



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 256 OF 2013

BETWEEN

CONSOLIDATED FINANCE BANK LIMITED.....APPLICANT

AND

KAPURCHAND DEPAR SHAH.....RESPONDENT

(An application to extend by THREE days the time within which to file and serve a notice of appeal in an intended appeal from a judgment and order of the High Court of Kenya at Nairobi (Nambuye, J.) delivered 21st September, 2012

in

H.C.C.C. NO.2723 OF 1998)

RULING

The applicant, Consolidated Finance Bank Limited, lodged in this Court on 12.10.2012 an application by way of a notice motion dated 12.10.2012 in which it sought the following orders:

- 1. That the applicant be granted leave to file and serve a notice of appeal out of time.***
- 2. That the notice of appeal filed on 8th October 2012 and served on the respondent on the same date be deemed to have been filed and served within such extended time.***
- 3. That the costs of this application do abide the result of the said appeal.***

The application shows that in the High Court in Civil Suit No.2723 of 1998 the applicant was the defendant and Kapurchand Depar Shah, the respondent herein was the plaintiff. Judgment in the suit was delivered on 21st September 2012 in favour of the respondent. The applicant herein was ordered to pay to the respondent as special damages Shs.348,000/=, and as general damages Shs.300,000/=. In addition the Court issued an order restraining the applicant from interfering with the respondent's quiet possession and enjoyment of motor vehicles registration Nos. KWD 997, KWS 264 and KWS 171. The applicant was also ordered to hand over (to the respondent) the logbooks and transfer forms in respect of the said motor vehicles.

The applicant claims that it had not been notified of the date of delivery of the judgment and consequently

was not represented in court when the judgment was read out on 21.09.2012. The applicant's advocates on record in the suit were Riunga Raiji & Company who subsequently notified the applicant of the delivery of the judgment in their letter dated 24.9.2012. The 14 days period for giving notice of appeal under rule 75 of the rules of this court run from 21.9.2012 and elapsed on 5th October 2012.

In the affidavit sworn on 12.10.2012 by Julius Mwaniki Gikonyo, the applicant's remedial officer, in support of the application the latter averred that his attention was drawn to the delivery of the judgment on 21.09.2012 when a letter addressed to the applicant by its advocates was relayed to him. The letter informed the applicant of the delivery of the judgment on 21.9.2012 and as the deponent was not familiar with the suit and was also on leave until 8.10.2012, he caused instructions to be given to the applicant's advocates on the same day (8.10.2012) that an appeal be lodged against the judgment. The instructions were transmitted through email as is evidenced in the annexure marked "JMG-3" annexed to the supporting affidavit.

The notice of appeal was filed on 8.10.2012. It was three days out of time.

On behalf of Kupurchand Depar Shah, the respondent, learned counsel **Mr. Rustam Hira** swore an affidavit on 30.11.2012 in reply to the application in which he averred that

"various other preliminary steps to enable the (intended) appeal to be filed, have not been taken despite the fact that the judgment was delivered on 24th September 2012, that is over a month ago."

The date of delivery of the judgment was wrongly indicated by the deponent, Rustan Hira, as 24th September 2012. The correct date is 21st September 2012.

Those are the facts in the application depicting the background to the application and the cause of, and reasons for the delay in filing notice of appeal and the opposition to the application.

The application came up for hearing before me sitting as a single Judge pursuant to rule 53(1) of the rules of this court. **Mr. P. M. Kiura**, learned counsel for the applicant, relied on the grounds stated on the face of the application and on the affidavit in support of the application sworn by Julius Mwaniki Gikonyo. He pointed out that the 14 days period for lodging notice of appeal ended on Friday 5th October 2012 and the applicant lodged notice of appeal on Monday, 8th October 2012. He submitted that the delay of 3 days was not inordinate. He contended that the applicant has a good appeal and pointed out what he said was a misdirection in the judgment when the Court applied the principle in **Giella v. Cassman Brown** in relation to a temporary injunction when the matter before the Court related permanent injunction. It was also his contention that there is no authority that payment of a smaller sum can satisfy a bigger debt.

