IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, J.A. [IN CHAMBERS]

CIVIL APPLICATION NO. NAI. 175 OF 2014 (UR 136/2014)

BETWEEN

LINGAM ENTERPRISES LIMITED……..……..…….……1ST APPLICANT

ERWEN ELECTRONICS LIMITED……...2ND APPLICANT

ARJUN RUZAIK…….…….……3RD APPLICANT

BINA RAJU PATEL……....……4TH APPLICANT

BANKIM MANUBHAI PATEL……....5TH APPLICANT

AND

RADIO AFRICA LIMITED….……...…...…….…….……RESPONDENT

(An application for extension of time to file the Memorandum and Record of Appeal in respect of the intended appeal against Ruling and Order of the High Court of Kenya at Nairobi (Kimaru, J.) dated 29th April, 2010

in

HCCC NO. 579 OF 2008)

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R U L I N G

By the Notice of Motion dated 11th July 2014, the applicants in the main seek the following order:-

> ***"That this Honourable Court be pleased to extend the time within which the applicants ought to have filed and served the Memorandum and Record of Appeal."***

In the event the above prayer is granted, the applicants have asked the court to fix the time for filing the intended memorandum and record of appeal.

The application is predicated on the eighteen grounds on its face and on the supporting affidavit of Milly

J. Odari sworn on 11th July 2014 which has several annexures. It is opposed by Mathenge Ngotho, an advocate whose firm has the conduct of this matter. It is worth noting also that there is an application Civil Application No. 150 of 2014 pending before this Court which application seeks orders of striking out the applicant's notice of appeal dated 5th May, 2010.

It is important in my view to give the brief circumstances of this matter as can be deciphered from the record. The respondent herein (Radio Africa Limited) filed a plaint at the High Court in Milimani seeking several reliefs as against the applicants. In response thereto, the applicants through the firm of Madhani & Co. Advocates filed a defence dated 11th December, 2008 in which they denied the applicant's claim in toto.

Not convinced that the defence raised any triable issues, the applicants moved that court under **Order VI Rule 13(1)(b), (c)** and **(d)** of the **Civil Procedure Rules** (since repealed). The said application was served on the applicants but it was not responded to. From the record before me, there was also no appearance from the applicants at the hearing of the said application. The High Court (Kimaru, J) after considering the application made a finding that indeed, the defence filed did not raise any triable issues. The learned Judge further observed that the applicants advocates on record in spite of being served with the hearing date had failed to attend court for hearing. The learned Judge in his ruling dated 10th December, 2009 found the defence "*frivolous and vexatious and one meant to delay the fast determination of the suit"*. He struck out the defence and entered judgment in favour of the respondent.

An application seeking to set aside that ruling was dismissed by the court on 29th April 2010 with the learned Judge remaining steadfast in his finding that "*clearly it is apparent that the defendants have no claim to the plaintiffs claim.*" It was this dismissal that provoked the filing of the notice of appeal dated 5th May, 2010 by the firm of Madhani & Co. Advocates. An application for stay of execution under **Rule 5(2) b** of this **Court's Rules** was filed, heard and allowed on 3rd February, 2012.

The applicants did nothing for about one year and only moved the court for orders of stay of execution on 31st March 2011. There is no copy of any letter from Madhani and company advocates bespeaking the proceedings on record to show whether the applicants even applied for proceedings to enable them file the memorandum and record of appeal pursuant to **Rule 82** of this **Courts Rules.**

The firm of Iseme Kamau & Maema took over the matter on 24th May 2011 and thereafter wrote to the court requesting for proceedings. I have noted the several letters written by the applicant's counsel from February 2012 to May, 2014. According to Ms. Milly Odari, she kept sending reminders to the court without receiving any response only to be surprised to learn later that the proceedings had been collected from the court by one of their clerks in the name of Armston Vidonyi Vihaki on 29th August 2012, which is close to two years before the filing of this application.

Ms. Odari lays the blame for this turn of events squarely at the door of the court…. why? Because, the court had not responded to her letters and informed her that their clerk had actually collected the proceedings from the court and even signed for them.

(See para16 of affidavit). She exonerates her firm totally from blame at paragraph 36 of her affidavit where she deposes:

> ***"That the failure to file the appeal in good time is not in any way attributable to the applicants and they should not be made to bear the consequences of a mistake not occasioned by them."***

In a change of tone however, Mr. Munyu, learned counsel for the applicants who prosecuted this application before me owned up and stated that the delay was occasioned by their clerk who was their agent, and further, that the said delay was inadvertent. Mr. Munyu sought refuge in **Articles 47** and **159(2)** of the **Constitution of Kenya 2010** and urged the court to allow the application to enable the appeal be heard and determined on merit.

The application was opposed by the respondent who deponed that the applicants were only nudged from their slumber by service on them of the application to strike out the notice of appeal. It was Mr. Mathenge's contention that the fact that the applicants' counsel sent to the court a copy of a certificate of delay was clear evidence that they were aware that they had received the proceedings as at 16th January 2013. Yet they did not see the need to file the memorandum and record of appeal. He urged that the application had no merit and the same ought to be dismissed.

Both counsel amplified the contents of the affidavits on record in their oral submissions before me. I have considered these submissions along with the contents of the rival affidavits and the entire record placed before me. I have found it necessary to revisit the history of this matter basically because, the prayer sought is discretionary. It is in my view important that a party seeking a discretionary order demonstrates not just diligence but also good faith. It is incumbent upon the applicant to demonstrate that he/she deserves a favourable exercise of this Court's discretion. This is particularly important when it comes to explaining the issue of delay and more so when the delay involved in this matter appears persistent and prolonged.

Have the applicants convinced the court that they deserve to be granted the orders they seek?

The factors to be considered by the court before granting leave are now well settled.

The issue we need to address in this application is whether the same passes the threshold required for applications of this nature.

In order for an application of this nature to succeed, an applicant needs to satisfy the following:-

> ***Was the delay complained of inordinate; has the same been explained to the satisfaction of the court; will the respondent suffer prejudice if the application is allowed? Does the intended appeal pass the test of arguability or is it frivolous and only meant to delay the matter;***

The list is by no means exhaustive. See **Fakir Mohamed v Joseph Mugambi & 2 Others (Civil Application No. Nai 332 of 2004).**

I have considered these principles which are also reiterated in the legal authorities cited by learned counsel in this matter. On the issue of delay, it is not disputed that the ruling the applicants seek to appeal against was delivered on 29th April 2010. Although the notice of appeal was filed promptly filed on5th May 2010, there was no spirited effort to pursue the proceedings. From the record, it is clear that it was only after the firm of advocates now on record for the applicants took over the matter a year later in May 2011 that a follow up of the proceedings was commenced. The same were collected by the applicants' recognised agent but nothing was done until counsel for the applicant was served with the application seeking to have the appeal struck out. Instead of accepting blame for the failure of their clerk to update her on the receipt of the proceedings, Ms Odari wants the court to take the blame for her lack of diligence, and actually exonerates her firm on oath!

It is not denied that the proceedings were collected from the Court and signed for by the appellant counsel's recognised agent on 29th August 2012. The same were not acted upon resulting in the delay in question. The Court cannot be blamed for the appellant's counsel's bad housekeeping. This blame lies squarely on counsel's shoulders and cannot be borne by the Court or by anybody else.

It is my view that there was no acceptable explanation given by Ms. Odari in her affidavit to explain the delay, which in my view is clearly inordinate. This application therefore fails the first two tests of whether the delay was inordinate, and if so whether the delay has been sufficiently explained. I need not go to the other factors for consideration listed above.

I am alive to the fact that this Court gave orders of stay on 3rd February 2012 but at the same time directed that there be a speedy hearing of the intended appeal. There was therefore some urgency in

following up the proceedings and ensuring that no time was wasted in filing the appeal. This was obviously not done. Extension of time is not given as a matter of course. It is a discretionary remedy but this discretion must be judicially exercised. This judicial exercise is guided by the factors mentioned above which the applicants must satisfy. It is my view that the applicants have not satisfied the principles set out above. This application therefore fails. The same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of November, 2014.

W. KARANJA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR