



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CORAM: J.MOHAMMED, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 155 OF 2013

BETWEEN

NEVILLE PATRICK GIBSON WARREN

DANIEL JAMES CORRY McVICKER

KENNETH HAMISH WOOLER KEITH

ZULFIKAR M. ALIBHAI APPLICANTS

AND

LINDA WATIRI MURIUKIRESPONDENT

(Being An application for extension of time to file & serve a Notice & Record of Appeal out of time from the Judgment and decree of the High Court of Kenya at Nairobi (Waweru, J) dated 14th December, 2007)

in

HCCC NO. 611 OF 2003

RULING

This is an application by Notice of Motion dated 5th July 2013, expressed to be brought under *Section 3A and 3B* of the *Appellate Jurisdiction Act* and *Rules 4 and 42* of the *Court of Appeal Rules*, seeking the following orders:

“(a) That this Honourable court do extend time for the Applicants to file and serve a Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (The Honorable Mr. Justice H.P.G Waweru) dated 14th December 2007.

(b) That this Honourable court do extend time for the Applicants to file and serve a Record of Appeal

from the Judgment and Decree of the High Court of Kenya at Nairobi (The Honorable Mr. Justice H.P.G Waweru) dated 14th December 2007.

The application is supported by an affidavit sworn on the same day by *Kenneth Hamish Wooler Keith [Mr Keith]* who is the 3rd Applicant herein and the Managing Partner in the firm of *Daly & Figgis Advocates [the Firm]*.

Paragraphs 10, 13 and 15 of the said affidavit relate to the application for extension of time.

10. That in a Ruling delivered on 26th April 2013 on the Respondent's Notice of Motion application dated 3rd February 2011, this Honorable Court held that the Applicant's Record of Appeal had been filed out of time. Accordingly, this Honourable court struck out the Appellant's Record of Appeal dated 17th December 2010..

13. That I am advised by the Applicants' Advocates on record and I verily believe that since the Applicants' Record of Appeal dated 17th December 2010 has been struck out, the Applicants must first obtain extension of time from this Honourable Court before their intended appeal could be properly presented before this Honourable Court for hearing and final determination on its merits.

15. That the Applicants have presented this application for extension of time within a reasonable period after delivery of the Ruling by which the Record of Appeal dated 17th December 2010 was struck out. During this period, the Applicants have reviewed their options, consulted, sought legal advice and resolved that the only recourse available to them is to seek extension of time and pursue the intended appeal until it is determined on its merit.

Due to the peculiar nature of this matter, one involving advocates and which has taken over 10 years to resolve, it is important for a proper appreciation of this ruling to lay down the background of this matter.

The gist of this application is that the Respondent sued the Applicants, for orders that the Firm be dissolved; that pending such a dissolution a receiver be appointed by the court to receive all the income and pay all outgoings; an order directing taking of accounts and making of all inquiries necessary for the purpose of that determination; an order, that upon such accounts and determination of the share of each partner, that the Respondent be paid her full and rightful share of the firm. The parties opted for negotiation and a Consent order was entered by the court on 9th January, 2004 where the only issue for determination by the court by that consent in clause (a) thereof, was framed in the following terms:

"(a) THAT this Honorable court be pleased to determine as a single issue, whether the terms of the Partnership Deed dated 31st October, 1990 applied to the partnership between the Plaintiff and the Defendants."

The Respondent's argument was that she was not bound by the Partnership Deed dated 31st October, 1990. After rival arguments by both parties, the learned Judge after deliberations made a determination that:

"I therefore find, for the above reasons, that the terms of the Partnership Deed dated 31st October 1990 did not apply to the partnership between the Plaintiff and the Defendants."

The above Judgment which is the subject of this application, was delivered on *14th December, 2007*.

When the application came up for hearing, before a single judge, learned counsel Mr Roger Sagana appeared for the Applicants while the Respondent was represented by learned counsel, Mr John Mbaluto.

In support of his application Mr. Sagana relied on the averments in the affidavit sworn by Mr Keith. He also invoked *Section 3A and 3B of the Appellate Jurisdiction Act*. In brief, it was his argument that this court has unfettered discretion to allow an application for extension of time. In exercise of this discretion, the court should consider whether the application is arguable and also the issues raised in the draft memorandum of appeal. He submitted that the draft memorandum of appeal raises both issues of law and fact against the Judgment of the High Court. It was his submission that the learned Judge erred when he held that he could only consider the Partnership Deed and not any other document. In counsel's view, the learned Judge also failed to consider the conduct of the Respondent in her interaction with the Firm.

Regarding the reason for delay, counsel submitted that the applicants timeously filed a Notice of Appeal and requested for proceedings. Subsequently, they filed the Record of Appeal on 17th December 2010. Counsel informed the court that the Record of Appeal was struck out by a three judge bench of this Court on 26th April, 2013, holding that the Record of Appeal was an essential document and should have been filed within the stipulated time or with leave of the Court. It was his submission that it was not the intention of the Applicants to file the Record of Appeal out of time. He submitted that the Applicants have strongly exhibited their intention to file an appeal against the judgment of the High Court.

