</sup> August, 2013. Mr. Murwoki is not candid with the Court and he has also concealed or failed to disclose material facts. He has sworn a false affidavit and no reliance can be placed on it to exercise my discretion in favour of the applicant. As is common knowledge, to benefit from the unfettered discretion of the Court under rule 4, it is imperative '**for the person seeking the favourable exercise of the court's discretion to place such material as will adequately inform the court in the exercise of such discretion.**' This was stated by Ringera J.A. in **Bagajo vs. Christian's Children Fund Inc [2004] 2 KLR 73 (Civil Application No. Nai. 298 of 2003).**

11. The learned Judge went on to point out that: ... ***Indeed the primary objective of the court under the rule is to ensure that litigants with apparently good appeals and who manifest their intention to appeal and have not been lax or slothful are not shut out of the door of the Court of Appeal.***" That has not been the case here.

12. In the final analysis, and for the reasons I have given, I have come to the conclusion that the applicant has not explained the delay in failing to lodge a Notice of Appeal within the time limited by the Rules of this Court. Consequently the Notice of Motion dated the 23<sup>rd</sup> October, 2013 is dismissed with costs to the 1<sup>st</sup> respondent (TAL). The 2<sup>nd</sup> respondent is not entitled to any costs as it did not file any papers and made no submissions before me.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of February, 2014.**

**P. KIHARA KARIUKI**

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**PRESIDENT, COURT OF APPEAL**

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

**DEPUTY REGISTRAR**