



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 9 OF 2011

1. MOMBASA BRICKS & TILES LIMITED

2. SOJPAL JETHA LIMITED

3. DINESH KUMAR ZAVERCHAND JETHA

4. THE ESTATE OF ZAVERCHAND JETHA

5. ATEET DINESH JETHA

6. ZAVERCHAND SOJPAL JETHA

HOLDING LTD PLAINTIFFS

VERSUS

1. ARVIND SHAH

2. HASHABEN SHA

3. GOSRANI HOLDINGS LIMITED

4. COAST PROPERTIES LTD

5. COAST CLAY WORKS LTD

6. COAST MAIZE MILLER LTD

7. SPA MILLERS NAIROBI LTD

HIGHWAY CENTRE LTD DEFENDANT

RULING

“Blunders will continue to be made from time to time and it doesn’t follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is often said to exist from the purpose of deciding the rights of the parties not for purpose of imposing discipline”.

Apaloo JA, in Philip Chemuolo & another vs Augustine Kubenbe (1982-1988) KAR 103

1. The Applicants, Exon Plastics Limited and Exon Investments Limited seeks from this court an Order that time be extended for them to file

a Notice of Appeal out of time in respect of the judgment pronounced on 22/12/2017. There is also a prayer that the Notice of Appeal lodged on 21/01/2018 and the Notice of Motion dated 9/2/2018 be amended to include the two applicants as parties to the Notice of Motion.

2. The reason for failure to file a Notice of Appeal by the said parties who did participate at the trial as the 2nd & 3rd defendants to the Counter-Claim is given to have been that the counsel who always had the conduct of the matter was out of office and therefore asked another counsel, one Anthony Masila to draft and file the Notice of Appeal and in doing so, not being fully conversant with the matter, omitted the names of the applicants from the Notice of Appeal.

3. The Application is supported by the affidavits sworn by the said advocate alleged to have committed the inadvertent mistake and another by Ateet Dinesh Jetha, the 1st defendant to the counter-claim. That affidavit by counsel attribute the error in omitting the names of the two applicants from the Notice of Appeal to have arisen from his reading of the Amended Plaintiff filed on 17/11/2014 which did not name the two as either plaintiffs or defendants.

4. On the other hand, the Affidavit by Mr. Jetha offers no explanation save for adopting the reasons advanced by counsel and exhibited a draft memorandum of appeal which was exhibited in the Application for stay and which name the two as applicants.

5. The Application was opposed by the decree holders through the Affidavit sworn by counsel, one Kinyua Kamundi. That affidavit faults the Application as being incompetent for having opted to remove names of other parties to the suit. The Affidavit further faults the counsel and applicants for accusing the judge of altering the judgment and that no judgment was delivered in court on 22/12/2017 but on 28/12/2018. For those reasons the decree holder contends that there cannot be any reason to amend the Notice of Appeal which in any event doesn't specify what aspects of judgment it seeks to appeal against. The third reason of opposition to the Application is the fact that a Notice of Appeal is not a pleading hence incapable of being amended and that to allow the amendment would be to deprive the Respondents, in the application dated 3/3/2018, a defense that has crystalized and grounded on the fact that the two applicants having not filed an appeal cannot seek or be granted orders of stay pending Appeal.

6. Lastly, it is contended that the Applicants have shown brazen contempt of court by failure to release the share certificates, failure to have the suit premises valued for purposes of rent and that the actions of the said applicants continue to inflict losses upon the decree holders now in the sum in excess of 1.8 billion Kenya Shillings. There is a conclusion that a party who has insinuated bad faith upon the court should not expect the courts discretion to be exercised in its favour.

Analysis and determination

7. Whether or not to grant an extension of time to a party is not a right to such party where he has participated at trial and has failed to take a step by an oversight, inadvertent, mistake or just negligence. In such an application, the party places itself at the discretion of the court and the primary concern of the court at that time is to interrogate whether or not the interests of justice would be served by extension of time. Several factors come into play including the constitutional imperative that justice be dispensed with without delay. *See Nicholas Kiptoo Arap Korir Salat Vs Iebc & 7 Others (2014)eKLR*

8. As a general rule, courts of law strive all the time to accord to parties access to courts and judicial services provided such a party has not exhibited a clear and inexcusable conduct like a design to delay, circumvent, derail, subvert or abuse the court process by overreaching or prejudicing the opposite side.

9. Put in the context and circumstances of this matter, it is noteworthy that two notices of appeal have been filed by both sides in the case. All remaining constant, the dispute is surely progressing to the Court of Appeal as a first Appellate Court. When that happens, I know the law to demand that that court proceeds by way of a retrial with the mandate and duty to reappraise, reexamine and fully interrogate the entire record and evidence with a view to coming to own conclusions. *See Selle Vs Associated Motor Boat Company Ltd (1968) EA 123*

10. If that be the correct position of the law then one would ask the prudence of stopping on one's way from being a party to such proceedings. I see no merit or justification at all

11. In any event the law under the court of Appeal Rules, rule 77, joins all the parties to the trial to the appeal unless the court grants permission to exclude such parties. Looked at from all angles the two applicants are bound to be parties to the appeals when filed and that they want to correct a mistake committed by counsel which excluded their names from the Notice of Appeal is itself a clear indication of their intension to be heard.

12. I have considered the reasons given by the judgment – debtors/applicants and I have no doubt that the mistake is an inadvertent one. I consider it an excusable and inadvertent mistake and not a deliberate adventure to defeat, derail or delay the cause of justice nor is it a reckless or inexcusable neglect. I hold so with a clear and unblurred appreciation of the difficulties the court itself had in preparing the judgment that uncharacteristically delayed for a period longer than expected. Part of the reason was that the file, the parties and the claims by each side are adequately confusing and almost confused. When read carefully, this file may one day be declared a *classic* study on how not to consolidate and join causes of action for law teachers, students, scholars, practitioners and judicial officers.

13. I find that the reasons advance are plausible and additionally that no prejudice would be occasioned to the Respondent by grant of extension of time. To the contrary the two applicants need to be part of the proceedings so that the appellate court gets the benefit of every party bringing forth their respective cases for the dispute to be determined finally and conclusively. In the contrary, if, I decline to extend time to file the notice of Appeal, I would be shutting the door for the Applicants to be heard on the appeal while the Rules of that court deem them necessary parties.

14. A substantive submissions were offered as to the validity of the Notice of Appeal filed as far as it fails to specify with clarity what parts of the judgment it seeks to challenge. For me, I hasten to avoid venturing that direction for I consider that it is the court of Appeal to consider

the propriety of the Notice of Appeal and not this court. That challenge may be taken at the appropriate forum if the decree holder be so minded.

15. I agree with the Respondents that a Notice of Appeal may not be a pleading but I do not understand the law to prohibit amendment of documents save for pleadings. If that were the case, then one would wonder why we have in our statute books the provisions in section 100 and Order 8 Rule 5, Civil Procedure Act.

16. The Applicant were faulted for asserting by one side of the mouth that they intend to appeal against the judgment pronounced on the 22/12/2017 and by a different side of the same mouth accusing the court of altering that same Judgment between the date of pronouncement and the date they obtained the signed copy.

17. Those are indeed very grave and may be reckless assertions to be made by a party against the court. However, I think it has now become fashionable in this country, whereby lawyers, politicians and parties to just throw all manner of mud and dirt at the court and its officers. In every situation that such occur, the court or indeed a judicial officer is not expected to engage in counter accusations, explanations or just a revenge mission. No. A judicial officer must remove himself from the boxing ring if he has to remain an impartial arbiter. This may be an idle voice from the desert of justice in the eyes of the judgment debtors but for sure even deserts do get converted into arable land producing produce to be exported to the otherwise nature given arable lands.

18. My perception is that to do otherwise would be not only be futile but I also see no appropriate forum available for such rejoinder, defense or explanation. As judicial officers we pray that such accusations are made before a forum able to conduct inquiry and decide the merits and accuracy of such accusations however grave with some fairness. It is however important to say here and now by way of speaking to counsel that even the office of an advocate as an officer of the court calls for responsibility if our legal system is to continue working robustly and with same dignity. In this matter, whether or not the judgment was altered is not for me to decide or defend myself over. The judgment debtors, including the Applicants in this application are appealing and I leave it to them and only hope that they will take it up appropriately at the appropriate forum.

19. Having said so and being minded that time need to be extended, so that the application dated 3/3/2018 may be heard on the merits, I now order as follows:-

- a) Time is extended for a period of 3 clear days, from now, for Exxon Plastics Ltd and Exxon Investments Ltd to file and serve their Notice of Appeal.
- b) Upon the Notice of Appeal being filed and served as aforesaid, the notice of motion dated 3/3/2018 shall be deemed amended to incorporate all the plaintiffs and defendants to the counter -claim as shall have filed notices of appeal to be Applicants in that motion.
- c) The failure to file the Notice of Appeal on time even if held to be inadvertent was a mistake by the Applicants' side which has occasioned to the court and the Respondent additional time spent. For that reason, and even though the Applicants, Exxon Plastics Ltd and Exxon Investments Ltd, have succeeded, this is one case where they cannot be awarded costs but ought to pay such costs as have been occasioned by this application.
- d) I award such costs to the defendants/counter claimants in the sum of Kshs.30,000/= to be paid within 10 days from today and in default execution may ensue.

Dated and delivered at Mombasa this 20th day of April 2018.

P.J.O. OTIENO

JUDGE