



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 12 OF 2014 (UR 7/2014)

BETWEEN

BAOBAB BEACH RESORT & SPA LIMITED.....APPLICANT VERSUS

DUNCAN MURIUKI KAGUURU.....1ST RESPONDENT

DESTINATION AFRICA DMC LIMITED.....2ND RESPONDENT

*(An Application for extension of time to file and serve the Record of Appeal out of time
in an intended appeal from the Ruling and Order of the High Court of Kenya Nairobi*

(Mumbi Ngugi, J.) dated 12th June, 2013

in

Constitutional Petition No. 223 of 2013)

R U L I N G

This is an application for extension of time within which to file and serve the record of appeal. The application is mainly based on **Article 48** and **159(2)(d)** of the **Constitution, section 3A and 3B** of the **Appellate Jurisdiction Act** and **Rule 4** of the **Court of Appeal Rules**.

The applicant intends to lodge an appeal against the Ruling of the High Court (**Mumbi Ngugi, J.**) delivered on 12th June 2013 dismissing a preliminary objection against a constitutional petition filed against the applicant by the respondents. The constitutional petition has not been incorporated in the record of the application. However, it is apparent from the impugned ruling that the respondents alleged that their rights under Article 27 of the Constitution against racial discrimination had been violated and that they had been defamed by the respondents. The reliefs sought included a declaration of violation of fundamental rights, injunction; compensatory and aggravated damages. By the preliminary objection, the applicant asked the court to strike out the petition as an abuse of the process of the court on grounds that the fundamental rights and freedoms cannot be enforced by a private individual or a private limited company against another private individual or a private limited company; that petitioners' claims for relief are matters for determination by the National Cohesion and Integration Commission under the National Cohesion and Integration Act No. 12 of 2008 and not by way of constitutional petition; and that the petitioners' claims for relief constitute matters involving the tort of defamation and

are only capable of being entertained by a civil suit and not by way of a constitutional petition. The preliminary objection was overruled and the petition ordered to proceed to hearing. However the applicant filed an application in the High Court for stay of proceedings pending appeal. On the 24th June 2013, the parties recorded a consent order staying all proceedings in the High Court pending the hearing and determination of the applicant's intended appeal. In addition, the applicant's counsel states that he applied for and was granted leave to appeal, which fact is not disputed by the respondents' counsel.

The application is made on the basis that the delay in lodging the record of appeal within the prescribed time was caused by the delay by the High Court in providing uncertified copy of the proceedings and a certified copy of the order of the court. The sequence of events since the date of the ruling is explained in the supporting affidavit of **Samir Inamdar**, the applicant's counsel.

The application is opposed on the grounds stated in the replying affidavit of **Wilfred Ngunjiri Nderitu**, the respondent's counsel. Mr. Nderitu contends that the delay in obtaining a certified copy of the order was on the applicant's advocate own making as he failed to take an essential step of preparing and submitting a draft copy of the order for the approval by the respondent's counsel.

The principles on which the Court exercises discretion to extend time under rule 4 need no repetition. The discretion of the Court should be exercised judicially upon the established principles as stated in numerous decisions of the Court, including **Wasike v. Swala [1984] KLR 591**, **Leo Sila Mutiso v Rose Helen Wangari mwangi (Civil Application No. NAI 251 of 1997 (unreported))**.

The Court is required to consider the length of delay, reasons for delay, the chances of appeal succeeding and the prejudice which may be occasioned to the respondent if the application is allowed. Further, the duty of the Court to administer substantive justice without undue regard to procedural technicalities to parties as embodied in the overriding objective principle in section 3A and 3B of the Appellate Jurisdiction Act and section 159(2) (d) of the Constitution is now a paramount consideration.

As regards the delay in lodging the record of appeal, the applicant is required by Rule 82(1) to lodge the appeal within 60 days of the date when the notice of appeal was lodged. However, by proviso to Rule 82(1) and by Rule 82(2), the period certified by the Registrar of the High Court as having been required for the preparation and delivery of a copy of proceedings is excluded from computation of time if an applicant applies for a copy of proceedings in writing within 30 days of the decision and serves a copy on the respondent. Those conditions were fulfilled by the applicant. However, a draft certificate of delay was not approved by the Registrar apparently because the applicant's advocates insisted that the period taken to issue a certified copy of the order to be appealed from should be included in the certificate of delay. Whereas the copy of the proceedings were ready for collection by 25th July 2013 the draft certificate of delay shows that the Registrar's letter dated 25th July 2013 was received by the applicant's advocates on 30th July 2013 and an uncertified copy of the proceedings collected sometime in August 2013. The certified copy of the order was not issued until 18th November 2013.

