



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: J. MOHAMMED, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 99 OF 2014**

**BETWEEN**

**NIC BANK LIMITED.....APPLICANT**

**AND**

**VICTOR OLOO OCHIENG.....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 of the High Court of Kenya at Nairobi (Mutava, J) dated 12<sup>th</sup> June, 2012 in HCCC NO. 3 OF 2010)**

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**RULING**

Before me is a notice of motion application dated 24<sup>th</sup> April, 2014, brought pursuant to **Rule 4 of the Court of Appeal Rules (the Rules)**. The applicant, **NIC BANK LIMITED**, seeks the following orders:

1. *That the time for filing the Record of Appeal be extended.*
2. *That a time be named within which the said Record of Appeal should be filed.*
3. *That the proposed Appeal be heard on priority basis.*
4. *That the costs of this application abide with the result of the said Appeal, or be dealt with as the justice of the case shall seem to require.*

The grounds upon which the applicant relies on in support of its application are that it filed a Notice of Appeal herein on 26<sup>th</sup> June, 2012 and the Record of Appeal should have been filed on or before 17<sup>th</sup> September, 2012; that it applied to be supplied with certified copies of the proceedings and the Judgment on 26<sup>th</sup> June 2012; that its advocate obtained the proceedings and the certified judgment on 24<sup>th</sup> February, 2014 and that the said non-compliance with the Rules aforesaid was due to a true and honest delay which is excusable and there has been no undue or inordinate delay in filing this application.

The genesis of this application is that the respondent was a director of **ECONOMIC INTELLIGENCE LIMITED (the Company)**. The Company engaged in a business of publishing print journals of financial matters and was advanced a loan facility by the applicant but defaulted in repayment to the effect that as

of June 2005, the company was indebted to the applicant in the sum of KShs.2,431,604.42. The applicant claimed that recovery efforts had failed to yield recovery of the said sum and on 21<sup>st</sup> May, 2007, the Company was wound up with the consent of both parties. The applicant claimed that thereafter the respondent on his own volition made proposals to personally pay the whole debt due to the applicant, which proposals the applicant claimed to have acceded to by a letter dated 8<sup>th</sup> July, 2008. The applicant therefore filed a claim at the High court seeking to enforce the respondent's undertaking and promises to pay the debt which at the date of filing the suit stood at KShs.5,499,340/=.

The High Court in a judgment dated 12<sup>th</sup> June, 2012, dismissed the applicant's claim with costs to the respondent. The learned Judge held *inter alia* that:

***“the mere fact that the respondent may have personally benefited from the loan facility cannot outweigh these defences without inflicting grave injustice by loading upon his back a burden that the defendant/respondent did not certainly assume.”***

It is that decision that the applicant intends to appeal against.

At the hearing of the application, Mr Wandeto Muriuki S., learned counsel for the applicant, submitted that the applicant filed this application in view of the delay in obtaining the typed proceedings. He submitted that on 26<sup>th</sup> June, 2012, the applicant applied for typed proceedings; that the proceedings were obtained on the 24<sup>th</sup> February, 2014, and that the applicant obtained a certificate of delay dated 28<sup>th</sup> March, 2014. Counsel argued that the draft memorandum of appeal indicates that the applicant has a good appeal and should be afforded an opportunity to be heard on merit. Counsel admitted that there was a delay in filing a record of appeal but added that the delay was not undue or inordinate as it was based on the fact that there was a delay in obtaining proceedings. Counsel submitted that the notice of appeal was filed in compliance with the Court of Appeal Rules.

Counsel further submitted that the learned Judge did not consider that the respondent had made an admission of liability and in fact, he had given a commitment to pay the sum owing to the applicant. He added that there was sufficient evidence on record to indicate that the respondent made that specific admission and for that reason, the learned judge erred in determining that the respondent was not liable to pay the sum of Kshs 5,499,340/=, for that reason the applicant had an arguable appeal and should be afforded an opportunity to ventilate and argue the intended appeal. Counsel argued that no prejudice would be occasioned to the respondent. Counsel cited the case of **DUNCAN**

**GATERU V JAMES RUO WAITHAKA, CIVIL APPLICATION NO. NAI 200 OF 2001** which quoted the case of **LEO SILA MUTISO V ROSE HELLEN WANGARI, CIVIL APPLICATION NO. NAI 251 OF 1997 (Unreported)**. Counsel prayed that this application be granted and the applicant be allowed to file its record of appeal out of time.

Ms Oyagi, learned counsel for the respondent submitted that she strongly opposed the application and relied on the replying affidavit dated 20<sup>th</sup> August, 2014. She argued that this application was supported by an affidavit sworn by Ann Mbugua, an advocate. Counsel pointed out that the Advocate Practice Rules prohibit an advocate from testifying on contentious matters; that the application has not demonstrated reasons for the delay; that counsel for the applicant should have taken into account that time is of essence and should have ensured that the typed proceedings were availed on time.

In response to the submissions made by counsel for the respondent, Mr Wandeto admitted that the application is supported by an affidavit sworn by an advocate but submitted that the issues that are deponed are not contentious; that what the applicant was deponing to are matters supported by annexures confirming when notice was filed and when the certificate of delay was obtained; that the advocate is swearing matters that she personally handled; that the affidavit is competent and should be allowed to stand in support of the application. He prayed that the application be allowed.

I have considered the application, the affidavits on record, list of authorities and submissions by counsel

and the law. The intended appeal herein is in respect of the decision of the High Court which dismissed the applicant's claim against the respondent. The discretion that I am being called upon to exercise in this application is under **Rule 4 of the Rules** which provides:

***“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 doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

The principles guiding the court on an application for extension of time premised upon **rule 4 of the Rules** are well settled. The discretion is wide and almost unfettered, for the only constraint imposed by the rule is that the terms should be just. It must be exercised judicially, not on whim, sympathy or caprice. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that it is entitled to the discretion being exercised in its favour. In exercising my discretion, I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance as stated in **FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLICATION NO. NAI 332/04**

**(Unreported)** the court stated that: ***“The exercise of this Court’s discretion under Rule***

***4 has followed a well-beaten path since the structure 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 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 judgment subject of the intended appeal was delivered on 12<sup>th</sup> June, 2012. The real point of the matter is the reason for the delay, whether the reason is reasonable and excusable. The whole matter seems to depend upon whether or not, this court can properly look upon a delay as being an exceptional one.

The applicant filed a notice of appeal on 26<sup>th</sup> June, 2012. **Rule 82** further provides that any period certified by the registrar as having been required to prepare proceedings should be excluded. In **MARIAMU ABUBAKAR IRERI & ANOTHER V NATIONAL CEREALS & PRODUCE BOARD, CIVIL APPLICATION**

**NO. NAI 9 OF 2008** this Court held:

***“In view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant's counsel, time prescribed for filing an appeal stopped running. The running of time resumed on or about 3<sup>rd</sup> September when copies of proceedings were delivered to the respondent.”***

Whether this delay was unreasonable ought to be determined from the explanation given for the delay. The applicant has stated that the reason for the delay was caused by the delay in accessing the certified proceedings and judgment.

The applicant also contends that it has an arguable appeal. I have perused the draft notice and memorandum of appeal annexed to the application and I find the appeal arguable as it raises an issue for determination as to whether the learned judge erred in dismissing the applicant's claim.

As this Court stated in **WASIKE V SWALA, 1984] KLR 591**, an arguable appeal need not be one with overwhelming probability of success. I find that the demands of justice will be better served by allowing

the application so as to allow the parties to ventilate their respective positions on merit. In **RICHARD**

**NCHAPI LEIYAGU V IEBC & 2 OTHERS, CIVIL APPEAL NO. 18 OF 2013**, this

Court expressed itself as follows:

***“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”***

I also find that the respondent will not suffer substantial prejudice if the application herein is allowed. In **MWANIKI NJOROGI KAMAU & ANOTHER V LEE SHETH POONG, CIVIL APPLICATION NO. NAI 55 OF 1998 (Unreported)** Lakha, J.A. stated:

***“As it often happens, this application highlights two principles, each in itself is salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case.”***

Having expressed myself as above, I find that the application herein has merit and I allow the same. Accordingly, the applicant is granted leave to file the record of appeal within seven (7) days from the date of this ruling. The respondent shall have the costs of this application.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of November, 2014.**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**