REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Misc. Appli. 280 of 2008

HENRY LUMUMBA ANUNDA……APPLICANT

VERSUS

KENATCO TAXIS LIMITED……RESPONDENT

RULING

1. The applicant herein was the defendant in Milimani Commercial Courts CMCC No. EJ 184 of 2001 in which he had been sued for recovery of the sum of Kshs.319,316/25 being special damages arising out of a road traffic accident that allegedly occurred on 7/09/1999. The court (P. Wekesa, Miss) entered judgment for the plaintiff as against the defendant in the sum of Kshs.314,316/25 plus costs of the suit and interest. This was on or about 9/12/2004.

2. The applicant has now applied to this honourable court vide his application dated 24/04/2008 brought under SS 79G, 3, 3A and 63 of the Civil Procedure Act for an order extending the time for filing of an appeal against the judgment and decree in CMCC No. EJ 184 of 2001 – Kenatco Taxis Ltd. –vs- Henry Lumumba Anunda (P. Wekesa, Miss) delivered on 9/12/2004. The applicant says that the said judgment was delivered without notice to the applicant and further that his intended appeal has high chances of success. Finally, he says that no prejudice will result to the respondent if the orders sought are granted.

3. The application is supported by the affidavit of the applicant sworn on 24/04/2008 in which he says that since the 12/11/2004 when he testified in court concerning the accident claim against him, he never heard anything else about the case until on or about 13/08/2007 when he was served with a notice to show cause why he should not be committed to civil jail. He says that though he had been informed as early as 5/02/2005 that the firm of M/s T.O.N. Kemunto Advocates, who had taken over the conduct of the matter on behalf of the applicant, had filed appeal, he discovered to his horror that the appeal had infact not been filed, hence the present application. The applicant says that failure to file appeal within time was occasioned by his former advocate's mistake which should not be visited upon him (the applicant).

4. The application was opposed. The Replying Affidavit dated 28/04/2008 was sworn by Dunstan Mutuku Wambua, advocate working with Mbai & Co. Advocates who have the conduct of this matter on behalf of the Respondent. He confirms that judgment in the lower court was delivered on 9/12/2004 and says further that the applicant's instant application is an after thought since it has been filed some three (3) years after judgment was delivered. Mr. Wambua believes that the reason why the applicant has made this application is because of the Notice to Show Cause, simply because according to Mr. Wambua, there was no time when the applicant was not represented by counsel during proceedings in the lower court.

5. Mr. Wambua also says that since the Notice of Change of Advocates acting for the applicant was filed on 2/09/2004, and that the said advocates represented the applicant throughout the proceedings in the lower court. According to a document marked "*H1*" to the applicant's affidavit the firm of T.O.N. Kemunto & Co. Advocates for the defendant filed Notice of Appeal on 4/02/2005, some two months after delivery of the judgment that is in dispute.

6. Further, Mr. Wambua says that when the applicant appeared in court on 16/08/2007, in answer to the Notice to Show Cause, he (applicant) promised to make settlement proposals, but that instead of settling the amount of the decree as promised, he brought this application, which in Mr. Wambua's view is an abuse of the court process. Mr. Wambua dismissed the applicant's contention that failure to prefer an appeal within the stipulated period was due to a mistake on the part of applicant's counsel. According to Mr. Wambua, the failure was applicant's own making.

7. On the 29/04/2008 when this application first came up before me for interpartes hearing, the application was taken out by consent of both counsels and stood over to 13/05/2008 for hearing to allow the respondent time to file Replying papers. Indeed the Replying Affidavit was duly filed on 29/04/2008, but at the hearing hereof, counsel for the respondent did not appear and no reasons were given for the absence. Accordingly, the application was heard exparte. Mr. Nyakiangana appeared and urged the court to allow the applicant's application on the basis of the reasons given in the affidavit in support. He also said that the applicant's intended appeal, a copy of which was annexed to the application and marked "*H3*" has high chances of success.

8. Section 79G of the Civil Procedure Act provides that where an appeal is not filed within thirty days from the date of judgment, such period may be extended if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal within time. It is therefore incumbent upon the applicant herein to demonstrate to this court that he had sufficient cause for the delay. The applicant says that it is his former advocates who let him down by not doing the needful even after filing the Notice of Appeal as early as 4/02/2005 although by that time too, the thirty days for the filing of the appeal had already lapsed. On the other hand, the respondent says that the application herein is a mere afterthought and only intended to stem the execution process against the applicant.

9. The applicant has annexed to his application two different Memorandum of Appeal, one drawn by T.O.N. Kemunto & Co. Advocates and forms part of the annexture marked "*H1*" filed in court on 4/02/2005 and the second one drawn by Julius Nyakiangana & Co. dated 24/04/2008.

10. The principles governing applications for leave to appeal out of time have enunciated in many a decision among them the case of Shanti –vs- Hindocha & Others [1973] EA 207 in which the court held, *inter alia*, that

· an extension of time may be granted even where the record has been lodged out of time and before the application;

· where an extension of time is granted it is given unconditionally and the appellant may advance what grounds of appeal he wishes.

11. In the earlier case of Baichand Bhagwanji Shah –vs- Jamnadas & Co. Ltd. [1959] EA 838, the applicant, being dissatisfied with the judgment of the Supreme Court delivered on 6/07/1959, filed notice of appeal within the prescribed fourteen days, but served it a day late. On 6/08/1959, the applicant applied for copies of proceedings which were not ready on 19/09/1959 when the applicant filed notice of motion seeking extension of time for lodging his appeal. The initial supporting affidavit did not contain sufficient reasons for the delay, so the applicant filed a Supplementary Affidavit in which the applicant said that the appeal had good chances of succeeding. The application was opposed on two grounds:? (a) that the application was made after the prescribed time had expired and (b) that there had been a month's delay in applying for the proceedings and (c) that the original affidavit did not state the nature of the case as required by the rules (rule 9 of the then Eastern African Court of Appeal Rules, 1954). The Court held that:?

(i) an application for an extension of time for lodging an appeal may be made after the prescribed time has expired;

(ii) failure by an applicant to explain delay in prosecuting an appeal may lead to an application for an extension of time being refused;

(iii) 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 unjustice.

12. I have considered the applicant's application in detail together with the affidavit in support. I have also considered the Replying Affidavit. My finding in this case is that the applicant has not demonstrated that there are sufficient reasons for the delay. First of all, I have put the grounds in support of the application side by side with the affidavit in support, and I find that there is no harmony between the two. The supporting affidavit does not state anywhere that the judgment in the lower court was delivered without notice to the defendant because paragraph 5 of the affidavit says that the applicant's lawyer, Mr. Nyangau was aware of the judgment. The applicant does not say that Mr. Nyangau, who was acting on his behalf was not informed of the date of the judgment.

13. I also find that the applicant does not say in the affidavit why he is dissatisfied with the judgment of the lower court. Such averments would give force to the grounds in the proposed Memorandum of Appeal. I believe the Respondent when he says that this application was filed as a reaction to the Notice to show cause. It is also clear from the affidavit in support that the applicant was constantly in touch with his former advocate and if the applicant had been vigilant as he says at paragraph 9 of the affidavit that he was, he would have obtained the proceedings in the lower court much earlier and he would have brought this application in a much shorter time than the three years he took to file the same. In essence therefore, the applicant has not satisfied the requirements of the relevant provisions of the law to persuade me to grant him the orders sought.

14. In the result, I have no option but to dismiss the application. As the respondent did not attend court on the hearing date that was fixed by consent, I order that costs of this application shall be in the cause.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of May 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:?