REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1736 of 1993

NYAMODI OCHIENG NYAMOGO....……..……....PLAINTIFF

VERSUS

TELKOM KENYA LIMITEDMUEMA……..……..…….DEFENDANT

RULING

This ruling is the subject of two applications dated 10th September 2012 and 19th September 2012. The application dated 10th September 2012 seeks the following orders:

1) That this Application be certified urgent, service of the same be dispensed with and it be heard ex-parte in the first instance owing to its urgency.

2) That this Honourable Court be pleased to stay execution of the Decree and/or all further proceedings pending the hearing and determination of this application inter-partes.

3) That the decree issued herein be set aside.

4) That the warrants of attachment and execution issued herein be set aside.

5) That this Honourable Court be pleased to stay the execution of the Decree herein arising from the Judgement entered against the defendant/applicant in this case by Honourable lady Justice R. N. Nambuye on 22.6.12 pending the hearing and determination of the Appeal herein.

6) That this Honourable Court be pleased to make such further Orders to meet the end of justice.

7) That costs of this application be in the appeal.

The application dated 19th September 2012, on the other hand seeks the following orders:

1. That service of this Application be dispensed with in the first instance.

2. That this Honourable Court do certify this application as urgent and direct that an early hearing date be granted for the same.

3. That this Honourable Court be pleased to extend time within which the plaintiff/Applicant can make its application for certified typed copies of proceedings and Judgement.

4. That costs of this application be provided for.

I intend to deal with the application dated 19th September 2012 first. The said application is expressed to be brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act; Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 7 of the Appellate Jurisdiction Act (Cap 9 Laws of Kenya) and Rule 4 and 82 of the Court of Appeal Rules, and all the enabling provisions of law and procedure. The said application is based on the affidavit sworn by **Donald B. Kipkorir**, the defendant's advocates. The gist of the said affidavit is that although the Notice of Appeal against the judgement delivered by **Hon. Lady Justice Nambuye** on 22nd June 2012 was filed on 15th July 2012 which was within the fourteen days stipulated by law, the advocates inadvertently failed to request for proceedings and judgement at the same time. It was only when a clerk from the defendant's advocates' firm went to serve an order on the plaintiff that his attention was drawn to the fact that no such request had been made. Counsel deposes that it is his usual practice to file Notice of Appeal together with the letter requisitioning for proceedings although this time round it bypassed his attention. It is the deponent's position that the defendant has by its action been diligent in following up the case as evidenced by its application seeking stay of execution and setting aside the decree. It is further deposed that this Court has jurisdiction to extend time to apply for the said proceedings and judgement and as the application has not been brought with unreasonable delay the same ought to be granted. In his submissions **Mr Kipkorir,** learned counsel for the defendant, reiterated the averments in the supporting affidavit and added that the issue of requisition of proceedings is a procedural step in the intended appeal since the defendant intends to rely on Rule 82(2) of the Court of Appeal Rules. It is his case that under Order 50 rule 6 of the Civil Procedure Rules as read with section 7 of the Appellate Jurisdiction Act this Court has discretion to enlarge time as the justice of the case requires and that no prejudice will be caused to the plaintiff. Reliance is also placed on the provisions of Article 159 of the Constitution with respect to the need to administer justice without undue regard to technicalities of procedure. In support of his submissions learned counsel cited **Mwenja vs. Mwenja [1991] KLR 360** and **Githiaka vs. Nduriri [2004] 2 KLR 67** for the proposition that an application for enlargement of time can be necessitated at any time on the happening of any unforeseen event and that an error on the part of a legal advisor may help build up sufficient reason for an extension of the time.

In opposing the application the plaintiff swore a replying affidavit on 27th September 2012 in which he deposed that the application is misconceived, incurably defective, frivolous and vexatious, purely designed to delay the fair determination of the matter and as such this Court has no jurisdiction to grant the orders sought under the provisions of the law cited or at all. It is further deposed that there is no evidence that the letter dated 26th June 2012 addressed to the Court was filed or received by the Court. It is the plaintiff's position that the defendant is an indolent litigant not deserving of the court's exercise of discretion and the appeal is not arguable at all. In his oral address to court, **Mr Sumba** learned counsel for the plaintiff submitted that this court has no jurisdiction to entertain the application since section 7 of the Appellate Jurisdiction Act has no application to the orders sought while Order 50 cannot bestow jurisdiction upon this court to make orders provided under Rule 4 of the Court of Appeal Rules since the time is limited under Rule 82 of the said Rules. With respect to section 7 of the Appellate Jurisdiction Act, it is submitted that the said section stipulates circumstances under which the High Court's jurisdiction may be invoked and the present case is none of them. It is further submitted that no sufficient reason has been advanced why the said request was not made within the stipulated time. In support of the submissions counsel relied on **Samuel Njiraini Ngabia vs. Michael Thungu Wanyoike & 2 Others [2009] eKLR**, **Njogu Macharia vs. Paul Wairuri Mwangi Civil Appeal No. 110 of 2006**, **Njoroge Kung'u vs. Kamau Kung'u & 2 Others Civil Application No. Nai. 306 of 1996** and **Joel K Yegon & 4 Others vs. John Rotich & 4 Others Nairobi HCMISCAPPL. No. 995 of 2003**.

