REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 35 OF 2007 (UR 24/07)

CITY COUNCIL OF NAIROBI …….…….. APPLICANT

AND

INTERCITY UTILITY SERVICES LTD ……..….1ST RESPONDENT

JOSEPH MAINA KIMANI

t/a RENCOR PARKING SERVICES LTD.....2ND RESPONDENT

(Application for extension of time to serve notice of appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Kubo, J) dated 15th January, 2007

in

H.C.C.C. No. 936 of 2005)

****

R U L I N G

The first and second respondents in this notice of motion before me dated 14th February 2007, Intercity Utility Services Ltd. and Joseph Maina Kimani t/a Rencor Parking Services Limited respectively are the plaintiffs in High Court of Kenya at Nairobi Civil Suit No. 936 of 2005. They filed in that court a plaint and chamber summons under a certificate of urgency. In that chamber summons they sought against the applicant in this notice of motion, the City Council of Nairobi, three orders mainly which were first interlocutory injunction order to restrain the applicant, its employees, agents, servants or Town Clerk, or any one of them from evaluating, processing and/or awarding or signing Car Park Management contract or tender to any person on the basis of the resolutions passed on 17th November 2004 or thereabouts or purporting and alleging and so acting as if there is a cancellation or rescission of the award of an identified contract to the first respondent until the hearing of the suit or further order of the Court, secondly, that the applicant by itself, agents employees, or the Town Clerk or any of them do deliver and facilitate where necessary the delivery of the particulars and names of the firm or organisation that submitted bids or proposals by the 20th June 2005, or thereabouts to enable the applicants to serve them with the proceedings filed in the matter as they might be interested parties in the matter and lastly that the respondents do undertake to compensate the applicant for any damage if suffered during the continuance of any of the interim orders sought. That application was heard inter-parties by the superior court (Kubo J.) who after full hearing delivered a ruling on 15th January 2007 granting the orders sought against the

applicant. The applicant felt aggrieved by the same ruling and orders and intends to appeal against the same. It lodged a notice of appeal on 29th January 2007 which was within the time prescribed by **rule 74(2)** of the Court of Appeal Rules (the Rules). However, that notice of appeal was not served upon the respondents within seven days as is required by **rule 76(1)** of the Rules. It was served on 12th February 2007 and that was seven days late.

The above is the genesis of this notice of motion before me which is seeking orders that:-

"**1. The Honourable Court of Appeal be pleased to grant the applicant extension of time to serve Notice of Appeal out of time in the matter of an intended appeal against the ruling and order of the superior court (Hon. B. P. Kubo) dated 15th January 2007 in HCCC No. 936 of 2005 (between Intercity Utility Services Limited and Another vs. City Council of Nairobi.**

2. This Honourable Court be pleased to grant such other or further orders or directions as it may deem just and expedient to grant."

The grounds for the application are set out in the same application and are as follows:-

"**1. That the applicant is desirous of mounting an appeal against the said order and has filed Notice of Appeal within time.**

2. That due to an inadvertent oversight the applicant's Advocates on record were unable to effect service of Notice of Appeal within the time prescribed by the Rules.

3. That failure to serve the Notice within time is excusable and no prejudice will visit the respondent if enlargement of time is allowed as prayed.

4. That copies of proceedings and ruling/order have also been applied for.

5. That the applicant is ready to compensate the respondents in costs in any event."

There was also an affidavit sworn by Edward N. Omotii, the learned counsel for the applicant, in support of the application. In that affidavit, the applicant's counsel states that the delay in serving the notice of motion was as a result of the oversight on the part of their process server as a result of pressure of work on the part of the process server.

The respondents opposed the application and filed a replying affidavit sworn by one Joseph Gakure Maina, a director of the first respondent. In that affidavit, the respondents contend that the firm E. N. Omotii & Company which purported to represent the applicant in the application and which filed the notice of appeal, sought to be served out of time was irregularly on record as that firm came into the record after the application in the superior court was heard but the same firm of advocates did not serve the former advocates, Messrs Kenta Moitalel & Company Advocates with the Notice of Change of Advocates. The effect of that is that whatever the present advocates for the applicant did is null and void and of no effect in law. Further, the respondents maintain that the applicant failed to obey court orders issued in HCCC No. 424 of 2002 and that is the same reason for the case the subject matter of the intended appeal, and lastly, that there has never been any reason as to why the applicant, after having awarded the car Park Management to the first respondent, then wanted to call for fresh tenders/bids in lieu of performing its part on the already negotiated contract.

Before me, Mr. Omotii, the learned counsel for the applicant, in his submission merely highlighted the contents of the supporting affidavit but added that the intended appeal had merits as it involved public policy and public funds. Mr. Kamau, the learned counsel for the respondents, on the other hand, again emphasized the contents of the respondents' affidavit but also maintained that the applicant was not deserving of equitable remedies it was seeking as it did not come to court with clean hands. The applicant, he stated, had not served the Notice of Change of Advocates as is required by both the Civil Procedure Rules and the Court of Appeal Rules. Further the applicant is guilty of non disclosure of

important fact namely the allegation that the intended appeal had merits.

He also submitted that the application could not succeed as the applicant had failed to comply with the provisions of **rule 76** of the Rules, which is a mandatory requirement as even if the Court were to assume that seven days delay was not inordinate, the letter that was bespeaking the proceedings was not written on the 12th February 2007, meaning that the applicant slept in its rights. Lastly, Mr. Kamau submitted that the granting of the application would seriously prejudice the respondents and referred me to paragraphs 7 and 8 of the replying affidavit maintaining that the orders sought are not in public interest but were in fact in the interest of the applicant only. He asked me to reject the application so that the main suit may be heard and the matter finalized as what the applicant was complaining about was only an interlocutory order which was of no serious consequence to the parties.

The application is brought pursuant to **rule 4** of the Rules. In such an application, the Court is being asked to exercise its discretion. Such a discretion, like all discretionary powers, must be exercised judicially and upon reasons. It cannot and must not be exercised capriciously or upon the court's own whims. In order to so exercise its discretion, the court has certain legal principles guiding it. The principles applicable in such application are well set out in many decisions of this Court. Two decisions will suffice. In the case of **Major Joseph Mweteri Igweta vs. Mukira M'Ethare and another – Civil Application No. Nai. 8 of 2000**, Lakha, J.A (as he then was) stated, *inter alia*, as follows:

"**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 delay, the explanation for the delay, the prejudice 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 the time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them."**

And in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 251 of 1997 (unreported)**, this Court stated, *inter alia*, as follows:

"**It is now well 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."**

I would add here that the list of the matters to be considered as mentioned in the two cases I have referred to herein above is not exhausted and cannot be exhausted. By the very nature of the fact that the application is seeking equitable remedies and the court is called upon to exercise its unfettered discretion when considering such an application, many other matters may still come up which the court will need to consider. All I may say is that the circumstances of a particular case and the need to do justice to the parties will be of paramount importance when considering an application under **rule 4** of the Rules.

In this case, there is no dispute as to the length of the delay. Parties agree that the notice of appeal was filed on 29th January, 2007. By dint of **rule 76** of the Rules, it should have been served within seven days i.e. by 5th February 2007. It was served on 12th February 2007. So the delay period was seven days. The applicant's explanation for that delay is at paragraphs 7, 8 and 9 of the supporting affidavit which state:

"**7. That unfortunately due to an oversight that was committed within my office the said Notice of Appeal was only served upon the Respondent's advocates on 12th February 2007 which was out of time prescribed by the Rules.**

8. That the nature of the oversight was that due to pressure of work on the part of our process server he failed to serve the notice within time and was oblivious of the 7 day rule.

9. That the delay is wholly inadvertent and regretted for the reasons already outlined and it is fair and just that time is enlarged as sought herein otherwise the applicant will stand to suffer for the oversight/inadvertence of its advocates."

I have carefully perused the replying affidavit. I also heard the respondent's counsel in his address to me. The matters deponed in the supporting affidavit part of which I have reproduced above and which are the reasons given by the applicant for the delay of seven days in serving the notice of appeal upon the respondents' advocates have not been in any way challenged. I have considered them. In my mind, it appears to me that the applicant is candid to the court as to the reasons for the delay in serving the notice of appeal. I cannot rule out such a possibility that a process server may, through pressure of work and oversight, delay in serving court process. When I am faced with only seven days delay and no challenge to the allegations as none was offered by the respondents, I cannot reject the reasons given by the applicant for the delay. I accept them.

The applicant states that the intended appeal has merit as the matter before the superior court concerns public interest. Mr. Kamau refutes that and says the intended appeal does not concern public interest but on the contrary, is meant to protect private interest as it concerns a situation where the applicant in its action rescinded and declined to execute an agreement which would have fetched Ksh.20,000,000/= a month in preference to an offer of only Ksh.10,000,000/= a month and thus, was not interested in what would be in public interest but in what it considered of interest to it alone. He referred me to part of the ruling of the superior court on that aspect. In my view, and with respect, I do not read that part of the ruling in the way Mr. Kamau reads it, neither do I view Mr. Omotii's submission in the light of the merit of the appeal being in the amount of money involved. In my view, the matter is of public interest in that the applicant, being a public body, must have its activities under scrutiny so as to ensure that at all times it acts in the interest of the public. If it enters into a contract and rescinds it, the public needs to know why it has done so for the contract is entered into by it on behalf of the public. It is to that extent that its actions assume public importance as they must be based on public policy. That in effect means that if it loses in an application as it did in the superior court and needs to challenge that decision, then it acts in public interest in so doing and thus the intended appeal needs to be ventilated for parties to ensure the public that its institutions are working. I have perused the record and the ruling and although no draft memorandum of appeal was filed as should have been done, I cannot say the intended appeal is frivolous. Indeed the learned Judge of the superior court was aware that he was dealing with a matter which involved public policy.

On the question of prejudice to the respondents, I do not see any at all, as what is being sought is extension of time to serve a notice of appeal which had already been served upon them on 12th February 2007 and they already have it. No extra time will be wasted by granting the order sought.

The other point raised was, if I understood the replying affidavit and Mr. Kamau, that the firm of advocates on record for the applicant is not validly on record as it had not served the former advocates for the applicant with the notice of change of advocates and by extension, that the notice of appeal he filed is not valid in law. My short answer to that is that, I cannot, sitting as a single Judge, declare the notice of appeal invalid. The validity of the notice of appeal is not before me and cannot be before me as a single Judge. However, if I may borrow from the decision of a full bench of this Court when it was hearing an application for stay of execution, the question of validity of a notice of appeal cannot be visited at this stage for it might, if visited, end in striking out of a notice of appeal which cannot be done at this stage. In the case of **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and Another** – **Civil Application No. Nai. 238 of 2005 (unreported)** this Court was dealing with an application under **rule 5(2) (b)** when the question of validity of the notice of appeal came up. It stated as follows on that issue:

"**We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule 5(2) (b) is being considered."**

And it went on to set out the two well known ingredients which the Court had to consider under that rule. Likewise, I do not see any reason for determining the validity, or otherwise, of a notice of appeal when an application under **rule 4** is being considered. I have set out in the two cases I have cited hereinabove what needs to be considered when considering an application for extension of time under **rule 4** of the Rules.

In conclusion, I do find this a suitable matter for the exercise of my discretion and I do so in favour of the applicant. Time for serving the notice of appeal is extended by such period as would validate the service that was carried out on 12th February 2007. To be clear, time for service of the notice of appeal upon the respondents is extended to 12th February 2007 inclusive of that date 12th February 2007.

As the applicant stated that it would meet the costs of the notice of motion, so be it. Costs of this notice of motion to the respondents.

Dated and delivered at Nairobi this 7th day of June, 2007.

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR