REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Misc. Civ. Appli. 93 of 2008

SIMON MUTAHI NDIRANGU)

KENTANK KENTAINERS LTD.) ..... DEFENDANTS/APPLICANTS

VERSUS

ANDREW NDERITU MATU)

WILSON N. MATU) ..... PLAINTIFFS/RESPONDENTS

R U L I N G

This is a ruling on a miscellaneous Civil application filed by **Simon Mutahi Ndirangu** and **Kentank Kentainers Limited** hereinafter referred to as "*the applicants*" against **Andrew Nderitu Matu** and **Wilson N. Matu** hereinafter referred to as "*the respondents*". The application is expressed to be brought under section 79G, and 95 of the Civil Procedure Act and order XXI rule 22 of the Civil Procedure rules. The application seeks prayers that service of the application be dispensed with upon the respondents, that stay be granted pending the hearing of the application, that this court do extend time within which to file an appeal out of time from the orders of the chief magistrate's Court at Nyeri in Civil Case number 732 of 2002 and finally that the costs of the application be provided for.

The application was predicated on the grounds that the intended appeal has very high chances of success, that the delay in filing the appeal has been properly explained by among other exhibits the certificate of delay and further that there will not be any prejudice occasioned to the respondent if this application is granted.

The application was further supported by the affidavit of **Harmesh Kumar Mahan**, learned counsel. His story appears to be this; that judgment in the subordinate court the subject matter of the intended appeal was delivered on 28th July 2006 in his absence but was later informed of the same by a letter dated 29th August 2006 from the respondents' Advocates. That his firm immediately applied for copies of proceedings and judgment on 31st August 2006. That leave to file appeal out of time was granted by the subordinate court for thirty days but could not file the appeal in the absence of proceedings. That proceedings having been availed to him now, he is ready and willing to file the appeal without any further delay. That the intended appeal has very high chances of success and finally he deponed that if leave to appeal is not granted irreparable harm will be visited upon the applicants.

The application was opposed. Through **M/S Lucy Mwai & Company Advocates**, the respondents' filed a replying affidavit. In the main, it was deponed that the judgment in the lower court was also delivered in the absence of their lawyer but immediately she learnt of the same, she notified the applicants' Advocates. That on 29th November 2006 the applicants were granted leave to appeal out of time and upto date 15 months later no such appeal has been filed, that there is no requirement that proceedings and judgment must be filed together with the memorandum of appeal. That the proceedings and judgment were in fact ready for collection on 21st August 2007. That the application is unmerited as it is res judicata. Finally it was deponed that the intended appeal had no chances of success and the applicants had not offered any security.

At the hearing of the application, this court pointed out to the counsel for the applicants, **Mr. Mahan** that prayers 1 and 2 in the application could not be granted as they were spent. The court could only entertain perhaps prayers 3 and 4 of the application in the circumstances. **Mr. Mahan** seeing sense in what the court was saying readily conceded and agreed to abandon those prayers in the application. He elected to pursue only prayer 3 of the application. **Ms Mwai**, learned counsel for the respondents did not object.

In support of prayer 3 aforesaid, **Mr. Mahan** orally reiterated the parts of the supporting affidavit that were relevant to that prayer. Essentially that he was notified of the judgment exactly 30 days after it was delivered by counsel for the respondent. He read mischief in the timing, that he collected the proceedings on 16th April 2008 and immediately thereafter filed the instant application. That it is a requirement that before one can file an appeal, proceedings and judgment be availed to the appealing party.

Similarly in response to the oral submissions of **Mr. Mahan**, **Ms Mwai** for he respondents reiterated what the respondents had set out in their replying affidavit, suffice to add that the application according to **Ms Mwai** was res judicata, that the proceedings were ready for collection on 21st August 2007 and it required a bit of diligence on the part of Mr. Mahan to have come to court to confirm whether the proceedings were ready and finally that an appeal can be filed without proceedings. The applicants were thus indolent and this court should not come to their aid.

I have now carefully considered the application, the supporting and replying affidavits with the annextures thereto, the rival oral submissions and the law. It is common ground that the applicants were on 20th November 2006 granted leave to file appeal out of time against the judgment of the learned magistrate. That order was granted on the application of the applicants. Before the ruling the application had been extensively canvassed before the learned magistrate. Indeed the hearing of the application was on 15th November 2006. It was opposed and the ruling was then reserved for 29th November 2006. On that day a ruling was delivered allowing the application. In the application, the applicant had specifically sought for extension of time for 30 days within which to file the appeal. The application was premised more or less on the same grounds as have been advanced in support of this application before me. Consequently a similar application having been dealt with by a court of competent jurisdiction and decision thereon having been made, it is not open to the applicants to move to this court seeking the same prayers based on the same grounds and facts as were available before that other court. What I am saying in a nutshell is that this application is res judicata. If the applicants were for one reason or another unable to file the appeal within 30 days, the time they had set themselves in the application, the only avenue open to them was to go back to the same court and plead their case for a further extension. They cannot come to this court over the same application and for the same prayers.

The foregoing aside, I would still have refused to grant this application on the grounds that the applicants have been indolent. They were made aware of the judgment against them on 29th August 2006. Much as they applied for the proceedings and judgment immediately, there is no evidence of any concerted effort to have the proceedings availed to them as soon as possible. They were contend with a laid back attitude, merely writing letters to court. I note further that the first letter to court was on 31st August 2006. A reminder only came four months later on 5th December 2006. This alone does not exhibit the urgency of the matter on the part of the applicants. The court of appeal once said in the case of **Kenya Commercial Finance Company Limited v/s Mulji Lalji Pindoha, Civil application No.**

"**..... It is upto the respondent to satisfy us that despite his due diligence in the mater, the High /court had failed to provide the said proceedings to him, and he, although still interested to file the intended appeal, is unable to do so for no fault of his own. We are far from satisfied that the respondent has shown proper diligence that this court has come to expect of those who seriously pursue their right to appeal. There is a certain limit upto when a successful party can be expected to wait and be deprived of the immediate, fruits of the judgment in his favour....."**

These propositions apply with equal force to the circumstances of this case. It was the duty of the applicants to move with speed and alacrity to put in motion the necessary measures that would result in the filing of the appeal without undue delay if seriously they contemplated filing an appeal. I am far from being convinced that the applicants have so acted. As correctly observed by **Ms Mwai**, it required a bit of diligence on the part of the applicants to push for he availability of the proceedings and judgment. Unfortunately it was not forthcoming of the applicants.

In any event it is not a mandatory requirement under the Civil Procedure Act and the rules made thereunder that an appeal must only be commenced once a party has received typed proceedings and judgment of the subordinate court. The appeal is merely commenced with the filing of the memorandum of appeal setting forth concisely and under distinct heads the grounds of objection to the decree or order appealed against. It is not necessary to file, a certified copy of the decree or order appealed against simultaneously with the memorandum of appeal. These can be filed as soon as possible or within such time as the court may order. The memorandum of appeal need not therefore be accompanied with the judgment and or proceedings. Indeed it can even be filed without certified copy of the decree or order appealed against. A record of appeal which of necessity must have the proceedings and judgment can be filed much later and before directions under Order XLI rule 8 of the Civil Procedure Rules are given. It is preposterous therefore to submit that the appeal could only have been filed after the proceedings and judgment of the lower court had been availed to the applicants.

I have looked at the certificate of delay issued by the subordinate court and I have no doubt that it is self-serving. Under section 79 G of the Civil Procedure Act, a certificate of delay can only be issued in respect of the decree and or order appealed against. It has nothing to do with the time taken to type and certify the proceedings and judgment. For avoidance of doubt, a certificate of delay can only be availed by the court whose decision is being appealed against to certify time taken by the said court and which was requisite for the preparation and delivery to the appellant of **a copy of the decree or order**. A certificate of delay issued in accordance with section 79G of the Civil Procedure Act covers only the period prerequisite for he preparation and delivery to the appellant of a copy of the decree or order appealed against. It does not and cannot be used to cover a period, as suggested in this certificate which may be required to obtain copies of the proceedings and judgment. **Kyuma v/s Kyema (1988) KLR 185**. It cannot therefore be issued in respect of the time taken to prepare and furnish to the appellant certified or uncertified copies of the proceedings and judgment. The sooner counsels appreciated this fine distinction and what amounts to a valid certificate of delay, the better for everyone.

It must be clear from the foregoing that this application is doomed to fail. Accordingly it is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 30th day of June 2008

M. S. A. MAKHANDIA

JUDGE

Delivered by Hon. Lady Justice Kasango this 30th day of June 2008

MARY KASANGO

JUDGE