



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 472 of 2009

SOFITRA LIMITED..... APPELLANT

VERSUS

JULIA OPONDO OKERE.....1ST RESPONDENT

AKAMBA BUS SERVICES LTD.....2ND RESPONDENT

RULING

1. On 10th June, 2005, Julia Opondo Okere, who is the 1st respondent to this application, was awarded judgment in Nairobi CMCC No.9982 of 2002 for Kshs.2,695,200.45. The judgment was against Sofitra Limited hereinafter referred to as the applicant, and Akamba Bus Services Limited, hereinafter referred to as the 2nd respondent, against whom liability was apportioned in the ratio of 70:30.
2. On the 23rd June, 2005 the applicant filed a memorandum of appeal against the judgment of the lower Court in CMCC No. 9982 of 2002. The memorandum of appeal was registered as Civil Appeal No. 431 of 2005. Following a consent agreed upon by the parties, the applicant released a sum of Kshs.250,000/= to the 1st respondent, and the balance of Kshs.1,676,822.80 was deposited in an interest earning account in the joint names of the advocates for the 1st respondent and the applicant that is, M/s. Onyango Oloo and Co. Advocates and M/s. Muriu Mungai & Company Advocates, respectively.
3. On 21st November, 2008 the firm of M/s. Musyoka Wambua Advocates filed a notice of change of advocates, to come on record as advocates for the applicant. There was however a disagreement with the applicant's previous counsel regarding the release of the file to M/s. Musyoka and Wambua Advocates.
4. At the request of the applicant's new advocates, the matter was listed before the Court on 10th March, 2009 for directions. The applicant's new advocates did not attend Court, but were subsequently informed that the applicant was required to file a record of appeal within 21 days.
5. The applicant's counsel explains that he was unable to obtain certified copies of the proceedings and judgment, as the Court file could not be traced. He only managed to obtain them on 30th March, 2009 but was served with the application for striking out the appeal on 1st April, 2009. The applicant finally filed a record of appeal on the 18th April, 2009 but did not apply to the Court for enlargement of time within which to file the record of appeal.

6. Following the hearing of 1st respondent's application for striking out the appeal, a ruling was delivered by the Court in HCCA No. 431 of 2005 in which the appeal was struck out. The applicant now seeks to have time extended to enable him file another appeal out of time. The applicant also seeks a further order restraining the 1st respondent, her servants or agents from withdrawing, alienating, or in any way, dealing with Kshs.1,676,822.80 plus interest that has accrued on Account No. 0123080811001 at CFC Bank Limited, pending the determination of the intended appeal.

7. In support of the application, Mr. Simiyu who appeared for the applicant explained that the applicant was not to blame for the delay in filing the record of appeal and that the mistake was a genuine mistake. Counsel for the applicant relied on the following authorities:

- ***Python Waweru Maina vs. Thuku Mugira [1982-88] 1 KLR 171***
- ***Haji Ahmed Sheikh t/a Hasa Hauliers vs. Highway Carriers Limited***

Counsel for the applicant urged the Court to exercise its discretion under Section 1A and 1B of the Civil Procedure Act, and allow the application.

8. The 1st respondent objected to the application through a replying affidavit in which he deponed *inter alia*,

(a) That the reasons canvassed by the applicant were previously considered in HCCA. No. 431 of 2005, therefore the Court cannot reconsider the present

application as the same is *res judicata*.

(b) That the supporting affidavit was fatally defective as the applicant's advocate has deponed to contentious issues.

(c) That the application to enlarge time for appeal has been made after inordinate delay, and that the delay was inexcusable as it was as a result of the appeal having been struck out due to accumulated errors by the applicant or his advocate.

The 1st respondent further deponed that she needed the funds which were deposited in an interest earning account released to her to enable her meet the costs of her medication and other obligations.

9. Mr. Obwayo who appeared for the 1st respondent argued that the Court lacked jurisdiction to grant the orders sought as the application is *res judicata*. He submitted that the moneys were deposited in an interest earning account as security and could therefore only be released if the appeal was filed. He further maintained that under Section 34 of the Civil Procedure Act, issues touching on the money could only be canvassed before the Court which gave the judgment. He submitted that the applicant could only

have come by way of review or appeal.

