



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JJ.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 234 'A' OF 2014

BETWEEN

**JACQUELINE AMOLO ODONGO & ROSEMARY AKINYI ODONGO
T/A**

JACKIE DISTRIBUTORS.....APPLICANT

AND

COOPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

**(Being an application for extension of time to file Notice of Appeal and an Appeal from the
decree of the High Court of Kenya at Nairobi (Hon. Mr. Justice J. B.**

Havelock, J.) dated 31st July, 2013 in HCC No. 495 of 2004)

RULING

Before me is a Notice of Motion brought under Rule 4 of this Court Rules. The applicant is seeking for extension of time within which to file an appeal against the aforesaid decree/judgment of Havelock, J. dated 31st July, 2013. The instant application was filed on 15th September, 2014. The reasons for delay are explained in the body of the application and the supporting affidavit sworn by Jacqueline Amollo Odongo on 23rd April, 2014.

The applicant contends that she was not immediately informed by her previous Advocates when judgment was delivered on 31st July, 2013. She learnt about the judgment almost a month later on the 29th August, 2013 and she immediately registered her dissatisfaction with the judgment but by that time, the time for lodging a Notice of Appeal before the Court of Appeal had lapsed. The said Advocates nonetheless lodged a Notice of Appeal on the 30th August, 2013 which was a few days late. The said Notice of appeal was also served late on the respondents on 6th September, 2013. When the new Advocates came on record, they applied for the proceedings and judgment for purposes of filing the Appeal. The applicant blames the delay in filing and serving the Notice of Appeal on her previous Advocate Mr. Munga Kibanga.

Mr. Ongengu, learned counsel for the applicant, urged me to grant leave in exercise of my unfettered jurisdiction and in the interest of justice, to enable the applicant exercise her right of appeal. He cited inter alia the Ugandan case of; - *Rwabinuni vs. Bahimbisomwe* [2010] EA page 337. He laid emphasis on

the holding that;

"It would be a grave injustice to deny an applicant such as this one, to pursue his rights of appeal simply because of the blunder of his lawyers when it is well settled that an error of counsel should not necessarily be visited on his client."

According to counsel, the appeal raises arguable points of both facts and the law regarding the applicant's claim for refund of monies that were wrongly debited in her account by the respondent totaling to almost Kshs. 25 million. Instead the applicant was awarded Kshs. 1,147, 980.20/= despite the overwhelming evidence in support of the claim.

On the other hand, this application was opposed; Mr. Imende, learned counsel for the respondent, relied on the replying affidavit sworn by Samuel Kibugi on 27th October, 2014. There were three sets of delay attributed to the applicant which were not at all explained. The first delay occurred when the Notice of Appeal was filed on 30th August, 2013, a delay of 16 days. The second delay occurred when it took the applicant nine months to file an application for extension of time in the High Court. That application was dismissed on the 9th July 2014, and it took the applicant another two months to file the present application. Although the applicant passes the blame to the previous Advocate, for the 1st delay, no explanation had been given for the subsequent delays. The applicant cannot also blame the Advocate as it is stated that she became aware of the judgment on the 29th August, 2013. Counsel relied on this Court's decision in the case of;- *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, he laid emphasis on the holding;

"Matters which the court takes into account in deciding whether or not to grant an extension of time are;-

- a. The length of the delay;
- b. The reason for the delay;
- c. Possibly, the chances of the appeal succeeding if the application is granted; and
- d. The degree of prejudice to the respondent if the application is granted".

While submitting on the prejudice to be suffered by the respondent, Mr. Imende argued that the respondent having paid the decretal sum last year in full, considered the matter closed as no application was made within a reasonable time. The applicant received the full settlement and decided to appeal as an afterthought. Also the applicant did not demonstrate how the appeal was arguable as it was an issue of assessment of damages.

The prayers sought in the instant application call for the exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words, judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court are well set out in a long line of *authorities*. ***See the case of;*** - *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, C.A. Appl. No. Nai. 251/97 (ur):

"It is now 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."

The above list is of course not exhaustive as held in the case of;- *Mongira & Another v Mukaria & Another*, 2005 2 KLR 103 at page 106-107, where the Court again cited Leo Sila Mutiso, (supra), and went on to state:

"These, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general" Rule 4 gives the Judge unfettered discretion and so long as the discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the far set out in paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way."

The list of factors is not exhaustive, the above principles are a mere guide. The applicant has not explained the period of about eight months delay she took before filing the application for leave to appeal in the High Court. Similarly no explanation has been offered for a further delay of about two months before filing the instant application. By her own supporting affidavit, the applicant stated that when she became aware of the delivery of judgment on the 29th August, 2013, she instructed her former Advocate to appeal and a Notice of Appeal was filed 16 days late and served upon the respondent on the 6th September 2013, a few days late. If this was the only issue, I would have excused the applicant. The other delay of almost one year is nonetheless not at all explained by the applicant. Incidentally, it cannot be blamed on their Advocates because; it is the same Firm that is on record for the applicant. The applicant had a duty to explain this inordinate delay and failure to do so, weakens her case. On whether the extension of time will prejudice the respondent, I agree with counsel for the respondent, that delay in pursuing one's rights causes prejudice to the other side, more so because they settled the decretal sum on the basis that the matter was closed. On the appeal being arguable, the applicants' claim was for damages for loss of business and profit, in the material that was placed before me, the applicant failed to demonstrate in which way the damages should have been calculated.

In conclusion I find no merit in this application; it is dismissed with costs to the respondent.

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

MARTHA .K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR