REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Application 349 of 2005

SEVENTH DAY ADVENTIST CHURCH EAST AFRICA LTD

PASTOR M. NYAKEGO

E.N. ADUKE …..…..APPLICANTS

AND

M/S. MASOSA CONSTRUCTION COMPANY……..RESPONDENT

(An application to file notice of appeal and record of appeal out of time from the judgment and decree of the High Court of Kenya at Kisii (Wambilyiangah, J.) dated 15.09.05

in

H.C.C.C. NO. 6 OF 2002)

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RULING

The **Seventh Day Adventist Church Organisation** (hereinafter "*the church"* or "*the applicants*") is embroiled in a dispute with a building construction firm, **M/S. Masosa Construction Company** (hereinafter "*the contractor" or "the respondent"*). The dispute relates to a contract signed between the two parties for the construction of a conference center for the church at Nyamira in 1995. According to the Contractor, the construction cost was initially agreed at Shs.17,102,152.50 but eventually it escalated to Shs. 19,064,160 by the time it was completed and handed over in the year 2000. The church had paid Shs.13,866,472 leaving a balance of Shs. 5,177,68. The church however contended that the agreed construction cost was Shs.10,600,000/= only and it was never agreed at Shs.17,102,152.20 or 19,064,160 which sums were unilaterally imposed on the church by the Contractor. The church further contended that they had overpaid the Contractor and reserved the right to counterclaim a sum Shs.3,236,472. The die was cast. The Contractor filed suit against the church in January, 2002 enjoining as co-defendants its executive director, ***Pastor Nyakego,*** and the project Architect, ***Mr. Aduke*** claiming from them, jointly and severally, the balance of Shs.5,177,688/= with interest thereon at 35% p.a. The suit was fully heard by Wambilyangah J who in his judgment delivered on 15.09.03 found that the contractor's claim was valid and entered judgment as prayed with interest at court rates.

Dissatisfied with that judgment, the church and the two co-defendants preferred an appeal to this Court but the appeal was struck out on 15.07.05 as it was incurably defective. The record of appeal had omitted primary documents. The church was not deterred by that set back. It came before this court on 07.11.05 and filed a notice of motion dated 28.10.05 seeking extension of time to file a fresh notice of appeal and a record of appeal. That was the matter argued before me, and the subject matter of this ruling.

The principles on which I have to consider the application are well settled. I considered several authorities in Fakir Mohammed v Joseph Mugambi & 2 others Civil Application Nai. 332/04 (Nyr. 32/04) (ur) and stated:

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture 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: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38."

There is no dispute that the applicants filed an appeal within time to challenge the decision of the superior court. There is also no dispute that upon the appeal being struck out, the applicants were punished in costs for the omission of primary documents in the record of appeal. The period of delay between the date of judgment and the striking out of the appeal is therefore not for consideration in this application. The application was filed on 07.11.05 although it was apparently drawn up 10 days earlier on 28.10.05. There was a delay of 115 days. Without any explanation, that delay would obviously be inordinate and would militate against the grant of the prayers sought. What is the explanation?

It is provided by learned counsel for the applicants Mr. Soire, who has his law firm in Kisii township and is seized of the matter in conjuction with another firm of advocates M/S. Akunga Momanyi & Co. who are based in Nairobi. He swears that as soon as the appeal was struck out on 15.07.05, he moved quickly to the Law Courts in Kisumu to obtain a copy of the ruling on the basis of which he would obtain their clients instructions on the matter. The Kisumu Court registry however informed him that the ruling had typing errors which had to be corrected in Nairobi and he was therefore kept waiting until 29.08.05 when it was supplied. Between that date and October 2005, both the advocates on record were consulting with the three applicants to obtain further instructions. Mr. Soire submitted that the delay was neither deliberate nor inordinate and was therefore excusable. For support of that submission, he cited Mwangi Kinyua v Waweru Kinyanjui & 4 others Civil Application No. NAI. 251/04 (ur) where a delay of 300 days was excused, and Jeremiah Mutura v Vice Chancellor, Jomo Kenyatta University of Agriculture & Technology (JKUAT) & Anor Civil Appl. NAI. 60/04 where a delay of 1 year was declared inordinate for want of any explanation. In this matter there was a good explanation, he submitted. He further submitted that the nature of the dispute was relevant and in this case the applicants stood to lose an enormous sum of over Shs.5 million when they have laid out good grounds of appeal which is likely to succeed. There is a draft Memorandum of appeal exhibited with the application. Finally there was no prejudice to the respondent since the decretal sum, including all costs in the superior court and those of the struck out appeal, have been paid to the respondent. The appeal was thus being pursued on principle.

For his part, learned counsel for the respondent, Mr. Ogutu was skeptical about the explanation for the delay. In his view, it was not necessary to await a copy of this Court's ruling striking out the appeal since the ruling was delivered in the presence of both counsel and they knew the result immediately. Even if the explanation for the delay between July and August is accepted, Mr. Ogutu still submitted that there was unexplained delay of two months upto the time instructions were given for filing this application and another delay of 10 days before the application was filed. In his view, there was no need to consult the clients in the matter since the previous instructions to file an appeal were still subsisting. That excuse is therefore a lame one. Finally Mr. Ogutu submitted that, although the decretal amount and all costs so far have been paid, the respondent will be prejudiced if the litigation is re-opened as it would cause them fresh anxiety. Equity should not aid the indolent.

I have considered the rival submissions of both counsel. The decisions of this Court cited on both sides and showing varying periods of delay which have either been excused or rejected by the court only confirm the principle that each case must be decided on its own peculiar facts and circumstances. It is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay. Explanations for such delays are also as many and varied as the cases themselves. In this matter, the explanation relates to the ruling of this Court and I am prepared to accept that it was not supplied to the applicants' counsel until 29.08.05. It was necessary not only for exhibiting with this application but also for consultations between the applicants' counsel and their clients. I do not find the explanation unreasonable. I am asked to take judicial notice that the church is an organization that can only make decisions through its organs and delays in making such decisions would be inevitable. Apart from Mr. Ogutu's protestation that such information ought to have been given on oath, I did not understand him to contend that decisions of such an organization would be made otherwise. Indeed the pleadings filed by the parties are *ad idem* about the description of the church. I accept the explanation offered for the delay in that regard.

At all events, and the main reason for favourable consideration of this application, the respondent has already recovered all the decretal sum and costs attendant to the litigation so far. The right of appeal is a strong right. It is only rivalled by the right to enjoy the fruits of judgment, and a proper balance has to be struck between the two. The respondent has enjoyed his right in full. I see no prejudice if an opportunity was given to the applicants to enjoy theirs too, even if, as they state, it is on a matter of principle. I have looked at the grounds of appeal put forward by the applicants and I cannot say the appeal is frivolous. If it ultimately succeeds the applicants will have been vindicated. If not, they have shown that they can bear the costs of the litigation.

In the result I allow the application as prayed. The notice of appeal shall be filed and served within seven days of this ruling. The record of appeal shall be filed and served within fourteen days of service of the notice of appeal. Costs of the application shall be borne by the applicants in any event.

Dated and delivered at Kisumu this 19th day of June, 2006.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR