



REPUBLIC OF KENYA

COURT OF APPEAL IN KENYA

AT NAIROBI

CIVIL APPLICATION 323 OF 2009

CFC FINANCIAL SERVICES LIMITED.....APPLICANT

AND

JUJA ROAD FANCY STORE LIMITED.....RESPONDENT

(An application for extension of time within which to lodge the record of appeal from the ruling and order of the High Court of Kenya at Nairobi (Hon. Lady Justice Khaminwa) dated 6th February 2009

in

H.C.C.C. NO. 331 OF 2008)

R U L I N G

I have before me a notice of motion dated 12th November, 2009 and filed on the same date in which the applicant CFC Financial Services Limited is seeking three orders namely:-

- “1. The time for lodging and serving the record of appeal in the intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Honourable Lady Justice Joyce N. Khaminwa) dated 6th February 2009 in Nairobi (Commissioner and Tax Division, Milimani) HCCC No. 331 of 2008 be extended.**
- 2. The time within which the said record of appeal is to be lodged and served be stated.**
- 3. The costs of this application to be provided for.”**

Those orders are sought on grounds that:-

- “(a) Though the applicant on 20th February, 2009 filed and served the notice of appeal against the ruling and order of the High Court dated 6th February 2009, leave to appeal was not sought in time.**
- (b) The applicant consequently sought leave vide the application in the High Court dated 7th April 2009, which leave was granted by ruling and order of the High Court on the 23rd October 2009.**
- (c) The applicant is still desirous of pursuing the intended appeal which raises important issues of law, has high chances of success and involves substantial amount of money.**
- (d) The application has been brought without undue delay and the granting of the orders sought will not cause any prejudice to the respondent not remediable by costs.**
- (e) It is fair and just that the time for filing the record of appeal be extended.”**

There was also an affidavit in support of the application sworn by Martin Gichohi Mwaniki, the advocate conducting the matter on behalf of

the applicant and who swore that he was authorised by the applicant to swear the affidavit.

The respondent did not file any replying affidavit but Mr. Majanja who appeared for it opposed the application on procedural aspects. Mr. Mwaniki, the learned counsel for the applicant, urged me to grant the application as the delay period which according to him was short, was caused by the fact that the applicant's first advocate filed notice of appeal timeously as the ruling the applicant seeks to appeal from was delivered on 6th February 2009 and the notice of appeal was filed on 20th February 2009. However, when Mr. Mwaniki's firm of advocates was appointed to act for the applicant in place of the former advocate who filed notice of appeal, the latter advocates, on perusal of the proceedings and the ruling of the superior court, realized that leave was needed before an appeal could be mounted from the ruling. This necessitated their filing an application for leave to appeal in the superior court. Change of advocates took place on 26th March 2009. The superior court granted leave on 23rd October 2009 and this application was lodged on 12th November 2009, about 20 days later. Mr. Mwaniki stated that on those circumstances, the delay which was from 2nd May 2009 when the record ought to have been filed is not inordinate when it is considered that the period between 7th April 2009 to 23rd October 2009 was taken up on account of waiting for superior court's decision on the application for leave to appeal. He, also stated that the intended appeal was not frivolous and referred me to the draft memorandum of appeal annexed to the record of the notice of motion. Mr. Majanja, on his part opposed the application on the main reason that the intended appeal was a non starter as in any case, the applicant had not written a letter to the Court bespeaking the proceedings as is required by the proviso to **rule 81** of this Court's Rules. He stated further that there was no need for the applicant to wait for leave of the Court before filing the record as the same leave could have been sought after the record was filed and such leave, if granted, could have been introduced by way of a supplementary record of appeal.

I have anxiously considered the application. The facts as stated in the record and in the affidavit in support of the application, are not in dispute. Mr. Majanja conceded that his client did not file any replying affidavit and that being so the facts are that the ruling appealed from was delivered on 6th February 2009; the applicant filed notice of appeal through his former advocates on 20th February 2009; those former advocates apparently did not appreciate that leave to appeal was necessary, and so did nothing towards that goal till 26th March 2009 when the present advocates took over the conduct of the case and found that there was need to seek leave of the Court to appeal against the ruling; they applied for leave on 7th April 2009 and got that leave on 23rd October 2009 after the time they could have lodged the appeal had expired; that necessitated this application which was filed on 12th November 2009. All these facts stand. The law as regards the principles to be applied when considering a matter such as this one before me brought pursuant to **rule 4** of this Court's Rules is now settled. The Court in considering the application, exercises unfettered discretion. But like all such discretions, the Court must exercise the discretion judicially and not upon its own whims or capriciously. In order to ensure that the discretion is exercised judicially, there are certain well settled principles that through many decided cases, have been accepted as guidelines to be followed by the courts. These guidelines are not in anyway exhaustive as that would in itself defeat the exercise of the unfettered discretionary jurisdiction which the Court enjoys when dealing with such application. These guidelines are that the Court has to consider the period of delay; the explanation or reason for that delay; whether the appeal or intended appeal as the case may be is arguable, but without considering the merits of the appeal or intended appeal at this stage and whether the granting of the application would prejudice the respondent. Lakha JA (as he then was) put these principles admirably in the case of **Joseph Mweteri Igweta vs. Muhira M'Ethare & Another, Civil Application No. NAI. 8 of 2000.** He stated in part as follows:-

“The subject matter of this litigation relates to twelve acres of land situated in Meru District. The application made under rule 4 of the Rules is to be viewed by reference to the underlying principles of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudices of the delay to the other party, the merits of the appeal (without holding a mini appeal), the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them.”

There are several decisions of this Court which re-echo the principles set out in the above case – see cases of ***Pan African Paper Mills (EA) Ltd vs. Olaka [2001] KLR 8***, and ***Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi, Civil Application No. NAI. 255 of 1997***.

In this notice of motion, the delay period is from about 2nd May 2009 when the record of appeal should have been filed to 12th November 2009 when this notice of motion was filed. The explanation for that delay is that the period between 7th April 2009 to 23rd October 2009 was taken up when leave of the superior court to proceed on appeal was being awaited. Of course, the period between 23rd October 2009 to 12th November 2009 was the period taken to prepare the record of this notice of motion. Mr. Majanja urges me to accept that that explanation is not valid because the applicant had not written a letter to the Deputy Registrar bespeaking the copies of the proceedings and thus the appeal is bound to be filed out of time. I have considered the rival positions. Mr. Majanja’s argument is based on facts not deponed to in any affidavit as there is no replying affidavit asserting those allegations. They are allegations made at the bar and in law I cannot give them serious consideration. In any case, even if I were minded to consider them, I would still not base my decision on those allegations as they would go towards matters that are not within my jurisdiction, me sitting as a single Judge, as those allegations would go towards considering whether the intended appeal would be valid or not and that is a matter for the full Court and not for a single Judge. On my part, I do not see anything wrong with a party who desires to appeal, seeking leave to appeal and waiting for that application for leave before he can lodge record of appeal. If he files the record before leave is granted, then that record is not valid and of no consequence until leave is granted, in which case that exercise proposed by Mr. Majanja would be an exercise in futility till the application for leave is granted. I do accept the explanation advanced for delay in filing the intended appeal.

I have seen and perused the draft memorandum of appeal annexed to the application. Without saying any more, I cannot say the intended appeal is frivolous. It is in my view arguable. Mr. Majanja did not raise any matters as concerns prejudice to his client and he could not as there was no replying affidavit filed in the matter. On my own, I see no prejudice that the respondent would suffer if this application is granted.

The above, being my view of the matter, this application succeeds. The applicant is granted thirty (30) days from the date hereof to file and serve record of appeal. Costs of the application to be in the intended appeal. Orders accordingly.

Dated and delivered at Nairobi this 16th day of December, 2009.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR