



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

On the 17th September, 2008, I delivered a ruling, in which I found *inter alia*, that no power for extension of time has been given to the High Court under the Court of Appeal Rules, and therefore, extension of time for filing a notice of appeal remains the preserve of the Court of Appeal. Accordingly, I held that the application made by the applicant, National Bank of Kenya Ltd, for extension of time for filing their notice of appeal filed on 30th April, 2008 was incompetent as the court had no jurisdiction to grant such an order.

The applicant has now come to this court under Section 7 of the Appellate Jurisdiction Act Cap 9 and Section 3A of the Civil Procedure Act Cap 21, seeking to have this court recall its ruling and order made on the 17th September, 2008, with a view to varying, altering or modifying the said ruling to allow the applicant's application dated 6th May, 2008.

The applicant contends that there is an apparent error in the ruling as the court proceeded on a misapprehension of Section 7 of the Appellate Jurisdiction Act, in holding that it had no jurisdiction to extend time for filing of the notice of appeal whilst Section 7 of the Appellate Jurisdiction Act actually gives the court such powers.

Relying on the case of *Standard Chartered Bank Ltd vs Abok & Another (2005) 1 EA 373*, Mr. Ojiambo, who appeared for the applicant, submitted that Section 7 of the Appellate Jurisdiction Act and Rule 4 of the Court of the Appeal Rules are both providing for extension of time to lodge an appeal to the Court of Appeal and therefore an applicant has a choice either to apply for extension of time to the High Court under Section 7 of the Appellate Jurisdiction Act or apply for extension of time to the Court of Appeal under Rule 4 of Court of Appeal Rules.

Mr. Ojiambo explained that the applicant did not wish to pursue an appeal against the order made by this court on 17th September, 2008, because of the expense and time factor. He maintained that the court has wide powers to recall an order or ruling which has not been extracted and acted upon. In this regard Mr. Ojiambo relied on *Belgo Holding Ltd vs Akber Abdullah Kassam Esmail*. Mr. Ojiambo also relied on

Raichand Lakamshi & Another vs Assanand & Sons (1957) EA 82, where it was held that the court including courts in Kenya have the same inherent powers as the courts in England to recall a judgment before it is perfected by a formal decree or order.

Mr. Ojiambo explained that the issue of jurisdiction was only raised at the hearing of the application and therefore he was taken by surprise and could not bring Section 7 of the Appellate Jurisdiction Act to the attention of the court. Mr. Ojiambo stressed that the applicant was not coming to the court seeking review under the Civil Procedure Rules but was merely seeking to invoke the inherent jurisdiction of the court in correcting a misinterpretation of the law. He urged the court therefore to recall its ruling and find that it has jurisdiction to extend time for the appellant to file his appeal as Rule 74 of the Court of Appeal Rules does not take away the power donated to the High Court by Section 7 of the Appellate jurisdiction Act.

Mr. Ojiambo also relied on the following authorities: -

- ***Re Harrison's Share Under a Settlement (1955) All ER 185-192.***
- ***Maino vs Avei & Another (2001) 2 LRC 262 – 276.***

The respondent, Interior Contract Supplies Ltd, have filed grounds of opposition contending that the application is incompetent and misconceived as no application under Section 7 of the Appellate Jurisdiction Act was made before the court. It was contended that Section 3A of the Civil Procedure Court does not empower the court to make the order sought and that the appellant's remedy was in the form of an appeal against the court's ruling of 17th September, 2008 if it considered that the court erred in law.

Mr. Mari who appeared for the respondent, submitted that the application subject of the orders issued by the court, was brought specifically under Order XLIX Rule 5 of the Civil Procedure Rules and no application having been brought under Section 7 of the Appellate Jurisdiction Act the court could not apply that Section. Mr. Mari maintained that the applicant having moved the court under the wrong provisions of the law, he cannot involve Section 3A of the Civil Procedure Act. He maintained that the application was an abuse of the court process, as the applicant's remedy only lies on an appeal. In a rejoinder to Mr. Mari's submissions, Mr. Ojiambo contended that jurisdiction is conferred on the court by statute and not by the citing of appropriate provisions.

I have examined the notice of motion filed on 6th May, 2008 which was subject of the ruling sought to be recalled. It is evident that the applicant moved the court under Sections 3A, 72 of the Civil Procedure Act, Order XLI Rule 4, Order XLIX Rule 5, and Order L Rule 1 & 2 of the Civil Procedure Rules. In response to the submission that the court did not have powers to grant extension of time under the cited provisions, Mr. Ojiambo maintained that Order XLIX Rule 5 of the Civil Procedure Rules gives the High Court powers to extend time for filing an appeal to the Court of Appeal, the Court of Appeal Rules did not take away that power. It was on the basis of these submissions that this court held that the procedure for appeals is laid down in the Court of Appeal Rules and the applicant could not therefore rely on the Civil Procedure Rules and therefore the application was incompetent.

Section 7 of the Appellate Jurisdiction Act provides as follows:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

A reading of this provision shows that it gives the High Court powers to extend time for the filing of an

appeal or a notice of appeal in the Court of Appeal. This section was however, never relied upon by the applicant. The applicant's advocate now explains that he did not cite this particular provision as he was taken by surprise, as he had no prior knowledge that jurisdiction would be an issue. Nevertheless, that excuse cannot hold as the applicant in seeking extension of time to file his notice of appeal in the Court of Appeal ought to have invoked Section 7 of the Appellate Jurisdiction Act and not Order XLIX Rule 5 of the Civil Procedure Rules which did not give this court powers to grant the orders which he was seeking. While I concur that there is an error in the ruling, to the extent that this court's holding that the power to extend time for filing a notice of appeal for an appeal in the Court of Appeal remains the preserve of the Court of Appeal is not the correct position, I find that this error in my ruling does not affect the substance of the ruling. As submitted by the applicant's counsel. The applicant had the option to either seek extension of time under rule 4 of the Court of Appeal rules, (in which case the application had to be made to the Court of Appeal) or seek extension of time under Section 7 of the Appellate Jurisdiction Act in which case, he could apply to this court. However, the application as presented before me was incompetent as Section 7 of the Appellate Jurisdictions Act was not invoked. The court did not have powers under any of the cited provisions to extend time for the filing of the notice of appeal. There was therefore no question of misapprehension of Section 7 of the Appellate Jurisdiction Act as that provision was not for consideration.

Moreover, Section 3A of the Civil Procedure Act, which has been invoked by the applicant to move this court to recall its ruling cannot aid the applicant. The Court's inherent jurisdiction is only intended to be invoked to meet the ends of justice or to prevent the abuse of the process of the court. In this case, the applicant is not without any remedy as there are appropriate avenues provided to meet the ends of justice.

For the above reasons, 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 31st day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ojiambo for the appellant

Mari for the respondent