Counsel argued that after the Record of Appeal was struck out, the applicants consulted and reviewed their options after which they resolved to file an appeal. He further argued that the judgment against the Applicants is in excess of *19 Million Shillings*, a significant amount and the Respondent has severally threatened to enforce the judgment including commencing winding up proceedings against the partnership of the Firm, which would in effect shut down the Firm. This would prejudice thousands of clients and the impact is, therefore, unquantifiable. It was his contention that if this Application is allowed, the Respondent would suffer no prejudice as she would be allowed to ventilate her rights before the Court of Appeal and the appeal determined on merit. For the above prepositions, reliance was placed on the authorities in ROMANUS OKENO V BANK OF BARODA, CIVIL APPLICATION NO. NAI 251 OF 2005 and PRUDENTIAL ASSURANCE COMPANY OF KENYA LIMITED V SUKHWINDER SINGH JUTLEY & FALCON INSURANCE AGENCIES LIMITED, CIVIL

APPLICATION NO. NAI 139 OF 2004. Finally, counsel urged the court to exercise its discretion and grant the application sought for extension of time.

Learned counsel, Mr. Mbaluto opposed the application and relied on the Respondent's affidavit sworn on 30th September, 2013. He submitted that this matter stems from a consent of the parties dated 18th December 2003 by which the parties agreed on how to resolve the High Court case *No. 611 of 2003*. He further submitted that in the High Court, the parties had entered into a consent and agreed on a single issue for determination;

"Whether or not the Partnership Deed dated 31st October 1990 applied to the Partnership between the Applicants and the Respondent". The Respondent retired from the partnership effective 3rd December, 2003, as per the consent order. This being a consent, she did indeed retire in accordance with the consent and it would be a great injustice that the Respondent even after 10 years of retirement from the partnership has not received a single cent from her share in the Firm. It was his submission that both parties agreed that pursuant to the agreement, the Respondent's entitlement in the partnership would be determined either upon the terms of the Partnership Deed if it applied to her or by a valuation as can be seen in *Clause (e)* of the Consent letter of 18th December 2003.

It was counsels' submission that when the learned Judge of the High Court determined that the Partnership Deed did not apply to the Respondent, the parties were bound to follow the valuation option. Learned counsel submitted that the applicants were thereafter dilatory and frustrated the valuation process instead of assisting in the entire process.

It was his submission that the Applicants' conduct is one of frustrating or delaying the finality of the matter and misleading the court. He further submitted that this court should not apply its discretion in favour of such a party. Counsel argued that the Record of Appeal was struck out on 26th April, 2013 while the instant application was made on 8th July, 2013, some 74 days later. He further argued that the delay has been inordinately long particularly because it is a dispute concerning lawyers who by their professional calling are expected by the society at large to abide by the law and the strict time lines stipulated by any procedural regulations. He argued that it was inconceivable for four advocates in a law firm to take 74 days to consult, review, and seek legal advice on whether to file an appeal or not. He further submitted that it has taken a cumulative period of 5 years 7 months since the Judgment sought to be appealed against was delivered. He submitted that the Respondent retired from the Firm ten [10] years ago and has not received payment in terms of the Judgment of the High Court. He submitted that in the intervening 10 year period, two of the applicants, Mr McVicker and Mr Alibhai have passed on. He submitted that it was, therefore, in the interest of justice that this application is denied with a view to concluding this matter.

On the issue of contempt proceedings, counsel argued that there would be no prejudice suffered on the

part of the Applicants since it is a judicial process where the Applicants will have an opportunity to argue their case. He averred that there is a need to balance and weigh the competing interests of both parties. He submitted that there should be an end to litigation and that justice should not be inordinately delayed. Counsel faulted the conduct of the Applicants as not being candid. Reliance was placed on REPUBLIC V DISTRICT LAND REGISTRAR, KIAMBU & ANOTHER - EXPARTE GRACE WAITHERA NJENGA, CIVIL APPLICATION NO. NAI 208 OF 2005 (Unreported). He submitted that the circumstances surrounding the delay are evidence that the Applicants are determined to frustrate the payment following valuation as was directed by the learned Judge under the terms of the Consent which required payment to be made within 14 days. He further submitted that valuation was carried out in the year 2011 which is three years ago. He relied on the case of PHOEBE NDUNDA & 3 OTHERS V. MWAKINI RANCHING CO. LTD & ANOTHER, CIVIL APPLICATION NO. NAI 448 OF 2001 (Unreported), for the proposition that public policy demands that litigation must come to an end and that the Respondent is entitled to enjoy the fruits of her judgment. Finally, counsel while urging the court to dismiss the application argued that there is no material placed before the court to enable the court to exercise its discretion. He argued that the Applicants are making bare allegations with no material in support of such allegations. For this proposition, reliance was placed on RATMAN V CAMARASAMY, [1964] 3 ALL ER 933.

