



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 140 OF 2009

LEOPARD ROCK MICO LIMITED APPELLANT

AND

ELECTRICAL SERVICES LIMITEDRESPONDENT

(Appeal against the Ruling of the High Court of Kenya at Nyeri

(Makhandia, J.) dated 9th October, 2008

in

HC Civil Misc App. No. 88 of 2008)

JUDGMENT OF THE COURT

1. By a Notice of Motion dated 21st October, 2008, the appellant filed an application before the High Court seeking extension of time within which to file an appeal against the decision of the Chief Magistrates' Court delivered at Nyeri on 27th June, 2007. The application was heard by the Makhandia J. (*as he then was*). In the application, the appellant averred that it could not file its appeal timeously because on the date when the judgment of the subordinate court was delivered, its counsel was not in court. The honourable Judge by a Ruling dated 9th October, 2008, dismissed the application holding that the appellant had been lax and had not shown any enthusiasm to pursue its case in the lower court.
2. Aggrieved by the ruling, the appellant has lodged this appeal citing six grounds *to wit*:
 - i. ***That the learned Judge erred in law having noted and it being conceded by the respondent that the appellant did not have notice of the judgment.***
 - ii. ***That the learned Judge erred in law and fact against the weight of the evidence in misapprehending the intent of the letters dated 24th February 2007, 10th August 2007 and 31st October 2007 which correspondence were consistent.***
 - iii. ***That the learned Judge erred in law and fact in considering materials and issues not placed before him.***
 - iv. ***That the learned Judge erred in law and fact against the weight of all the evidence in holding***

- and finding that the appellant sat back and was lax and had not shown any enthusiasm to secure its position in the suit.*
- v. *That the learned Judge erred in law and act and against the weight of evidence in holding that the appellant was guilty for lack of candour.*
 - vi. *That the learned Judge erred in wrongly exercising his discretion by finding and holding against the appellant that he was indolent without considering that the respondent had equally taken almost over one (1) year before executing the decree.*
3. At the hearing of this appeal, the appellant was represented by learned counsel **Kabira Kioni** while the respondent was represented by learned counsel **H. K. Mahan**.
 4. Counsel for the appellant reiterated and elaborated on the grounds of appeal. He outlined the background facts to the suit emphasizing that the appellant had no notice or knowledge of the date of judgment when the trial magistrate delivered the same. It was submitted that the first time the appellant became aware that judgment had been delivered is when auctioneers proclaimed its assets. Counsel submitted that the appellant was not guilty of inordinate delay because when it became aware that judgment had been delivered, it acted with speed to file an application seeking stay of execution. It was submitted that the learned Judge erred in law and fact in misconstruing the meaning and purport of letters dated 24th February, 2007, 10th August, 2007, and 31st October, 2007. The appellant submitted that when proceedings before the trial court had been concluded and the trial magistrate had been transferred, the appellant wrote letters to the court registry seeking to inquire the status of the proceedings before the trial court. It was submitted that the Judge erred in finding that through these letters, the appellant had knowledge that judgment had been delivered.
 5. On the issue of lack of candor, the appellant submitted that indeed there was a previous application that had been made in the matter but that application had been withdrawn and the appellant did not deem it fit to bring to the attention of the Judge the existence of a prior application that had been withdrawn.
 6. Learned counsel Mr. H. K. Mahan for the respondent opposed the appeal. In supporting the findings and judgment of the High Court, he submitted that the appellant had not explained the reasons for delay in excess of one year in bringing the application for extension of time. That the Judge did not err in law as he was not satisfied with the reasons for delay and the time taken to file the application for seeking extension of time.
 7. We have considered the submissions by learned counsel in this matter. We have examined and analyzed the judgment of the honourable Judge and the reasons given for dismissal of the application for extension of time to file an appeal against the trial magistrate's decision. In dismissing the application, the honourable Judge expressed himself as follows:

“This court has unfettered discretion to allow an application for extension of time. However, in doing so, the court must be satisfied that the applicant has not been indolent. The court will also consider the length of the delay and also the reasons for the delay. The court may also wish to consider whether the intended appeal is arguable.In the instant application, the delay in filing the appeal is about a year. The explanation is that the applicant was not aware of the judgment. That cannot be possibly true going by the record. It cannot be true that the applicant only became aware of judgment when its items were proclaimed on 21st February 2008. Going by its letters dated 10th August, 2007, and 31st October, 2007, respectively, the applicant must be taken to have known of the existence of the judgment. Further, as deposed to by Harmesh Kumar Mahan and Mr. Nganga, in affidavits dated 25th April, 2008, and filed in the Chief Magistrate's court on 25th April, 2008, respectively, it is abundantly clear that the said Nganga never purported to act for the applicant. It behoves parties who seek the exercise of this court's discretion not to fall short of candour. It is quite apparent to me that the applicant is guilty for lack of candour, which fact alone would disentitle it to the orders sought. Even if I was to assume that the applicant was not aware of the judgment, and that it was got unawares when its goods were proclaimed, one would have expected that a diligent litigant would take the necessary steps to establish the current position of the case. In the instant case, it does not require a rocket scientist to establish that the applicant had just been lax and had not shown any enthusiasm to secure its position in the suit. One would have expected that being diligent and having a lawyer

acting for it in the matter; it could be constantly kept abreast of the progress in the matter. I do not believe that a litigant would merely instruct a lawyer in the matter and sit back expecting miracles. There is therefore inordinate and unexplained delay in prosecuting the matter. Instead of just writing letters to the subordinate court, one would have expected a diligent lawyer to do a little more, walk to the registry and call for the file to appraise one of the progresses in the matter. This was not the case here”.

8. On our part, we take cognizance of the fact that the honourable Judge correctly stated that extension of time to file an appeal involves the exercise of discretion on the part of the court. In *Mbogo & Another, -vs- Shah (1968) E.A. 93* at page 95, Sir Charles Newbold P. held:

“.....a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

9. Counsel for the appellant urged us to find that the Judge did not properly exercise his discretion in declining to extend time to file an appeal against the Chief Magistrate’s judgment. In *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997* (unreported), the Court expressed itself thus:-

“ 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. In the instant case, the appellant has simply repeated the same submissions, reasons and explanations that were made before the High Court without demonstrating how the Judge erred in law. It is our considered view that no explanation was given for the for the one (1) year delay. The period of delay and reasons for delay were not explained to the satisfaction of the honourable Judge. Further, the appellant has not demonstrated if any prejudice will be caused to the respondent if extension of time were granted. For these reasons, we decline to interfere with the exercise of discretion on the part of the learned Judge in declining to grant an order for extension of time to file appeal against the judgment by the Chief Magistrate’s court. The upshot is that this appeal has no merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 19th day of March, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR