



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

Civil Appeal 529 of 2003

NATIONAL BANK OF KENYA LTD..... APPLICANT

VERSUS

INTERIOR CONTRACT SUPPLIES LTD.....RESPONDENT

R U L I N G

The applicant National Bank of Kenya Ltd, has moved this court by way of a notice of motion brought under Section 3A and 72 of the Civil Procedure Act, Order XLI Rule 4, Order XLIX Rule 5 and Order L Rules 1 & 2 of the Civil Procedure Rules. The applicant seeks orders *inter alia*:

- That the time for the filing of the notice of appeal be enlarged and notice filed herein on 30th April, 2008 be deemed as duly filed in the extended period.
- That leave be granted to the applicant to appeal against the decision of Justice Prof. O. Mutungi made on the 2nd day of November, 2005.
- That the order of stay granted on the 2nd September, 2003 be extended till the hearing and final determination of the intended appeal or in the alternative stay of execution of the decree made on the 7th August, 2008 in CMCC No. 1790 of 2003 Milimani be granted pending the hearing and determination of the intended appeal.
- That the decretal amount of Kshs.2,188,428/= with all accrued interest held by the advocate for the parties hereto being a joint account No.902001750003 at NIC Bank, NIC House Branch do remain as security.

The application is supported by an affidavit sworn by Damaris Gitonga, a manager of the applicant bank in charge of legal services. It is also supported by grounds stated on the body of the application. It is contended that the applicant's attention has only recently been drawn to the fact that the appeal was summarily rejected on 2nd November, 2005. Being dissatisfied, the applicant intends to appeal against the order of summary dismissal in the Court of Appeal.

The applicant filed a notice of appeal on the 30th April, 2008. The applicant now prays for an order of stay of execution pending its intended appeal. The applicant has deposited the decretal sum into a joint account in the names of the advocates of the parties and therefore believes that no prejudice will be suffered by the respondent. The applicant maintains that unless an order for stay of execution is granted, its intended appeal will be rendered nugatory and the applicant will suffer substantial loss. It is further maintained that the respondent is a briefcase company with no known assets and therefore recovering the

decretal sum if paid will be difficult. The applicant further prays for leave to appeal against the decision of 2nd November, 2005 and also an order enlarging time so that the notice of appeal filed on 30th April, 2008 is deemed to have been properly filed. At the hearing of the application Counsel for the applicant abandoned the prayer for leave to appeal against the decision of the Judge, contending that the applicant has an automatic right of appeal under section 72(1) & (2) of the Civil Procedure Act. Counsel for the applicant further maintained that the intended appeal raises serious issues of law and procedure regarding the summary rejection of the appeal.

In this regard Counsel cited: -

- *Orero vs Seko (1984) KLR 238*
- *Nzioki vs Kitusa (1984) KLR 487*
- *Civil Application No.70 of 2007 Ngugi Gitonga vs Erick Kagema Kigotho*
- *Civil application No.120 Of 2005 Harbans Singh Soor vs Fatima Ali Mohammed.*

The respondent has filed grounds of opposition raising the following: -

§ That the application for extension of time to file a notice of appeal is incompetent as it does not lie.

§ That the application for leave to appeal against the orders made on the 2nd November, 2005 is incompetent and non-meritorious.

§ That the application for stay of execution is incompetent as the applicant has no valid appeal or any right of appeal.

§ That the application before court is incompetent as no leave to appeal has been granted or can be granted.

§ That the application will result in grave prejudice to the respondent.

Counsel for the respondent submitted that this court has no jurisdiction to extend time for filing a notice of appeal as that can only be done by the court of appeal pursuant to Section 4 of the Court of Appeal Rules. It was further submitted that the applicant had failed to demonstrate that its intended appeal which is a second appeal falls within the provisions of Section 72 of the Civil Procedure Act and therefore the applicant has no automatic right of appeal. As regards leave to appeal it was contended that such leave ought to have been obtained from the Judge who made the order being appealed against. In this regard the case of *John Geoffrey Ng'ang'a vs Richard Otieno Kwach HCCC No.311 of 1996* was relied upon. It was therefore maintained that there was no competent appeal before the court. It was further submitted that the deposit of the decretal sum was not a sufficient reason to order stay of execution as the respondent was still being prejudiced by the lower interest rates (compared to the court rates) applicable to the deposited amount.

In a rejoinder to the submissions made by the counsel for the respondent, counsel for the applicant maintained that under Order XLIX Rule 5 of the Civil Procedure Rules the court has powers to extend time for filing an appeal. It was maintained that the Court of Appeal Rules cannot take away the power conferred upon the court by the Civil Procedure Rules.

Having carefully considered the application and the submissions made by Counsels, I note that the following issues stand out for determination.

- (1) Whether this court can enlarge time for filing a notice of appeal required to be filed under Rule 74(1) & (2) of the Court of Appeal Rules.

(2) Whether the applicant has an automatic right of appeal against the order of summary rejection of the appeal made on 2nd November, 2005. If not, whether this court can grant leave to the applicant to appeal against that order.

(3) Whether the court should grant an order for stay of execution pending appeal.

Rule 74 of the Court of Appeal Rules provides as follows:

“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

“(2) Every such notice shall, subject to rules 82 and 94, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

Rule 4 of the Court of Appeal Rules states as follows:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

Under Rule 2 of the Court of Appeal Rules;

‘ “Court” means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone.’

In my understanding the above provisions taken together give the Court of Appeal powers to extend time for the filing of a notice of appeal under Rule 74 of the Court of Appeal Rules. However, the applicant has sought extension of time from this court under Order XLIX Rule 5 of the Civil Procedure Rules. That Rule states as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

It is clear to me that order XLIX Rule 5 empowers this court to enlarge time where such time has been fixed either under the Civil Procedure Rules or by an order of the court. In this case, the time for filing a notice of appeal has been provided for under the Court of Appeal Rules. The procedure for appeals in the Court of Appeal is not laid down under the Civil Procedure Rules but is provided for under the Court of Appeal Rules. There is therefore no contradiction between Order XLIX Rule 5 of the Civil Procedure Rules and the provisions of the Court of Appeal Rules. The Court of Appeal Rules take over from the Civil Procedure Rules. No power for extension of time having been given to this court under the Court of Appeal Rules, extension of time for filing a notice of appeal remains the preserve of the court of appeal. I therefore find that the application made before this court for leave to enlarge time for filing the notice of appeal is incompetent as this court has no jurisdiction to grant such an order.

I have perused the court record and it is evident that the order made on 2nd November, 2005 rejecting the appeal summarily was made pursuant to Section 79B of the Civil Procedure Act. The parties were not heard prior to the making of the order, nor was the order communicated to the parties. Indeed, the parties and the court appeared not to be aware of that order, as the appeal came up before the court on several occasions after the order of 2nd November, 2005, and directions even given under Order XLI Rule 8B for

hearing of the appeal to proceed. It was not until 17th April, 2008 when the appeal came up for hearing before me that I pointed out to the parties that the appeal had already been summarily rejected.

Neither the Civil Procedure Act nor the Civil Procedure Rules provide express leave to appeal against an order made under Section 79B of the Civil Procedure Act. Nevertheless, Section 72 of the Civil Procedure Act states as follows:

“(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely:

- (a) the decision being contrary to law or to some usage having the force of law;***
- (b) the decision having failed to determine some material issue of law or usage having the force of law;***
- (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.***

(2) An appeal may lie under this section from an appellate decree passed ex parte.”

In the case of Orero vs Seko (Supra), Nyarangi Ag.JA (as he then was) had this to say regarding the above section: -

“Section 79B of the Civil Procedure Act empowers a judge of the High Court to peruse the record of an appeal from the subordinate court and if he considers that there is no sufficient ground for interfering with the decree, part of the decree or order appealed against, he may reject the appeal summarily. The power should be used most carefully and as was stated in Peter Nzioki & Kivilu Musimi v Kitusa Civil appeal No. 54 of 1982 (unreported), only in the clearest case such as an appeal based wholly on matters of fact upon which proper findings will have been made.”

In my considered view, an appeal against an order for summary rejection of an appeal by a Judge under Section 79B of the Civil Procedure Act falls within the provisions of Section 72(1)(c) and (2) of the Civil Procedure Act as it is essentially raising the issue of procedure relating to the admission or rejection of the appeal. That is to say, that an aggrieved party would have an automatic right of appeal against such an order. But even assuming that leave to appeal was required, the applicant could only apply for leave to appeal after becoming aware of the order subject of the appeal. The order not having been communicated to the applicant, and the applicant having applied for leave within a reasonable time after being made aware of the order, the applicant cannot be blamed for the delay in seeking leave.

Further, it was contended that such leave to appeal, could only have been given by the Judge who made the order subject of the appeal. With respect, I find such a contention to be untenable for two reasons. First, the applicant could not request for leave from the Judge who made the order as he was not made aware of the order. Secondly, since the judge who made the order is no longer seized of these proceedings, such an order can be made by any High Court Judge currently seized of the matter. That is to say, that were leave necessary, I would have granted the applicant leave to appeal against the order of 2nd November, 2005.

Under Order XLI Rule 4(1) of the Civil Procedure Rules, the court appealed from is empowered for sufficient cause to issue an order for stay of execution of a decree or order. In this case, the applicant has shown that it intends to appeal against the order summarily rejecting its appeal. The applicant stated under oath through its manager, legal services, that the respondent is a briefcase company with no known assets and that one John Murithi Maina, a major shareholder who was convicted of defrauding the respondent remains the main shareholder. There was no reply to this affidavit. The facts deponed to have therefore not been controverted. I am therefore satisfied that there is sufficient reason to justify the

granting of an order for stay of execution pending appeal.

The upshot of the above is that I allow the application to the limited extent of granting an order for stay of execution for a period of 30 days to enable the applicant take action as may be necessary. I award costs of the application to the applicant.

Orders accordingly.

Dated and delivered this 17th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ojiambo for the applicant

Mari for the respondent