The applicant advocate's letter to the Deputy Registrar of the High Court dated 11th December 2013 shows that he was by that date still searching for a certificate of delay which should include the time taken for both typing of proceedings and extracting the certified order insisting that it was mandatory requirement under Rule 87, that the record of appeal must contain typed copy of proceedings and certified copy of the order, appealed from. Mr. Inamdar contends that a record of appeal without a certified order which is a primary document under Rule 87(1), would be incompetent.

The contention by Mr. Inamdar in essence that the time taken for extracting and delivery of a certified copy of the order should be excluded from computation of time under proviso to rule 82(1) is not supported by authority. The decision in **Daniel Ng'ang'a Kanyi v. Sosphina Co. Limited & Anor. - Civil Appeal (application) No. 315 of 2001- Nakuru [2005] eKLR**, one of the authorities he relies on shows, *inter alia*, that the period taken in drafting the order appealed from is not excluded from computation of time and that, strictly, it is only time required for preparation and delivery of a copy of the proceedings which is excluded by proviso to now rule 82(1). The rigours of omission to include the

so called “*primary documents*” in the record of appeal has been cured by Rule 88 which now allows any omitted documents stipulated by either Rule 87(1) as in this case or rule 87(2) to be included in a supplementary record of appeal to be filed without leave within 15 days of the lodging of the record of appeal, or thereafter with leave of the Deputy Registrar of this Court.

The applicant could have filed the record of appeal upon obtaining a copy of the proceedings and thereafter taken advantage of rule 88.

Although the Registrar of the High Court had not issued a certificate of delay and has thus not computed the period which should be excluded, it is apparent that the uncertified copy of the proceedings was delivered to the applicant’s counsel latest by end of August 2013. In my reckoning, time started running from about 1st September 2013. The appeal should have been filed within 60 days from that date, which is, on or about 31st October 2013. The present application was filed on 30th January 2014 – 3 months later. If the Christmas vacation of 3 weeks is excluded from the computation of time, the application was filed about 2 months and one week after the expiry of the requisite time. That is not, relatively speaking, an inordinate delay.

The delay was apparently caused by the counsel’s honest but mistaken belief that a competent appeal could not be filled without a certified copy of the order appealed from. There is no presumption that all advocates and Judges know all the rules of the Court (**PaulWanjohiMathengev.DuncanGichareMathenge – Nyeri, Civil Application No. NAI 50 of 2010** [2013] eKLR). Further, a litigant, depending on the circumstances of the case, can be relieved from mistakes of his advocate (**Murai v. Wainaina (No. 4) [1982] KLR 38**).

The applicant through his counsel had evinced an intention to appeal against the ruling since the ruling was delivered. It sought leave to appeal and order for stay of proceedings and persistently sought a certified copy of the order and a certificate of delay. The delay is, in the circumstances, excusable.

As regards the merits of the intended appeal, the applicant states that the intended appeal raises weighty issues on the interpretation of the Constitution as to whether the Bill of Rights applies to, and binds all non State actors as a matter of course and what is the correct threshold of a constitutional question. The applicant has filed a draft memorandum of appeal.

The High Court made a finding (at paragraphs 22 of the Ruling) that the preliminary objection was properly raised and was within the parameters of **Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696**. The ruling also shows that there is no unanimity of opinion in the High Court as to whether a private individual can maintain a claim for violation of fundamental rights against another private individual.

The omission to include the notice of preliminary objection and the pleading in the record of the application is not fatal if the Court can discern on the material before it, whether or not the intended appeal is arguable. In this case, there is a comprehensive ruling which contains the nature of the claim, the reliefs sought, the nature of the preliminary objection, the arguments of the respective parties and the decision on each ground of preliminary objection. The supporting affidavit and draft memorandum of appeal provides other material. The preliminary objection raises issues of law.

There is sufficient material on which I find, as hereby do, that the intended appeal is not frivolous and is indeed arguable.

If the application is allowed, the respondents will suffer some prejudice in the sense that the process of appeal will occasion delay in the determination of the petition in the High Court. But that is a delay attributable to judicial process which cannot supersede the applicant’s undoubted right to appeal. The respondents have themselves consented to the proceedings in the High Court being stayed pending appeal. An appeal comes with all incidences, including the incidences of delay. An order of costs will be fair compensation.

All considered, I am satisfied that this is a proper case for exercise of discretion in favour of the applicant. I allow the application with costs to the respondents.

The applicant to file and serve the record of appeal within 14 days from the date hereof.

Dated and delivered at Nairobi this 10th day of October, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR