



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Ibrahim, Ojwang, Wanjala, Njoki, Lenaola SCJJ)

CIVIL APPLICATION NO 23 OF 2019

BETWEEN

KENYA REVENUE AUTHORITY.....APPELLANT

AND

KRISH COMMODITIES LIMITED.....RESPONDENT

(Being an application for extension of time to file an appeal out of time against the decision of the Court of Appeal

(Visram, Karanja, Koome JJA) sitting at Mombasa in Civil Appeal No. 67 of 2017 dated 27th June, 2018)

RULING

A. INTRODUCTION

[1] This is an application by way of a Notice of Motion dated 2nd August, 2019 brought under Articles 159 and 163(4)(a) of the Constitution of Kenya, Section 21(2) and 24 of the Supreme Court Act as well as, Rules 23 and 53 of the Supreme Court Rules 2012. The Applicant seeks the following specific orders:

- 1. THAT the Honourable Court be pleased to grant leave to extend the time limited for filing of the Petition of Appeal.**
- 2. THAT the costs of and incidental to this application do abide the result of the said Appeal.**

[2] The Application is premised on several grounds and the supporting Affidavit of Maureen Agutu sworn on 2nd August, 2019.

[3] The Application is opposed by the Respondent through a Replying Affidavit sworn by Mital Shah, the Director of the Respondent, on 22nd August, 2019.

B. BACKGROUND

i. Proceedings at the High Court

[4] At the High Court, the Respondent filed **Misc. Appl. No. 59 of 2013** to challenge the Applicant's decision, dated 2nd October,

2009, to detain and withhold the Respondent's ten (10) containers of goods on account of an unpaid sum being duty owed to the Applicant of Kshs. 26,215,578/=. The Respondent claimed in that regard that its constitutional right to fair administrative action as guaranteed under Article 47 of the Constitution was infringed by the Applicant. That the Applicant's conduct was not only *ultra vires*, but also an abuse of powers occasioning the Applicant irreparable loss and damage. Finally, the Respondent claimed that the Applicant, in detaining its goods acted unfairly, unlawfully and maliciously.

The Applicant on its part denied any wrong doing and maintained that it acted within the provisions of the law, and that the orders of *certiorari* and prohibition sought by the Respondent the as *ex parte* Applicant, did not lie.

[5] The High Court in its Judgment listed one issue for determination namely, *whether the demand by the Respondent for the sum of Kshs. 26,215,528/= or any other amounts on account of duty allegedly uncollected due to the application of a lower duty rate was a wrongful and unlawful action*, and whether therefore orders of *certiorari* and prohibition could issue, to quash the demand notice, and prohibit the Respondent from making any demand on account of alleged underpayment of duty/taxes in respect of the various importation of consignments of rice made by the Applicant which were cleared by the Respondent under Entry Nos. 2008 MSA 1524652, 2008 MSA 1624728, 2009 MSA 1583016, 2009 MSA 1050489, 2009 MSA 1717824 and 2009 MSA 1718645.

[6] On 6th December, 2016, *Emukule J* held that the Applicant was well within its mandate to inspect and audit the import documents in terms of Section 235 and 236 of the East African Community Customs Management Act (EACCMA), and demand short-levied tax in terms of Section 135 of EACCMA 2004. He consequently exercised his discretion and proceeded to dismiss the Respondent's application for Judicial Review orders.

ii. Proceedings before the Court of Appeal

[7] Aggrieved by the decision of the High Court, the Respondent preferred an appeal to the Court of Appeal, being *Civil Appeal No. 67 of 2017, Krish Commodities Limited v Kenya Revenue Authority*, on the ground that *the learned judge of the High Court erred by misapprehending the issues arising for determination before him*, failing to determine the constitutionality of the provisions of the Treaty for the Establishment of the East African Community Act No. 2 of 2000 in as far as the applicability of the EACCMA was concerned; finding that EACCMA was valid law and takes precedence over any partner states' law, failing to appreciate the circumstances under which the Simba System assessed the duty payable over imported goods and failing to determine whether the Respondent's is right to fair administrative action had been infringed.

[8] On 27th June, 2018 while determining the appeal, the Court of Appeal (*Visram, Karanja, Koome JJA*) listed two issues for determination, that is, *whether EACCMA is applicable in Kenya* and *whether the Appellant's decision was amenable to judicial review*. On the first issue, the Court of Appeal agreed with the High Court that EACCMA was applicable in Kenya emphasizing that EACCMA was published in the East African Gazette Notice No. 1 of 1st January, 2005 (and not 4th of January, 2005) and came into force on 1st January, 2005. On the second issue, the learned judges held that the High Court begun on a wrong footing in identifying the issue for determination. In their opinion, the issue was not whether the Applicant had the power to conduct post clearance process and demand the short-levied duty. They emphasized that the learned Judge of the High Court ought to have looked into the decision-making process and answer the question as to, whether the Respondent was treated fairly by the Applicant in the circumstances. Consequently, the Appellate Court found that the Respondent was not treated fairly and reasonably, and that the Applicant's conduct to detain the Respondent's containers was an abuse of the Applicant's powers. To this end, the Court upheld the appeal, set aside the impugned judgement and substituted it with an order allowing the Respondent's application.

[9] Aggrieved by the Court of Appeal's decision, the Applicant filed a Notice of Appeal on 5th July, 2018 but did not file the Appeal within the required timelines hence the Application before this Court for extension of time to file the Apopeal.

C. PARTIE'S RESPECTIVE CASES

(i) The Applicant's Submission

[10] The Applicant urges that it filed its Notice of Appeal on 5th July, 2018 and served the same on 13th July, 2018 in compliance with the Supreme Court Rules but was unable to file the appeal for lack of the Court of Appeal Judge's notes during the hearing which, despite request made on 5th July, 2018 were issued to him on 5th July, 2019 beyond the statutory timelines for filing an appeal to this Court.

[11] The Applicant submits in that context that the delay in filing the appeal was beyond its control and in that context, this Court should exercise its discretion under Rule 53 of the Supreme Court Rules and extend time to enable it pursue the Appeal. It adds that the delay was not inordinate given that the necessary documents were filed within timelines. We wish to note at this point, that other than the Notice of Appeal which was filed on 5th July, 2018, the Applicant has not mentioned any other document filed as alleged.

[12] While citing this Court's decision in *Shabbir Ali Jusab v. Annar Osman & Another SC Civil App. No. 1 of 2013; [2013] eKLR*, the Applicant further urges that the instant application was filed timeously upon receipt of the Court of Appeal Judges' notes.

[13] As to whether the intended appeal stands a chance of succeeding, the Applicant submits that the intended appeal raises substantial Constitutional issues that arose from the Judgment of the Court of Appeal and which ought to be determined by this Court particularly as regards the interpretation and application of Articles 24, 47 201(b) (i), 209 and 210 of the Constitution Section 135 and 235 of the East African Community Customs Management Act. In support thereof, the Applicant cites this Court's decisions in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, SC. Appl. No. 5 of 2014; [2014] eKLR* and *In the Matter of the National Gender and Equality Commission SC. Reference No. 1 of 2013; [2014] eKLR*.

[14] It is the Applicant's other submission that the Respondent will not suffer any prejudice if the Application is allowed because *the Notice of Appeal was lodged within the requisite timelines and the Respondent also served on time*. The Applicant thus avers that its stand to suffer great prejudice if the matter is not heard and determined as the Court of Appeal Judgment in effect stripped its statutory powers to carry Post Clearance Audits and has hampered its ability to discharge its statutory mandate.

[15] Finally, the Applicant submits that it is in the public interest that the Appeal be admitted for the reason that the Appellate Court's decision can be used to strip it of its powers to carry out audits under other statutes such as the Income Tax Act, the Value Added Tax Act, the Tax Procedures Act and the Exercise Duty Act which allow the Applicant to carry audits within a period of five years after any action it has taken under those statutes and rectify any errors arising from the said audit.

(ii) The Respondent's Submissions

[16] In opposing the Application, the Respondent submits that the Applicant had lost interest in pursuing the intended appeal until the High Court sitting in Mombasa cited the impugned Court of Appeal decision in the case of *Aryuv Agencies Limited v Kenya Revenue Authority Judicial Review No.5 of 2013; [2019] eKLR*, whereby the High Court at Mombasa (Ogola J.) advised the Applicant to pursue an appeal before this Court.

[17] The Respondent further urges that the Applicant's appeal stands withdrawn in view of Section 36 of the Supreme Court Act as it was not filed within the stipulated timelines. To buttress this submission, the Respondent cites the following cases *Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others, SC. Appl. No. 41 of 2014; [2018] eKLR*, *Sister Sarah Adipo v Teachers Service Commission CA Civ. App. No. 31 of 2019; [2019] eKLR* and *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR*.

[18] Furthermore, the Respondent submits that the Applicant has failed to explain the one-year delay in filing the instant application nor the steps made to pursue typed proceedings and even delayed to file its written submissions in respect of the instant application as directed by this Court on 14th August, 2019. In that context, they urge this Court not to exercise its discretion in favour of the Applicant.

[19] On jurisdiction, the Respondent submits that the issues before the superior courts did not involve interpretation and application of the Constitution, but related to prerogative orders premised on the Applicant's alleged irrational, unreasonable, unfair, inefficient and inexpedient conduct.

[20] On the matters of public importance, the Applicant submits that the Applicant will require certification from the Court of Appeal, in that regard which certification has not been sought. Consequently, this Court lacks jurisdiction in the matter. The Respondent thus urges for the dismissal of the Application with costs.

C. ISSUES FOR DETERMINATION

[21] Having carefully considered the grounds in support of the Application, the submission of the parties, the authorities in support thereof, it is apparent to us that there is only one issue for determination by this Court, namely: *Whether this Court should extend time*"

D. ANALYSIS

[22] Rule 53 of the Supreme Court Rules, 2012 grants this Court discretion to extend time. It provides that:

“The Court may extend the time limited by these Rules, or by any other decision of the Court.”

[23] It is the Applicant’s submission in the above context that as soon as the Court of Appeal delivered its Judgment on 27th June, 2018, it filed a *Notice of Appeal* on 5th July, 2018. Nonetheless, it could not file its appeal within time because *it was awaiting the “typed proceedings and decree of the Court of Appeal*. During the period of awaiting “*typed proceedings and decree*”, the time for filing an appeal lapsed. It also urges that the intended appeal is for the benefit of the general public and so the Application should be allowed. The Respondent on the other hand urges that the reasons advanced by the Applicant were not sufficient and, that the Notice of Appeal stood withdrawn upon the lapse of stipulated timelines for filing an appeal, that the Applicant has in any event not pursued extraction of the decree from the Court of Appeal; has delayed in filing submissions in the instant Application and inordinately delaying to file the current application. It also urged that the Applicant has not sought certification that this is a matter of general public interest.

[24] In addressing the Application, we note that Rule 33(1) of the Supreme Court Rules provides as follows:

“An appeal to the Court shall be instituted by lodging in the Registry within thirty days of the date of filing of the notice of appeal-

- a) *a petition of appeal;*
- b) *a record of appeal; and*
- c) *the prescribed fee”.*

[25] Rule 33(4) of the Supreme Court Rules also thus provides:

“For purposes of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and shall further contain the following documents relating to the appeal in the first appellate court—

- a. *the certificate, if any, certifying that the matter is of general public importance;*
- b. *the memorandum of appeal;*
- c. *the record of proceedings; and*
- d. *the certified decree or order” [emphasis supplied].*

[26] Further, Rule 33(6) of the Supreme Court Rules, provides as follows:

“Where a document referred to in sub-rule (3) and (4) is omitted from the record of appeal, the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal.”

[27] With respect to extension of time, this Court has already set the guiding principles in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others** [SC. Application no. 16 of 2014; [2014] Eklr as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;*
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
- 5. whether there will be any prejudice suffered by the respondents, if extension is granted;*
- 6. whether the application has been brought without undue delay; and*
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”* [emphasis supplied]

[28] Further, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others, SC. Civil Appl. No. 3 of 2016; [2017] eKLR*, this Court emphasized the need for an applicant, *in an application for extension of time*, to satisfactorily declare and explain the whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:

“[24] a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered”

[29] In the present case, we note that the typed proceedings were certified on 2nd of July, 2019 though no certificate of delay from the Deputy Registrar of the Court of Appeal has been attached to enable us ascertain the delay. We also note that other than the request for the typed proceedings made by the Applicant on 5th July, 2018, there is no other follow up from the Applicant on the same.

[30] Assuming that a certificate of delay was attached herein to confirm that the typed proceedings were issued on the same date they were certified that is, 2nd July, 2019, was the present application filed on time" Was that the only remedy available to the Applicant" We have taken note of the fact that the present application was filed a month later, that is, 2nd August, 2019. The Applicant has not provided a satisfactory explanation for the one-month delay after receipt of the typed proceedings.

[31] Further, we note that the Applicant did not pursue the procedure provided for under Rule 33(6) of the Supreme Court Rules which allows for filing of the requisite documents late, *but without leave of Court*. Having filed the Notice of Appeal on 5th July, 2018, the last day for filing the Appeal was 19th July, 2018. Thereafter, the Applicant had a further fifteen days (until 3rd of August, 2018) to file a supplementary record without leave. This therefore means that the Applicant ought to have filed the Appeal and the record with the documents that were available as a sign of diligence, then later seek leave of this Court to file the supplementary record *out of time*. Consequently, it is our finding that the Applicant has not satisfactorily explained the inordinate delay of one year to warrant exercise of this Court's discretion to enlarge time.

[32] We have also interrogated the Court of Appeal's decision which was to the effect that EACCMA was applicable in Kenya, and that the learned Judge of the High Court had failed to correctly identify the issues for determination; that the Respondent was not treated fairly and reasonably and that the Applicant's conduct to detain the Respondent's containers was an abuse of the Applicant's powers. We also do not see how, even if certification had been obtained (and it has not), any of these findings affect the interest of the general public to enable us exercise our discretion to extend time to file the appeal. Neither do these issues require an interpretation or application of the Constitution.

[33] The upshot of the above is that we are inclined to disallow the application for extension of time with costs to the Respondent.

A. ORDERS

[34] Consequently, we make the following Orders

i. The Notice of Motion dated 2nd August, 2019 be and is hereby disallowed.

ii. The Applicant shall bear the costs of the Respondent.

[35] Orders accordingly.

DATED and DELIVERED at NAIROBI this 23rd Day of January 2020.

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M.K IBRAHIM

JUSTICE OF THE SUPREME

COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME

COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT



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