IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J.A. (In Chambers))

CIVIL APPLICATION NO. NAI 98 OF 2013

BETWEEN

AVIATION CARGO SUPPORT LIMITED..... 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 a judgment of the High Court of Kenya, Nairobi (Havelock, J) delivered on 26th day of September 2012

in

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

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RULING OF THE COURT

The applicant, AVIATION CARGO SUPPORT LIMITED, presented to this Court on 13.05.2013 an application by way of notice of motion dated 9th May 2013 founded on Section 7 of the Appellate Jurisdiction Act, Cap 9, and rule 4 of the rules of this Court seeking orders:

1. ***That (the applicant) be granted leave to file and serve its Record of Appeal out of time and/or that time for filing and serving the said record of appeal be extended.***
2. ***That costs of tis application be in the cause***

The application was premised on the grounds that:

a. ***The notice of appeal was lodged and served upon the respondent within the prescribed time***
b. ***The appeal is arguable and has overwhelming chances of success***
c. ***The delay is not inordinate having been occasioned partly by the registry in the High Court***
d. ***The respondent shall not be prejudiced by the application***
e. ***It is in the interest of justice that the time for filing and serving of the record of appeal be extended.***

The application was supported by an affidavit sworn on 9.5.2013 by Sarah Wangui, who described herself

as the Managing Director of the applicant with instructions and authority to swear the affidavit in support of the application. In 9 paragraph of the affidavit, the deponent averred that the High Court in Suit No.789 of 2010 at Milimani Commercial Courts delivered judgment on 26th September 2012 in which it found the applicant liable to pay the respondent US Dollars 74,831.96 and interest. The applicant was aggrieved by the judgment and consequently filed on 2.10.2012 notice of appeal dated 1.10.2012 manifesting the applicant's intention to appeal against the whole of the High Court decision.

On 27.9.2012, the applicant through its advocates on record applied for a certified copy of the proceedings and copied its letter to the respondent's advocates.

It is conceded by the applicant that proceedings were released on 19th December 2012.

The applicant's counsel did not prepare the draft decree pursuant to order 21 Rule 8(2) of the Civil Procedure Rules which States:

> ***"8. (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly."***

Instead, it was the advocates for the respondent who prepared the draft decree and forwarded it under cover of their letter dated 7.3.2013 (marked as SW4 and attached to the affidavit sworn by Sara Wangui in support of the notice of motion). One would have expected the party desirous of lodging appeal to take the initiative to do so instead of waiting for or until the other party drew it. In the instant case, the respondent's counsel drew the draft decree five months after the judgment.

By its letter dated 12th March 2013 presented to the registry of the High Court on 14.3.2013, the applicant sought *"a certificate of delay for purposes of filing a Record of Appeal."* The Registrar of the High Court did not respond to the request. Admittedly, the proceedings were typed and certified by 27th November 2012. As at that date, the period for lodging the record of appeal was yet to elapse. Consequently, one does not have far to seek to see why the Registrar of the High Court did not give the requested Certificate of Delay. But as a matter of best practice, the Registrar ought to have replied and given his reason for not issuing the requested certificate of delay. But no matter. The applicant ostensibly paid for the proceedings later and states that it collected the same on 19.12.2012. The receipt issued on payment is not exhibited and no reasons have been assigned why the applicant did not collect the proceedings on 27.11.2012, yet they were typed, and certified, a fact that the applicant knew as is evident from paragraph 5 of the applicant's supporting affidavit sworn by Sara Wangui.

The application came up for hearing before me as a single Judge sitting in chambers on 16th July 2014**. Mr. George Wandati**, the learned counsel for the applicant urged the Court to allow the notice of motion and grant leave to file and serve the record of appeal out of time or extend the time for filing the record of appeal. His statement in his submissions that proceedings were ready on 19.12.2012 was at variance with the averment in paragraph 5 of the supporting affidavit which states:

> ***"5. The proceedings were typed and certified on the 27th November 2012. I am advised by my Advocates on record which advise I verily believe to be true that the proceedings were released to them on 19th December 2012. Annexed and marked SW3 is a true copy thereof."***

Counsel for the applicant told the Court that the proceedings were collected on 19.12.2012 but did not proffer any reasons why they were not collected on 27.11.2012 or soon thereafter yet the applicant was aware that the proceedings were typed and certified. Nor did counsel explain why it took the applicant up to 13th May 2013 to apply for extension of time. It was the applicant counsel's submission that the application had merit and the appeal chances of success. He urged the Court to disregard

technicalities of procedure and invoked Article 159(2)(b) of the Constitution in support of this. In his view, the order sought is discretionary and the delay was not inordinate, and they would be no prejudice to the respondent if the order sought is granted. He contended that substantive justice will be rendered if extension is granted. He conceded that the counsel on record for the applicant at the time inadvertently erred in needlessly seeking a certified copy of the proceedings instead of collecting the uncertified copies of the proceedings as there was no requirement in law for the proceedings to be certified. He did not explain why the applicant waited until 13.5.2013 to make the application for extension of time when the period for appealing elapsed on 2.12.2012 and the proceedings were to hand on 19.12.2012. Mr. Wandati referred the Court to the two following authorities which he contended supported his case:

> ***"Civil Application No.131 of 2008, Christopher Mugo Kimotho and The Hon. the Attorney General;***
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> ***Civil Application No.48 of 2009, James Kamau Gachau and Dorcas Wairimu Kamau"***

I have perused these authorities. In the case of **Christopher Mugo Kimotho, V. Attorney General**, the period of delay was much shorter compared to the period of delay in this application and the Court in that case declined to exercise its discretion to extend time because that delay was not explained. Clearly, the authority does not support the applicants case.

