



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 189 OF 1994

1. ELIUD MWAMUNGA

**2. BENEDICT MWANZIGHE.....PLAINTIFFS/
RESPONDENTS**

3. HARRY NZAI

-VERSUS-

1. GASPER WALELE

**2. CRISPUS MSAFWARIDEFENDANTS/
APPLICANTS**

3. TAITA RANCHING CO. LTD

RULING

The defendants came before the Court by Chamber Summons dated **14th December, 2007** and brought under s. 3A of the Civil Procedure **Act** (Cap. 21, Laws of Kenya) and Order **XLI**, rule 4 of the Civil Procedure Rules.

The substantive prayers of the applicants are as follows:

(a) *that the time for filing Notice of Appeal be extended to cover the period upto and including 22nd November, 2007;*

(b) *that there be a stay of execution of the Judgment delivered on 2nd November, 2007.*

Facts in support of the application are set out in 1st defendant's affidavit of **14th December, 2007** and the supplementary affidavit of **8th July, 2008**.

The deponent depones that judgment in the main cause was delivered on **2nd November, 2007** without notice to the defendants; the defendants' former Advocate, **Mr. Anyanzwa**, learned of the judgment on **21st November, 2007** when he visited the Registry to inquire; and the Advocate thereupon, and without delay, lodged a Notice of Appeal, and filed an application for the supply of certified copies of proceedings and judgment.

By the instant application, the defendants are seeking extension of time, to cover the period up to **21st November, 2007** when the Notice of Appeal was filed. Counsel submitted that whereas the defendants' application is not opposed by 1st plaintiff/respondent, 2nd and 3rd plaintiffs opposed it – and to this effect, 2nd plaintiff had sworn a replying affidavit dated **26th May, 2008**.

In the said replying affidavit, 2nd plaintiff states that the applicants' supporting affidavit is defective and should be disallowed, on grounds of missing signatures, and of bearing inappropriately-authenticated exhibits. The deponent avers that the defendants have failed to institute appeal within the time allowed, that the contents of the supporting affidavit are inaccurate, and that the applicants "have not shown in any way how the Hon. Judge, **Mrs. Khaminwa** erred in her judgment dated **25th September, 2007**": on this point the deponent further avers –

“There is no challenge to the said judgment which is sound and good in law.....”

The deponent makes averments on yet more controversial issues, as follows:

“THAT I am advised by my advocate, Mr. Anjarwalla, which advice I verily believe [to be] true, that the defendants are wrongly bringing into this case issues which are not part of this case and are thereby trying to frustrate the plaintiffs.....”

The deponent avers that the application has been brought after undue delay – six weeks since judgment was delivered; and that the judgment in question, by its nature, is not amenable to stay orders; that “there is no substantial loss which the applicants will suffer if no stay is granted”.

In his submissions, counsel for the defendants/applicants stated repeatedly that the judgment sought to be appealed against was delivered on **2nd November, 2007**, so the Notice of Appeal should have been filed by **16th November, 2007** – and so there was a delay of five days before filing the Notice of Appeal: and this delay was occasioned by the fact that the defendants were not aware that the judgment had been delivered. Counsel submitted that the case in question had been concluded on **6th July, 2005**, and judgment was to be delivered on notice to the parties; but there was no evidence that such notice was ever served upon the defendants. It was urged that in those circumstances, a delay of five days was not unreasonable, especially as the cause for delay had been explained.

Learned counsel, on the merits of the appeal, urged that “the appeal has a very high chance of success”, and it was in this respect relevant that “the Court took two and a half years....to deliver its judgment yet the law provides for 42 days”.

Counsel invoked the Court of Appeal's ruling in ***Ocean Freight Shipping Company Limited v. Oak Dale Commodities Ltd***, Civil Application No. Nai 198 of 1995, in which the following passage occurs:

“This is yet again one of those situations in which the learned judge of the superior court was wholly unable to deliver her judgment on the date she had said she would do so; she originally said she would deliver her judgment on the 30th April, 1992; the judgment was not delivered until the 6th August, 1992, nearly five months later. And when it came to delivering the judgment, she apparently did not send out a notice to both parties, so that they could both be present or arrange to be represented. Had she delivered her judgment on 30th April, 1992 or had she given a notice to both parties as to when her judgment would be delivered, it is very unlikely we would be dealing with the present motion at all.”

