REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 232 of 2007 (UR 143/07)

RAMESH SHAH ……..…….....… APPLICANT
AND
KENBOX INDUSTRIES LIMITED ……RESPONDENT

(An application for leave to serve Notice and file record of appeal out of time from the Ruling of the High Court of Kenya
Ransey J) delivered on 27th September 2004)
in
H.C.C.C. NO. 1107 OF 1990
****

R U L I N G

This is an application under rule 4 of the Court of Appeal Rules, in which Ramesh Shah, seeks three orders, as follows:

(a) Leave be granted to him to serve the Notice of Appeal dated 29th September 2004 which he had issued and filed in High Court Civil Case No. 1107 of 1992.
(b) In the alternative, that the service of that Notice of Appeal effected on 7th December 2004 out of time, be deemed as properly served.

(c) Time be extended within which to lodge and serve a record of appeal against the decision of Ransley J. in the above suit given on 27th September, 2004.

Kenbox Industries Limited is named as the respondent. It was the plaintiff in the above suit, in which it claimed equitable reliefs, damages, special and general, arising from alleged breach of an agreement of sale of Jukeboxes and electronic flipper machines, among other reliefs.

The background facts to the application before me are brief. Judgment was entered on 10th June 2003 against the applicant in the aforesaid suit upon an ex parte hearing. The applicant, as defendant in the suit applied under OIXB rule 8 of the Civil Procedure Rules for an order setting aside that judgment. Ransley J. heard the application and delivered his ruling on 27th Septembber, 2004 dismissing that application. The applicant was aggrieved and as he was perfectly entitled to, filed a Notice of Appeal pursuant to the provisions of rule 74 of The Court of Appeal Rules. The said notice was timeously filed on 29th September, 2004, but was not served on time.

It would appear that on 10th December, 2004, the applicant filed another Notice of Appeal against the judgment which as I stated earlier was delivered on 10th June 2003. This was about 17 months out of time. It is clear that the applicant was desirous of pursuing two

separate appeals, one against the judgment and the other against the ruling declining to set aside that judgment. And because the Notice of Appeal against the judgment was filed out of time, it was imperative for the applicant to seek extension of time in order for it to be regular. Likewise because the Notice of Appeal against the ruling refusing to set aside judgment had not been served timeously, an order enlarging the time within which to serve it was essential. The applicant realized this and filed two applications. The first one in time was Civil Application No. NAI 340 of 2004, and the second Civil Application No. NAI. 341 of 2004. It would appear to me that both applications were listed on 17th June 2005 before Deverell J.A for hearing because he made an order on that day on the following terms:

" There being a consent by both parties to the proposed procedure I order that application NAI 341/2004 be marked as withdrawn with costs of the application to be paid by the applicant in that application.

I further order that NAI 340/2004 be heard on Thursday 23rd June 2005 by Waki J.A at 9.00 a.m".

For some reason Waki J.A did not hear Civil Application NAI 340 of 2004. Deverell J.A heard it and delivered his ruling on 12th September 2005 allowing the application. The respondent herein who was also the respondent in that application was aggrieved and referred the Judge's ruling to the full court which reversed his decision on 27th April, 2007. It is that decision which provoked the application before me.

It is quite clear to me that the applicant no longer wishes to pursue an appeal against the judgment and decree dated 10th June 2003. His intention as can be gathered from this application is that he intends to pursue an appeal against the refusal to set aside the aforesaid judgment. It is the applicant's contention that he was let doubt by his advocate who did not advise him on the date his suit in the High Court was due for a hearing. He was not personally to blame and the mistakes of his counsel should not be visited on him. His counsel, in this application, Mr. Wagara, submitted that the applicant has satisfactorily explained his failure to take the necessary steps timeously and I should, therefore exercise my unfettered judicial discretion in his favour.

Mr. Servia, appears for the respondent. He submitted before me that this application is a gross abuse of judicial process as the issue of delay has been dealt with both by the superior court and this Court which found that failure to attend the hearing before the superior court was not satisfactorily explained, and that the applicant, wants to have a second bite on the cherry. The application, he said, lacks bona fides and should therefore be dismissed with costs. Otherwise granting it would prejudice the respondent as the case is old.

I have anxiously considered this matter. It is well settled that in applications of this nature, the court exercises judicial discretion. The discretion is unfettered and in considering the application the court is obliged to look at both sides of the street and consider the conduct of the applicant both before and after the date of his application. This Court considered the factors which need to be considered in application of this nature, in Civil Application NO. NAI 340 of 2004, which I referred to earlier; and cited several authorities on the matter. I need not cite them here, but the paramount factor to bear in mind is that delay in taking the essential steps has to be explained to the satisfaction of the court. It is after the court becomes satisfied on this that it may proceed to consider the other factors. It is not often that the court will aid a party who is dilatory for no apparent reason.

Regarding the question of delay, it was the applicant's own decision to abandon Civil Application No. NAI. 341 of 2004, which was identical to this one. This application is clearly a revival of Civil Application No. NAI 341 OF 2004.

The applicant has not explained satisfactorily why he thought that a withdrawal of that

application was the best course of action for him. If he believed Civil Application No. NAI. 340 of 2004 was sufficient for his purposes then this attempt to revive it can only be an abuse of the process of the court.
The applicant by bringing this application is in effect approaching the courts by trial and error method and is litigating by instalments, both which are unacceptable and amount to abuse of the process of the Court. It is quite clear to me that this application was brought to delay the conclusion of the dispute between the parties. Moreever, this Court dismissed Civil Application No. NAI 340 OF 2004 on 27th April 2007. The applicant has not explained why it took him almost five months to bring this application. It is clear he is not serious in what he says he wants to do.

In the result I am disinclined to exercised my discretion in favour of extending the time and dismiss the application dated 14th September 2007 with costs.

Dated and delivered at Nairobi this 15th day of February, 2008.
S.E.O. BOSIRE
…….
JUDGE OF APPEAL
I certify that this is a true copy of the original
DEPUTY REGISTRAR