Mr. Sagana in reply contended that the Respondent was invited to the partnership of the Firm with effect from 1st July 1997 while the existing Partnership Deed was that of 31st October 1990. He submitted that the judgment is a civil debt and does not abate on the death of any of the Applicants. He reiterated that even though the Record of Appeal was struck out, the same was not filed out of time intentionally. He argued that the circumstances leading to the striking of the Record of Appeal and the instant application should find favour in the court exercising its discretion. Finally, counsel urged the single Judge to apply the overriding objective and grant the extension as prayed for by the Applicants.

I have carefully considered the application before me, the rival affidavits and the oral submissions made by the learned counsel. I have read and been duly informed by the earlier rulings of this Court in this matter. It is trite law that the discretion to extend time to file an appeal is indeed unfettered. The same has nonetheless to be exercised in a judicious manner taking into consideration the circumstances of each case. Before the court can exercise such discretion, the applicant has to show the following:

1. *That the intended appeal is arguable, that is, it is not frivolous;*
2. *That the respondent would not suffer undue prejudice if the application is not allowed [see WASIKE V SWALA, [1984] KLR 591; and lastly,*
3. *That the application has been brought without undue delay.*

The guidelines for the exercise of such discretion have been laid down in a number of authorities

including MUTISO V MWANGI, CIVIL APPLICATION NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, [2003] KLR 486, MAJOR JOSEPH MWERERI IGWETA V MURIKA M'ETHARE & ATTORNEY GENERA L, CIVIL APPLICATION NO. NAI 8 OF 2000 (UR) and MURAI V WAINAINA, (NO. 4) [1982] KLR 38. See also FAKIR MOHAMMED V JOSEPH MUGAMBI & ANOTHER, C.A. NAI 332/04 (Unreported) which rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors.”

The matters to be considered are not exhaustive and each case will depend on its own facts and complexities. In MWANGI V KENYA AIRWAYS LTD, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under *Rule 4*, went on to hold:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered”.

It is also trite law that this court has jurisdiction to entertain an application for extension of time to enable an appeal which has been struck out and not dismissed to be re-instated, see MURAI V WAINAINA, (No.3) [1982] KLR 33 and OCHIENG V RANMAL MERAG, [1984] KLR 361.

On the first issue, it is clear in this case from the court’s ruling in an earlier rule 5(2)(b) an application, Civil Application No. NAI 108 of 2010 (UR 79/2010), this court held that:

"To the extent that the respondent followed the terms of the Consent Order between the parties by seeking assistance of the court in appointing a valuer it is not prima facie, apparent what argument the applicants will raise against the appointment of a valuer. They are not complaining that the person who was appointed was not qualified. Nor are they saying the appointment goes contrary to the terms of the consent order. As that order is still in place we are unable to discern what issue the applicants will raise in support of their intended appeal."

I find support in the above holding.

On the second issue, learned counsel for the respondent argued that it is over 10 years since the judgment sought to be appealed against was delivered. The respondent has been in court pursuing the matter since 19th June, 2003. Without apportioning blame as to who has been responsible for this delay, it is evident that this matter has been pending in our courts for too long. That in itself has been prejudicial to the respondent. The single judge notes that two of the applicants have since passed away and notes that the respondent has made several efforts to enforce the payments ordered by the High Court. My view of this matter and given the peculiar circumstances of this case is that the respondent stands to suffer prejudice if this matter is delayed further. The respondent is entitled to enjoy the fruits of her judgment.

This brings us to the question as to whether the delay is inordinate or not. There is, in my view, no plausible explanation or material evidence placed before the court why the Notice of Appeal and the Record of Appeal were filed 74 days out of time. The only explanation appears on the affidavit sworn by Mr. Keith at paragraph 15 as follows:

“That the Applicants have presented this application for extension of time within a reasonable period after delivery of the Ruling by which the Record of Appeal dated 17th December, 2010 was struck out. During this period, the Applicants have reviewed their options, consulted, sought legal advice and resolved that the only recourse available to them is to seek extension of time and pursue their intended appeal until it is determined on its merit.” [Emphasis mine]

Is that a viable, acceptable explanation for delay?

It was upon the applicant to place sufficient material before the court, which would explain why there was delay in filing the record of appeal. The court has to balance the competing interests of the applicants with those of the respondent. This was well stated in the case M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point.

Aganyanya J.A in MONICA MALEL & ANOR VS. R, ELDORET CIVIL APPL.NO. NAI 246 OF 2008, stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

It should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in HAYWOOD V COPE, (1858) 25 BEAV 140:

“...the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”

On the application of the overriding objective, I agree with Omolo JA, in his ruling in the case of JAMES NJUGUNA V FRANCIS NGAMBI RUKOMIA & THREE OTHERS, (2010) e-KLR where he stated in relying on the CITY CHEMIST (NRB) & ANOTHER V ORIENTAL COMMERCIAL BANK LTD, CIVIL APPLICATION NO. NAI 302 OF 2008 (UR 99/2008):

“The new thinking brought in by sections 3A and 3B, does not “totally uproot well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

In conclusion, I find that there are no special circumstances demonstrated by the applicants for me to exercise my discretion in their favour. The result is that I dismiss the notice of motion dated 5th July, 2013 with costs to the Respondent.

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

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

DEPUTY REGISTRAR

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J. MOHAMMED

JUDGE OF APPEAL