The Civil Procedure Act is expressed to be an Act of Parliament to make provision for procedure in civil courts. However under section 1(2) of the said Act it only applies to proceedings in the High Court and, subject to the Magistrate's Courts Act, to proceedings in subordinate courts. Where there is a special procedure prescribed by or under any other law, section 3 of the Civil Procedure Act provides that that special procedure is to be adopted. It therefore follows that unless certain provisions are incorporated by or imported into the Appellate Jurisdiction Act, the Civil Procedure Act is not the statute that regulates the procedure in the Court of Appeal. Even if this was not the position it is clear that enlargement of time

under Order 50 Rule 6 of the Civil Procedure Rules is permitted only in cases where the limited time is fixed by the rules, or summary notice or by order of the Court the definition of the Court being the High Court or subordinate courts.

The time limited for requesting for proceedings is provided for under Rule 82 of the Court of Appeal Rules and due to its centrality in the instant application it is worth reproducing in full. The said rule provides:

(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

(a) a memorandum of appeal, in quadruplicate;
(b) the record of appeal, in quadruplicate;
(c) the prescribed fee; and
(d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

(3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.

What the foregoing rule provides is that whereas an appeal is to be instituted within 60 days of the date when a notice of appeal was lodged, where a party applies in writing for a copy of the of the proceedings with a copy of the application being served upon the respondent, the said sixty days will not include the period certified by the registrar of the Superior Court as having been necessary for the preparation and delivery of such proceedings to the appellant. What then happens where such request is not made within the aforesaid 30 days? Two things are possible. First, the intending appellant may move the Court of Appeal under Rule 4 of the Court of Appeal Rules for extension of time within which to comply. The said rule provides:

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

"Court" is described under Rule 2 of the Court of Appeal Rules as meaning the "Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone". It follows that under Rule 4 aforesaid only the Court of Appeal can extend time.

The other option available to the intending appellant is to wait for proceedings and then make an application under rule 4 aforesaid for extension of time to lodge the appeal where the appeal is not lodged within the aforesaid 60 days. There is no provision, as far as I am aware, which bars a party who has not requested for proceedings from applying for extension of time. The only difference is that he does not have the automatic advantage of excluding the period that was necessitated by the preparation and delivery of a copy of the proceedings. I do not pretend to be breaking new ground here. In **Lucy Wambui Maina & 2 Others vs. Peter Sundra Maina Civil Application No. Nai. 330 of 2004** the Court of Appeal held that the mere fact that the letter bespeaking proceedings was not copied to the Respondents only disentitles the applicants from taking advantage of the proviso to rule 81 (now rule 82) of the Court of Appeal Rules but does not preclude them from relying on the certificate of delay to

explain that they were not at fault in obtaining proceedings when they did. The same position, in my view, applies where the proceedings have not been applied for. Rule 4 aforesaid, it has been held, confers on the Court of Appeal a wide discretion to extend time subject to there being an explanation.

The defendant has, however, sought to rely on section 7 of the Appellate Jurisdiction Act. That section provides:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or makingsuch appeal may have already expired.

It is clear that the High Court's powers under section 7 aforesaid is limited to three instances and these are giving notice of intention to appeal from a judgment of the High Court and for making an application for leave to appeal or for a certificate that the case is fit for appeal. Nowhere is it mentioned that the High Court may extend time limited under rule 82(2) of the Court of Appeal Rules.

Accordingly, it is my view and I so hold that the only provision under which time limited under Rule 82(2) may be extended is under Rule 4 of the said Rule or perhaps by invoking the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. In both instances, however, the jurisdiction is conferred upon the Court of Appeal and not the High Court. The authorities cited are, with due respect, irrelevant since they were made pursuant to rule 4 of the Court of Appeal Rules. Accordingly I will refrain from dealing with the issue whether or not the reasons advanced by the defendant for not applying for proceedings are excusable so as to avoid trespassing onto the jurisdiction of the Court of Appeal should it in future be called upon to deal with the issue. The application dated 19th September 2012 is accordingly struck out as being incompetent for lack of jurisdiction with costs to the plaintiff.

With respect to the application dated 10th September 2012, the first issue I wish to deal with is whether the decree herein ought to be set aside. It is the defendant's position that when a draft decree was submitted to its advocate for approval or amendment under Order 22 Rule 8, its advocate declined to approve the same and instead proposed that the said decree be placed before the Judge for settlement under Order 21 rule 8(4) of the Civil Procedure Rules. Instead of this procedure being adopted, the plaintiff proceeded to request the Deputy Registrar to extract the decree which was done and execution process was thus commenced. Annexed to the supporting affidavit is a copy of the letter dated 11th July 2012 from the defendant's advocate to the plaintiff's advocates in which the former categorically objected to the "entire decree" and proposed that the same be resolved under Order 21 Rule 8(4) of the Civil Procedure Rules. The receipt of the said letter is not disputed since the same bears the signature of Nyamogo & Nyamogo Advocates. Order 21 rule 8(4) provides that on any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties. I, however, agree that the mere fact that a party disagrees with the decree does not necessarily render a decree extracted by the registry a nullity. A duty is now imposed on the Courts by the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act to ensure the attainment of justice in the interpretation of the provisions of the Act and the Rules made thereunder. Accordingly, before the Court nullifies a decree on the failure to take procedural steps in its preparation, the Court will have to look at whether the failure to strictly adhere to the said provisions would have occasioned a miscarriage of justice. If the parties are not in agreement with the format of the decree then the matter is placed before the judge who made the decision, if available, for the settlement of the same. In my view, this presupposes that the receiving party should intimate his disagreement within 7 days of receipt of the draft since if he does not do so within the said period he runs the risk of the decree being signed and sealed by the Deputy Registrar. The rationale for this elaborate procedure, in my view, is to ensure that the decree reflects the terms of the judgement itself. In fact the main consideration is not the approval by the parties *per se* but the reflection of the judgement since the Deputy Registrar is not bound to sign and seal the draft approved and submitted by both parties if in his opinion the same is not drawn in accordance with the judgement. Until the decision in the case of **Edward Maina Njanga T/A Maina Njanga & Co Advocates vs. National Bank of Kenya Ltd Civil**

Appeal (Application) No. 111 of 2005 which was decided on 27th July 2006, the Court of Appeal's view was that decrees extracted without following the provisions of Order 20 rule 7 (now Order 22 rule 8) were a nullity. However, by that decision, the Court of Appeal held that for the purposes of Appeal failure to comply with the said provision in the extraction of the decree did not render the appeal fatally defective.

In this case, however, there is one other issue. It is the defendant's case that the decree as extracted does not accord with the draft that was submitted for approval. I have looked at the draft decree annexed to the supporting affidavit and the figure indicated therein as the total is Kshs. 23,861,244.58 while the figure indicated in the decree which was eventually extracted is Kshs. 40,615,910.32. There is obviously a big discrepancy between the two figures. Even if it were to be argued that the defendants did not specifically address the letter requesting for settlement of the decree to the Registrar, the fact that a different decree from the draft was extracted may lead one to question the *bona fides* and correctness of the said decree.

The plaintiff has argued that this court is *functus officio* in so far as the extraction of the decree is concerned and therefore the defendant can only challenge the said decree by way of a review or an appeal. I am not prepared to buy into this argument. The Court must always retain the residual powers to ensure that its process is not abused and where a decree as extracted does not, for example, accord with the judgement the Court has no option but to set the same aside.

In this case I am satisfied that considering the discrepancy between the draft decree and the decree as extracted, the possibility that the failure to place the draft decree before the Judge for settlement thereof may have occasioned a miscarriage of justice cannot be ruled out.

Accordingly the decree issued by the registry on 30th August 2012 together with all consequential orders are set aside.

The end result of that is that there is no decree capable of being executed. Since Order 42 rule 6 talks of stay of decree or order, in the absence of a decree there is no need for me to deal with the prayer for stay of execution pending appeal at this stage.

The defendant will have the costs of the application dated 10th September 2012.

Dated at Nairobi this 23rd day of October 2012
G.V. ODUNGA
JUDGE

Delivered in the presence of:

Miss Mungai for the applicant

Mr. Nyamogo for Mr Sumba for the respondent