10. In support of this submission, Mr. Obwayo relied on the following authorities:

- ***Civil Application No. 9348 of 2005, Francis Kariu Gakumbi vs. Philsker Njoki Maina***

- ***Kenya Posts Authority vs. Silas Obengele***

- ***B.M. Musila t/a Musilla & Co. Advocates vs. Kenya commercial Bank Limited.***

11. The 2nd respondent also filed grounds of objection in which it was contended:

- (i) That there was no sufficient evidence or any adequate reasons adduced by the applicant for the Court to exercise its discretion in favour of the applicant.

- (ii) The appeal arises from an accident that occurred on 7th May, 2002 and litigation had to come to an end.

- (iii) The applicant is seeking an equitable remedy, and has not come to Court with clean hands.

- (iv) The extension of time for filing the appeal would be prejudicial to both the respondents.

- (v) It will not be in the interest of justice to allow the application.

- (vi) The application has no merits.

12. Miss Jan Mohammed who appeared for the 2nd respondent also swore a replying affidavit in which she deposed that no sufficient evidence has been placed before the Court to justify the Court exercising its discretion in the applicant's favour.

13. In her submissions Miss Jan Mohamed objected to the application for extension of time. She relied on ***Misc. Application No. 654 of 2008, John Gakobo Macharia vs. Kenya Power & Lighting Company Limited*** in which the case of ***Bagajo vs. Christian Children Fund incorporation [2004] 2 KLR 73***, was followed regarding the guidelines for the Court in exercising its discretion for extending time to file an appeal. Miss Jan Mohammed submitted that the length of delay in lodging the application had not been adequately explained. She submitted that the respondent was likely to suffer prejudice if the orders sought were given as the judgment of the lower Court was delivered on 10th June, 2005. In

reference to Section 1A and 1B of the Civil Procedure Act, Miss Jan Mohammed pointed out that justice has to cut both ways. She therefore urged the Court to dismiss the application.

14. Mr. Simiyu who appeared for the applicant submitted that the authorities which were cited were distinguishable. He maintained that the actual delay in this particular instant was only 1 ½ months. He therefore urged the Court to allow the application.

15. I have carefully considered the application, the submissions made and the authorities cited. The issue that pops out first for determination is whether the application dated 9th July, 2009 filed by the applicant is *res judicata*, in view of the ruling which was delivered in HCCA No. 431 of 2005. In my view, although the current Misc. application and HCCA No.431 of 2005 involves the same parties and both arise from Nairobi CMCC No. 9982 of 2002, the two applications do not involve substantially the same issues. The previous application was for striking out an appeal, whilst the current application is for extending time for filing the appeal. The issues which were germane to the first application were whether the applicant's appeal was an abuse of the Court process. In the present application, the issue is whether there is good justification for this Court exercising its discretion for the extension of time to file the appeal out of time. I do therefore reject the plea that the application is *res judicata*.

16. The applicant has attempted to explain the reasons why it was unable to file the record of appeal within time resulting in the striking out of the appeal. Nonetheless, this is not a simple situation where a party has delayed in filing the appeal within time. It is a situation in which an appeal which was filed within time was struck out by a Court because the appeal was held to be an abuse of the Court process. That is a factor which this Court cannot ignore, as it would be a contradiction to allow the applicant to file another appeal after having his initial appeal which was filed within time struck out, because it was an abuse of the Court process since the applicant was not interested in prosecuting it. The applicant has not appealed against the order of the Court nor has he sought to have the order reviewed. Therefore the finding made by the Court that the applicant's appeal was an abuse of the process of the Court, remains the position. I therefore find no basis for allowing the applicant to file another appeal after having abused the Court process.

17. With regard to the prayer concerning the money which was deposited in an interest earning account, firstly, the moneys were deposited pursuant to orders made in the lower Court and therefore any order regarding release of the money ought to come from that Court. Secondly, the money was deposited as security for the pending appeal. There being no appeal now pending, there is no reason why the 1st respondent should be kept away from reaping the fruits of her litigation.

18. The upshot of the above is that I find no merit in this application and do therefore dismiss it with costs. Those shall be the orders of this Court.

Dated and delivered this 24th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Simiyu for the appellant

Mutiso holding brief for Jan Mohammed for the 2nd respondent

Eric, court clerk