The Court, in that case, extended the time within which the Notice of Appeal was to be filed, by one day, “so as to validate the notice filed on [**21st August, 1992**] and we also extend the time within which the

record of appeal was to be filed to the **30th August, 1995**".

Learned counsel submitted that, under s.7 of the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya), the High Court has limited powers to extend time to file a Notice of Appeal out of time.

Counsel for 2nd and 3rd plaintiffs/respondents began from a preliminary objection: that the application could not stand up, because the supporting affidavit was defective and should be expunged.

On the substance of the application, counsel urged that the Court could not extend time for filing the Notice of Appeal, as sought by the applicants, before first taking certain essential steps as adverted to in several decisions of the Court of Appeal: **Gitau Ng'ang'a v. John Mwangi King'ori**, Civil Application No. Nai 246 of 1999; **Bhaichand Bhagwanji Shah v. D. Jamnadas & Co. Ltd.** [1959] EA 838. Counsel relied on clause 81 of the Court of Appeal Rules, which thus provides:

"(1) Subject to rule 112, an appeal shall be substituted 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 sent to the respondent".

Learned counsel urged that the applicants had not lodged the documents provided for in the Court of Appeal Rules, within the prescribed time-limit; and that the applicants had not sent a copy of their application for proceedings to the respondents: and on that account, counsel urged that rule 82 of the Court of Appeal Rules was to be invoked, with the effect that the applicants were to be "deemed to have withdrawn the notice of appeal". It was urged, consequently, that "there is no point in extending time as the notice is to be deemed withdrawn".

Counsel submitted that the applicants had not shown the merits of their appeal, on the basis of principles set out in **Bhaichand Bhagwanji Shah v. Jamnadas Limited**: that ([1959]E.A. 838, at p.839) –

"an applicant for an extension of time must support his application by a supplementary statement of the nature of the judgment and of his reasons for desiring to appeal from it to enable the appellate court to determine whether refusal of the application would cause injustice."

Counsel urged that the applicants had not shown how **Lady Justice Khaminwa** erred in her judgment. The contests to the instant application are of two broad categories: procedural, and substantive. The procedural elements include the form of the affidavits, and the mode of validation of the supporting

affidavit. Although these are clearly significant issues of propriety of form, and, only where the merits are overriding would suitable discretionary orders be made in respect of them, the Court has been more concerned that there are notable shortcomings on the merits. Although the applicants state that their appeal will have overwhelming chances of success, this is not perceptible, as they have not identified the main shortfalls in the Judgment which, by the record on file, is dated **25th September, 2007** – even though the applicant’s position is that it was delivered on **2nd November, 2007**.

Just as the date of delivery of the said Judgment is not addressed even in the submissions, counsel have not clarified the point regarding **delay** in the delivery of judgment, or its delivery without due notices to both sides in the dispute. From the submissions by counsel, the emerging probability is that the applicants had no knowledge that the judgment had been scheduled for delivery; and this is an issue of merit regarding the prayer for enlarged time for the lodging of an appeal.

Taking such circumstances into account, the justice of this matter, in my opinion, dictates that the application be allowed, as a failing of merits such as may be involved in the High Court proceedings, is sure to be rectified in the Court of Appeal.

I will, therefore, order as follows:

(1) The time for filing the Notice of Appeal is hereby

extended to cover the period up to and including 22nd November, 2007.

(2) There shall be a stay of execution of the Judgment of the

Court herein pending the hearing and determination of the appeal.

(3) The costs of this application shall be in the appeal.

DATED and DELIVERED at MOMBASA this 22nd day of October, 2010.

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Defendants/Applicants:

For the Plaintiffs/Respondents: