

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Wanjala, Njoki & Lenaola, SCJJ)

CIVIL APPLICATION NO.17 OF 2019

–BETWEEN–

THE ATTORNEY GENERAL..... APPLICANT/APPELLANT

–AND–

ZINJ

LIMITED.....RESPONDENT

*(Being an Application for enlargement of time to serve a Notice of Appeal and Record of Appeal in an intended appeal from the Judgment and Orders of the Court of Appeal in **Civil Appeal No.56 of 2018** of the Court of Appeal at Malindi (**A. Visram, W. Karanja, M.K. Koome, JJA**) delivered on 20th day of March, 2019)*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 28th May, 2019 and filed on the same day seeking orders of enlargement of time to serve a notice and record of appeal against the Judgment and Orders of the Court of Appeal delivered on 20th March 2019 in Civil Appeal No.56 of 2018 and brought under the provisions of Articles 159(2)(d) and 163(4) of the Constitution, Section 3 of the Supreme Court Act, Rules 26 and 53 of the Supreme Court Rules, 2012 and;

[2] UPON reading the Applicant's Supporting Affidavit sworn by Ruth Chepkemboi Lutta on 24th April 2019 and;

[3] UPON considering the written submissions filed by the Applicant on 21st June, 2018 wherein it is contended that the delay in serving the notice and record of Appeal was as a result of apparent confusion between the Attorney General's Nairobi and Malindi offices as to where the requisite service was to be effected and;

[4] NOTING the Applicant's further submission that, while the time for effecting service under Rule 32(1) of this Court's Rules lapsed on 10th April 2019, service of the notice and record of appeal was effected on 11th April 2019 and therefore the delay was only of one day and;

[5] FURTHER NOTING the submission that no prejudice would be caused to the Respondent if time is enlarged as prayed and that the intended appeal has high chances of success as demonstrated by the contents of the Memorandum of Appeal and;

[6] NOTING from the record that the Application is not directly responded to but instead, the Respondent, by a Notice of Motion application dated 6th September 2019 and premised on Rule 37(1) of this Court's Rules, seeks orders of dismissal of the Applicant's Motion dated 28th May 2019 as well as a striking out of the Notice of Appeal dated 1st April 2019 on the grounds that:

- a) *The Appellant herein served the Applicant/Respondent with a Notice of Appeal dated 1st April, 2019 and lodged on 3rd April, 2019.*
- b) *The said Notice of Appeal was lodged out of time as per Supreme Court Rule 31.*

- c) *The Appellant's Application dated 24th April, 2019 came up for mention on 17th June, 2019 before the Deputy Registrar of this Court, when parties agreed to enter into a consent in favour of the Appellant's Application and that the same consent be lodged in Court.*
- d) *On 18th June, 2019 the Applicant/Respondent through its Advocates forwarded a consent in triplicate to the Appellant's Advocate for filing.*
- e) *Since then the Appellant has failed and/or neglected to execute the said consent and lodge it in Court for adoption.*
- f) *The Appellant has failed and/or refused to file the requisite record of appeal subsequent upon the Notice of Appeal aforesaid, contrary to law; and no reasonable explanation has been offered thereto.*
- g) *The Notice of Appeal dated 1st April, 2019 and lodged on 3rd April, 2019 is frivolous, vexatious and an abuse of the Court process, in that; the said Notice of Appeal was solely intended to stay the execution of the Judgment at the Court of Appeal delivered on 20th day of March, 2019 by Hon. Justice A. Visram, W. Karanja and M. K. Koome at Malindi with no intention to pursue an appeal, at all.*
- h) *On the whole, the Notice of Appeal herein is highly prejudicial to the Applicant/Respondent, it is unjust and unfair; and there are sufficient reasons warranting the orders sought hereby.*
- i) *The Application has been brought without any unreasonable delay.*

[7] FURTHER NOTING that the above grounds are repeated in the Supporting Affidavit sworn on 6th September 2019 by one, Mohamed Madhubuti, a Director of the Respondent company and extrapolated in the submissions filed on 26th September 2019 and;

[8] UPON READING the Applicant's Replying Affidavit sworn on 23rd September 2019 by Rita Chepkemboi Lutta and Submissions filed on 11th October 2019 in which it was deponed that the Applicant, at all times, acted in good faith; has explained the delay in not serving the notice and record of appeal on time; has a genuine and credible appeal predicated on Article 40 of the Constitution and that therefore his application ought to be allowed and;

[9] HAVING considered the two related Applications before us, we now opine as follows:

- (a) The Application dated 28th May 2019 satisfies the principles set out in the cases of ***Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*** Application No.16 of 2014 and ***Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*** SC Application No.15 of 2014; on extension of time by this Court as well as;
- (b) The principles in ***Board of Governors, Moi High School, Kabarak & Another v Malcom Bell*** SC Petition No. 6 and 7 of 2013 as affirmed in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** Application No.5 of 2014 and ***Wycliffe Oparanya Ambetsa v the Director of Public Prosecutions*** SC Petition No.14 of 2016 as the reasons for the one day delay in serving the notice and record of appeal have been satisfactorily explained and the delay is not inordinate in any event.
- (c) Once the Application dated 28th May 2019 has been granted, it means that we see no merit in the Application dated 6th September 2019 because non-execution of a Consent Order by one party does not of itself connote bad faith – a party can change its mind prior to execution of any Consent Order. Furthermore, no prejudice has been caused to the Respondent by

the non-execution of the Consent Order on an application it has never responded to. In effect, its own application is misconceived on all fronts.

[10] In the circumstances, we now **ORDER** as follows:

- a) The Application dated 28th May 2019 is hereby allowed and time to serve the Applicant's Notice and Record of Appeal is hereby enlarged for a further seven (7) days from the date of this Ruling.***
- b) The Application dated 6th September 2019 is hereby dismissed.***
- c) Each party shall bear its costs of both Applications.***

DATED and DELIVERED at NAIROBI this 15th day of January, 2020

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
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