The application shows that the respondent had borrowed money from the applicant which was secured on the aforementioned motor vehicles said to have disposed of by the respondent against whom criminal proceedings were instituted at the behest of the applicant on grounds of fraudulent disposition of mortgaged goods contrary to Section 291 (1) of the Penal Code, Cap 63. The respondent contends, inter alia, that there was an agreement for him to pay Shs.1.5 million in final settlement and satisfaction of the debt he owed the applicant and that the applicant had agreed on that account to return to him the said motor vehicles. On that basis, the respondent counter-claimed in the suit against the applicant and alledged that he was maliciously prosecuted. He sought compensation. The High Court dismissed the counter-claim.

Mr. Kiura urged the Court in considering the application under rule 4 of the rules of this Court to have regard to the fact that the applicant has an arguable appeal and the fact that no prejudice will be occasioned to the respondent if the motion is allowed and the orders prayed for are given. He submitted that, the delay was not inordinate and the reasons for the delay are plausible. He drew the attention of the Court to the following authorities on interpretation of rule 4 which I have perused:

1. *Murai v. Wainaina (No.3) [1982] KLR 33*
2. *Wasike V. Swala [1984] KLR 591*
3. *Kiarie V. Njoroge [1986] KLR 402*
4. *Gatu V. Muriuki [1986] KLR 211*
5. *Africa Airlines International Ltd. V. Eastern & Southern Trade & Development Bank (PTA BANK) KLR 140*
6. *Wasike V. Khisa & Another [2004] KLR.197*
7. *Githiaka V. Nduriri [2004] 2 KLR 67*
8. *Maritim V. Kibaru [2005] 2 E.A. 162*
9. *Njai V. Highview Farm Limited & Another [2009] 2 E.A. 329*

Rule 4 of the Rules of this Court confers on the court unfettered discretion to extend time limited by the rules or by orders of the Court. It states:

***“r.4 The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these rules, whether before or after the doing of the act, and a reference in the Rules to any such time shall be construed as a reference to that time as extended.*”**

The jurisprudence that emerges from the case law in relation to the interpretation of rule 4 is clear. Before 1984, the rule read *“the Court may for sufficient reason extend the time limited by the rules or by any decision of the Court...”*. Legal Notice No.80 of 1984, removed from the rule the word “sufficient” which limited the discretionary power of the Court. The principle that guided the court before the amendment was whether an applicant could show “sufficient” reason for the delay. After the amendment, the discretionary power of the Court was widened.

In an application under rule 4, (supra) the policy of the court was echoed by Apaloo JA, as he then was, in **GATU V. MURIUKI [1986] KLR 211** when he stated (1) that:

“the court ought to be inclined to exercise its discretion to enlarge the time to appeal, where the applicant has shown prima facie that he has an arguable case for consideration” on appeal and (2) that:

“the Court should exercise its discretion to allow an application if it is satisfied that no harm would result to the respondent or if it did the same was capable of being compensated in costs.”

Further, in **WASIKE V. KHISA & ANOTHER [2004] KLR 197**, Githinji, JA, pointed out (1) that the discretion under rule 4 is unfettered and must be exercised judicially and (2) that it is only unreasonable delay which is culpable that would disentitle an applicant of extension of time and (3) that whether or not delay is unreasonable will depend on the circumstances of each case.

After perusing the authorities cited by counsel it is clear that the factors to be considered by the Court while considering an application under rule 4 include

- i. the length of the delay
- ii. the reasons for the delay
- iii. whether the applicant has an arguable appeal
- iv. the degree of prejudice to the other party if time is extended
- v. the public importance of the matter in appropriate cases
- vi. generally the requirements of the interest of justice including the need to facilitate access to justice under Article 48 of the Constitution.
- vii. regard to human errors or mistakes including errors by legal advisors as was the case of **Gulam Hussein N. Cassamand another v. Shashikant ‘Ramji** (Civil Application No. Nai 1 of 1981) where C.B. Madan, JA (*as he then was*) held that errors by a legal advisor can be pardoned.

In the present application, the delay was of three days and was explained. The explanation given as plausible. I observe that the applicant wasted no time in lodging the notice of appeal. He lodged it as soon as it was practically possible. On the face of it, the intended appeal seems arguable. I do not think the respondent will suffer any prejudice that cannot be compensated by an award of costs. In the circumstances, I allow the application and grant the orders sought in prayers 1 and 2. With regard to costs, these shall abide the result of the appeal.

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

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR