



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, J.A.)

CIVIL APPLICATION NO. NAI 321 OF 2013

BETWEEN

DEL MONTE KENYA LIMITED APPLICANT

VERSUS

PATRICK NJUGUNA KARIUKI RESPONDENT

(Being an application for extension of time to serve a Notice of Appeal out of time and to apply for proceedings and Judgment out of time from the Judgment and decision of the Industrial Court (Ongaya, J.) dated 26th October, 2012

in

Industrial Cause No. 953 of 2011)

RULING

1. The applicant, Del Monte Kenya Limited, filed an application dated 28th February, 2013 seeking the following orders:

“1. THAT this Honourable Court be pleased to Order extension of time within which to serve the Notice of Appeal dated the 8th November 2012 in respect of the Judgment/Award made against the Applicant, DEL MONTE KENYA LIMITED in Industrial Court Cause No 953 of 2011, Patrick Njuguna Kariuki vs. Del Monte Kenya Limited on the 26th October 2012.

2. THAT in the ALTERNATIVE to prayer 1 above, this Court be pleased to order extension of time within which to serve the Notice of Appeal dated the 8th November 2012 in respect of the Judgment/Award made against the Applicant, DEL MONTE KENYA LIMITED in Industrial Court Cause No 953 of 2011, Patrick Njuguna Kariuki vs. Del Monte Kenya Limited on the 26th October 2012 and that the Notice of Appeal served on the Respondent on the 29th November 2012 be deemed duly and properly served.

3. THAT this Honourable Court be pleased to Order extension of time

within which to apply for the proceedings and the judgment and any other delay of any action required to be taken by the Applicant in lodging an Appeal in respect of the Judgment/Award made against the Applicant, DEL MONTE KENYA LIMITED in Industrial Cause No 953 of 2011, Patrick Njuguna Kariuki vs. Del Monte Kenya Limited on the 26th October 2012.

4. THAT the Honourable Court be pleased to make such further Orders as are necessary for the ends of justice in the matter.

5. THAT the Costs of and incidental to this Application be provided by the Honourable Court for in any event.”

2. The application was supported by affidavits sworn by **Maruti A. Khamala**, the applicant’s advocate who is a partner in the law firm of **Simba & Simba Advocates**, and **Noah Omondi Ongolo**, the Litigation Clerk in the said law firm.

3. Mr. Khamala deposed that on 8th November, 2012 he drew up a notice of appeal against the decision of the Industrial Court (Ongaya, J.) delivered on 26th October, 2012 in Industrial Court Case No. 953 of 2011. The trial court had made an award of **Kshs.8,863,282.29** in favour of the respondent whose services had been terminated by the applicant. The trial court further ordered re-engagement of the respondent.

4. Immediately after drawing the notice of appeal, Mr. Khamala instructed their Litigation Clerk to lodge the same in court since it was to be used as an exhibit in an application for stay of execution which counsel had drawn on the same day.

5. When the notice of appeal was filed, Mr. Khamala instructed their Litigation Clerk not to immediately serve it but instead attend to the urgent compilation of the application for stay of execution for filing and thereafter serve the notice together with the application within seven days of their filing.

6. On 15th November, 2012, the Litigation Clerk served only the application for stay of execution and inadvertently failed to serve the notice of appeal. That omission was realized after the respondent’s advocate filed the replying affidavit to the applicant’s application on 20th November, 2012, prompting late service of the notice of appeal on 29th November, 2012. However, a copy of the said notice had been exhibited in the application for stay of execution that was served on 15th November, 2012.

7. The applicant contended that the respondent will not be prejudiced by grant of the orders sought while on the other hand, the applicant’s appeal will be entirely prejudiced if its application is not allowed.

8. The respondent opposed the application and filed a replying affidavit. He stated, *inter alia*, that:

(a) the application is incompetent because a number of vital documents were missing from the record, among them the judgment appealed against and the notice of appeal.

(b) no appeal had been filed within sixty (60) days from 8th November, 2012 when the Notice of Appeal was filed, as required under rule 82 (1) of the Court of Appeal Rules.

(c) having failed to institute an appeal within 60 days as stated above, the applicant is deemed to have withdrawn its notice of appeal.

(d) the applicant did not require any leave to apply for proceedings and judgment out of time.

(e) no explanation had been proffered as to why no appeal had been filed or proceedings sought from the trial court.

9. The respondent further contended that there had been inordinate and inexcusable delay in filing this application. He added that prayers 3 and 4 are superfluous and ought not to be granted because grant of the orders sought would amount to excusing anything and everything not done by the applicant.

10. The respondent's view is that the applicant has no arguable appeal and if the application is allowed he would be prejudiced by continued delay in payment of the damages awarded to him by the trial court and would continue to be out of employment. He urged the Court to dismiss the application.

11. Mr. Khamala, learned counsel for the applicant as well as **Mr. Mwangi**, learned counsel for the respondent, made brief submissions. The applicant's counsel cited this Court's ruling in **DEL MONTE KENYA LIMITED v PATRICK NUGUNA KARIUKI**, Civil Application No. NAI 4 of 2013, delivered on 27th September, 2013. In that application, the Court granted stay of execution of the trial court's judgment pending appeal, on condition that the applicant pays to the respondent four months' salary that had been earned prior to the termination of his services and deposit of the balance of the decretal sum in an interest earning account in the joint names of counsel for both parties. Those conditions have since been complied with; counsel stated.

12. **Rule 4 of this Court's Rules** gives this Court unfettered discretion in granting or refusing to extend time for doing various acts as required by the Rules, whether before or after the doing of the Act. In **MUCHUGI KIRIGO v JAMES MUCHUGI KIRIGO & ANOTHER**, Civil Application No. NAI 356 of 1996, this Court stated that:

“.....the discretion granted under rule 4 of the Rules of this Court to extend time for lodging an appeal, is as is well known, unfettered and is only subject to being granted on terms as the Court may think just. Within this context, this Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and that his opponent was prejudiced by it.”

13. In this application, the notice of appeal was filed in time, it is service of the same that was delayed by a period of fourteen (14) days or thereabout. The applicant's advocate has stated the reasons that caused that delay. It is noteworthy that the delay is not attributable to the applicant but to his advocate. In **GULAMHUSSEIN NOORMOHAMED CASSAM & ANOTHER v SHASHIKANT RAMJI SACHANIA & ANOTHER** [1981] LLR 1 KAR, the notice of appeal was filed in time but due to counsel's error the same was not served within the stipulated period of time. It was held that an error on the part of a legal adviser may help to build up sufficient reason under **rule 4** of this Court's Rules. See also **KIHUNI v GIKANGA**, Civil Application No. NAI 43 of 1984 [1984] eKLR.

14. I do not consider the delay of fourteen (14) days to be inordinate. In any event, from the date when the respondent's advocate was served with the application for stay of execution wherein a copy of a filed notice of appeal had been exhibited, the respondent became aware of the same.

15. This Court, differently constituted, in its earlier ruling on the application for stay of execution pending appeal, held that the appeal is arguable. The Court stated:

“The applicant has presented several arguable points including whether the award of exemplary damages was retrospective; whether an order for the reinstatement of the respondent was justified in the circumstances of this case and the propriety of the award of loss of salary.”

I am in full agreement with that finding.

16. In view of the foregoing, the interests of justice demand that the notice of appeal dated 8th November, 2012 and served on the respondent on 29th November, 2012 be deemed as duly and properly served, in terms of prayer 2 of the application. I so order.

17. As regards prayer 3 of the application, I agree with Mr. Mwangi that the applicant did not require leave of this Court to apply for proceedings and judgment for purposes of filing an appeal. There is no basis for granting such a prayer. It was not contended that there was anything that prevented the applicant's counsel from applying for the proceedings and the judgment. The prayer is outrightly untenable and is consequently rejected. The same applies to prayer 4.

18. As regards costs of the application, the applicant shall bear the same. They are to be taxed if not agreed upon.

Dated and delivered at Nairobi this 9th day of May, 2014.

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

/dkm