In **James Kamau Gachau V. Dorcas Wairimu Kamau**, notice of appeal was filed in time but the record of appeal was not filed within 60 days of filing the notice of appeal and it was not until after two years that the applicant applied for extension of time. The Court found the delay inordinate and the reason proffered for the delay completely lame and unacceptable and dismissed the application. Clearly, this authority did not support the applicant's case.

On his part, **Mr. Musa Juma**, the learned counsel for the respondent opposed the application. He told the Court that his client strongly opposed the application. It was its right to robustly oppose the application. He submitted that the length of the delay was inordinate. The delay was of over 6 months as the notice of appeal was lodged on 2.10.2012 and the application for extension of time was made on 13.5.2013. He pointed out that the proceedings were ready on 27.11.2012 and stated that the record of appeal could have been lodged on or before 2.12.2012 before the 60 day period for appealing ran out. Counsel for the respondent contended that his client will suffer prejudice if the application is granted as that would result in the respondent not enjoying the fruits of the money-decree during the pendency of the appeal. He urged the Court to exercise its discretion by dismissing the application which he contended was not meritorious. Substantive justice, he said, is to be done to both parties. On the authorities cited by the applicant's counsel, the respondent's counsel contended that they did not support the applicant's case.

I have duly perused the application and considered the rival submissions of counsel. Both parties were represented by counsel in the High Court as they were before me. Judgment was delivered in the suit in the High Court on 26.9.2012, and Notice of Appeal was filed on 2.10.2012 pursuant to rule 75 of the rules of this Court. It manifested the applicant's intention to appeal against the whole of the judgment. The record of appeal should have been filed within 60 days from 2.10.2012 in compliance with rule 82(2) of the Court of Appeal rules. It was not. The proceedings were applied for timeously as is evident from the applicant's application letter marked as exhibit "SW2" which was copied to the respondent's advocates and therefore by dint of that fact entitled the applicant under the proviso to rule 82(1) of the rules of this Court to have excluded from the 60 day period for lodging appeal such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery to the appellant of copy of the proceedings. In this case, however, the proceedings were typed and certified by 27.11.2012 before the 60 day period for lodging the record of appeal run out on 2.12.2012. Consequently, the need to invoke the proviso to rule 82(2) for the purpose of certificate of delay did not arise. The applicant avers that the proceedings were typed and certified on 27.11.2012. But the applicant does not state why it did not collect the same until 19.12.2012 yet its advocates knew or ought to have known that time was of the essence. But having collected the proceedings on 19.12.2012, by which time the period for lodging appeal had run out on 2.12.2012, the applicant did not take the initiative to apply immediately for leave to lodge the record of appeal out of time. It was not until

13.5.2013 that the applicant lodged the application. It did not assign any or any plausible reason why it took over six months to lodge the application on 13.5.2013, yet it knew by 26.11.2012 that the proceedings were typed and certified and the record of appeal ought to have been filed within 60 days of 2.10.2012 when the notice of appeal was filed. In the face of the facts attendant to this application, has the applicant shown to the court that there is merit in granting the order sought?

The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vissiccitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.

In the instant application, the applicant does not explain the mishap of not lodging the record of appeal before the expiry of the 60 day period from 2.10.2012 yet the applicant was aware that the proceedings were typed and certified on 27.11.2012. And even if one were to accept as not unreasonable the fact that the period left for lodging appeal after the proceedings were typed on 27.11.2012 was very short, there is no explanation why the applicant did not move the Court soon after 2.12.2012 (when the record of appeal should have been lodged) for extension of time or leave to file the record out of time. Instead, the applicant waited for over six months and it was not until 13.5.2013 when the applicant made the application. There is no reason or explanation given why the applicant waited up to 13.5.2013 to apply. There is no reason given to show what may have militated against the making by the applicant of such application earlier. The delay is inordinate and has not been explained. I so find. Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be granted to lodge record of appeal out of time. An aspiring appellant ought to be zealous and to take the initiative to comply with the law. In the instant case, the applicant who had legal representation and who was intent on appealing did not even draw the draft decree although it ought to have done so under Order 21 Rule 8(2) of the Civil Procedure Rules. It waited until the respondent's counsel drew it and had it approved by the Registrar who issued it on 11.2.2013. That is not conduct consistent with pro-activeness. Clearly, the applicant was indolent. I observe that the date when the proceedings were paid for has not been shown nor is there any explanation why the applicant neither drew the draft-decree after the delivery of the judgment on 26.9.2012 nor why the draft decree drawn by the respondent's counsel had to be approved by the Registrar instead of the applicant's counsel to whom it was ostensibly sent for approval in the first place. In the face of these facts, my finding that the applicant has failed to satisfactorily explain the inordinate delay is inevitable. Yet the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. That is why the principle of overriding objective was enacted in Section 3A (1) of the Appellate Jurisdiction Act, Cap 9. It provides that:

> ***"the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act."***

This principle applies to determinations not only of appeals but also of applications made in appeals and intended appeals, as in this case. The Court is enjoined under Section 3B (1) of the said Act while interpreting the provisions of the Act to give effect to the overriding objective which include just determination of the proceedings. As stated by this Court in **CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008)**

> ***"the overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. 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. In the instant application, the applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the Court. Consequently, I am unable to exercise my discretion in favour of the applicant as his application lacks merit."

In light of what I have stated above, it is my finding that the delay was inordinate and has not been satisfactorily explained. Accordingly, I dismiss the application by Notice of Motion dated 9th May 2013 presented to this Court on 13.05.2013. I award the costs of the application to the respondent. It is so ordered.

Dated and delivered at Nairobi this 14th day of February 2014.

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR