



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISC. CIVIL APPLICATION NO. 17 OF 2015**

**FRANCIS JAMES NDEGWA.....APPLICANT**

**VERSUS**

**2NK LIMITED.....RESPONDENT**

**RULING**

1. The Applicant, Francis James Ndegwa, filed a Notice of Motion under a Certificate of Urgency dated 13<sup>th</sup> May, 2015; the application was brought under the Civil Procedure Act but the specific provision was not mentioned and it was also brought under the provisions of Order 51 Rule 1 of the Civil Procedure Code. The Applicant prayed for the following Orders;

- a. Spent
- b. That this Honourable Court be pleased to grant leave to file the record of appeal out of time.
- c. That costs of the application do abide the final decision of the intended appeal.

**APPLICANTS SUBMISSIONS**

2. The application is based on the grounds found on the face of the application and on a supporting affidavit made by the applicant on the 13<sup>th</sup> May, 2015.
3. The ruling in Tribunal Case No. 252 of 2009 was delivered on the 31<sup>st</sup> July, 2014 and a Notice of Appeal was lodged on the 8<sup>th</sup> August, 2014; and on the 12/08/2014 he applied for copies of the proceedings and ruling; the applicant contends that he could not proceed to prepare the record of appeal within the stipulated time as the Tribunal denied him the proceedings and the ruling/ judgment;
4. The Applicant avers that after lodging complaints to the Office of the Judiciary Ombudsman, the Commissioner of Co-operatives and the Permanent Secretary the Tribunal was then compelled to issue him with the proceedings, ruling/ judgment and a Certificate of Delay; which documents were received from the Tribunal on the 30/07/2015.
5. He annexed a draft Memorandum of Appeal marked as 'FJN1' to the application and submitted that the appeal had high chances of succeeding; that had the proceedings been availed to him on time he

would have filed his appeal in good time.

6. The applicant invoked the provisions of Articles 25(c) and 50(1) of the Constitution 2010 and submitted that he had a right and was entitled to a fair trial.

7. The applicant pointed out to the court that there was no Notice of Appointment; therefore the respondent's advocates had not been generally or specifically appointed by any instrument in writing in accordance with the provisions of Order 9(1) the Civil Procedure Rules; The applicant argued that the deponent of the Replying Affidavit dated the 21/07/2014 was a stranger as he was not the Chairman nor a member of 2NK Sacco and therefore had no authority to make the Replying Affidavit; that the offending affidavit ought to therefore be struck out.

8. The applicant prayed that his application be allowed.

### **RESPONDENTS SUBMISSIONS**

1. The respondent opposed the application and relied on the Replying Affidavit made on the 27<sup>th</sup> July, 2015 by its Chairman; through its counsel the respondent submitted that the application was unclear as to whether the applicant was seeking leave to file a Record of Appeal out of time; or whether he intended to seek leave to appeal out of time; Counsel contended that the application was on the wrong footing and lacked clarity.

2. That the applicant had learnt of the outcome of the award/judgment on time and ought to have filed a holding appeal; that he had a right to appeal but did not exercise it; the court's discretion could only be exercised on disclosed reasons; No letters of complaints made to the Ombudsman, the Commissioner of Co-operatives and the Permanent Secretary were annexed to the application; the application was brought late in the day and from his own admission the applicant was guilty of laches; that litigation must come to an end.

3. On whether the advocates had instructions to act on behalf of the respondents; Counsel stated that they had always been on record as acting for the respondents; that the applicant had even effected service upon their firm, Nderi & Kingati, Advocates.

4. Counsel submitted that the application lacked merit and prayed that it be disallowed.

### **ISSUES FOR DETERMINATION**

9. Taking into consideration the above submissions this court has framed the following issues;

i. Whether the advocates are properly on record acting on behalf of the respondents;

ii. Whether the explanation given for the delay is satisfactory;

iii. Whether it would be just in the circumstances for the court to invoke the provisions of Article 159 of the Constitution;

iv. Costs.

### **ANALYSIS**

5. When the matter was before the Tribunal it was within his knowledge that this firm of advocates was acting for the respondent; the applicant also took it upon himself to copy the letters requesting for proceedings, to the said firm of advocates; the court takes cognizance of the fact that the application contains the address of service of the respondents being that of the said firm of advocates; indeed when effecting service of the application, the applicant did so by duly serving the said firm.

6. By his conduct the applicant is stopped from challenging whether the firm of Nderi & Kingati Advocates were seized of instructions to act on behalf of the respondent.

7. This court has had occasion to peruse the proceedings of the Tribunal and notes that the firm of Nderi & Kingati, advocates filed final submissions on behalf of the respondents on the 18/09/2013; this entry clearly supports the fact that the advocates were acting on behalf of the respondents and that this fact was within the applicants knowledge at the time of filing the instant application.

8. It was also noted that the application was not properly headed; with the advent of the Constitution 2010 at Article 159(2)(d) it is the practice of the courts to consider administering justice without undue regard to technicalities of procedure; under the provisions of Articles 25(c) and 50(1) the applicant does have an unalienable right to a fair hearing; the applicant also has a right to come to court to seek redress

9. It is this court's considered view that the failure to cite the section of the law is a procedural technicality and a matter of want of form and such an omission does not go to the root of the application; there is need to focus on administering substantive justice; therefore I shall invoke the provisions of Article 159(2)(d) and find that the application is properly before this court; then proceed to address the issue of whether to grant leave to the applicant to appeal out of time.

10. The relevant provisions of the law are captured under the provisions of Section 79G of the Civil Procedure Act; it outlines the time for appeals to be filed from a subordinate court to the High Court; litigants are required to file appeals within a period of thirty days excluding the time which the lower court may certify as being required for the preparation and delivery to the appellant copy of decree or judgment.

11. The appellant has demonstrated to this court that the award was made on the 31/07/2014; this fact is not disputed by the respondent; the applicant then applied for the copies of the proceedings on the 12/08/2014; he received the copies of the proceedings and the award on the 30/04/2015; the Tribunal issued the applicant with a Certificate of Delay and it gives the reasons for the delay and the period taken for the preparation of the proceedings and judgment; that the typing of the proceedings was completed on the 2/05/2015.

12. This court is satisfied with the explanation given by the applicant and that could not proceed to file the appeal without the proceedings; the inordinate delay can be attributed to the Tribunal; the Certificate of Delay certifies the period taken to prepare the proceedings and judgment; the certificate of delay that was issued by the Secretary to the Tribunal is found to conform to the provisions of Section 79(G) and the proviso to Section 2 of the Civil Procedure Act.

## **FINDINGS AND DETERMINATION**

13. For the forgoing reasons the application for leave to institute the appeal out of time is found to be meritorious and is hereby granted.

14. The applicant is directed to file the Record of appeal within 30 days from the date hereof.

15. In default the leave granted shall stand vacated.

16. The costs of this application shall abide the outcome of the appeal.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 10<sup>th</sup> day of March, 2016.**

**A. MSHILA**

**JUDGE**



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