



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

**Civil Case 517 of 1990**

**SAMKEN LIMITED .....PLAINTIFF**

**V E R S U S**

**1. BONIFACE KAGUO MWANGI**

**2. CONTRATOURS LIMITED .....DEFENDANTS**

**R U L I N G**

The Plaintiff herein, SAMKEN LIMITED, is the Judgment-Debtor. The Defendants, BONIFACE KAGUO MWANGI and CONTRATOURS LIMITED, obtained judgment against it upon their counterclaim. It appears that the decretal sum is now well over KShs. 13 million.

Following an examination of the only available director of the Plaintiff under Order 21, rule 36 of the Civil Procedure Rules (the Rules), the Deputy Registrar ordered as follows on 20<sup>th</sup> March, 2008:-

“Upon evaluating the testimony and evidence from both sides, I am convinced that the explanation offered by Mr. Samuel Mwaura is not plausible, and I thus give leave to the Defendants/Applicants to proceed against the said Samuel Mwaura and Geoffrey John Worke Kent as they deem necessary to recover the fruits of their judgment from the Plaintiff.”

Costs were also awarded against the two directors. Samuel Mwaura is the available director of the Plaintiff. Geoffrey John Worke Kent is the other director who Samuel Mwaura says resides in the United States of America.

Following that order of the Deputy Registrar, the said Samuel Mwaura applied by notice of motion dated 17<sup>th</sup> April, 2008 seeking stay of the order pending an intended appeal. He so applied under the guise of the Plaintiff. As no appeal had been filed, Samuel Mwaura (hereinafter called the Applicant) withdrew the application on 12<sup>th</sup> June, 2008. In the meantime he had filed (again under the guise of the Plaintiff) notice of motion dated 5<sup>th</sup> June, 2008, which is the subject of this ruling. That application seeks enlargement of time to file appeal against the Deputy Registrar’s order of 20<sup>th</sup> March, 2008. The draft memorandum of appeal annexed to the application shows that the intended appeal will be under Order 48, rule 5(2)&(3) of the Rules. Under those provisions, an appeal to a Judge in chambers is permitted from a decision of the Registrar under the Orders referred to in sub-rule (1) of the rule. Those Orders include Order 21 (other than rules 28, 57 and 79 thereof). As already seen, the order of the Deputy Registrar sought to be appealed against was made under Order 21, rule 36.

This present application is brought under Order 49, rule 5 of the Rules. That rule gives the court power to enlarge time where, *inter alia*, a limited time has been fixed for doing any act or taking any proceedings under the Rules. Sub-rule (3) of rule 5 of Order 48 has decreed that memorandum of appeal shall be filed within seven days of the decision of the Registrar.

Most of the grounds for the application appearing on the face thereof are to the effect that the intended appeal is serious and arguable. The supporting affidavit sworn by the Applicant seeks to explain, especially in paragraphs 20, 21 and 22 thereof, why memorandum of appeal was not lodged within time.

The Defendants have opposed the application by grounds of opposition and a replying affidavit sworn by the 1<sup>st</sup> Defendant, both filed on 24<sup>th</sup> June, 2008. The grounds of opposition are:-

1. That the Applicant is guilty of inordinate delay.
2. That the Applicant has not offered any security for costs now justly due to the Defendants.
3. That the intended appeal is frivolous or vexatious and only intended to deny or delay the Defendant's enjoyment of the fruits of the judgment and orders justly due to them.
4. That the Applicant has not come to court with clean hands.
5. That no substantial loss may result to the Applicant if leave to appeal out of time is refused.

The replying affidavit elaborates these grounds.

I have given due consideration to the submissions of the learned counsels appearing. I consider the following to be the main issues to be decided in this application:-

1. Has there been inordinate delay in bringing the application, and if so, has it been satisfactorily explained?
2. What is the real effect of the order of the Deputy Registrar sought to be appealed against? Was it to lift the veil of incorporation of the Plaintiff/Judgment-Debtor and thereby to burden the directors thereof with the judgment against it?
3. Should the court's discretion be exercised in favour of the Applicant?

### Delay

The relevant rule gives only seven (7) days within which to lodge appeal to a Judge against a decision of the Registrar. This shows that the Rules regard such appeal with utmost urgency. The logic for such urgency is not difficult to see. An order of the Registrar under Order 48 will more often than not be interlocutory in nature; hence the need for expeditious disposal of any interlocutory appeal that may be lodged against such order so that the substantive matter may move along.

In the present case the decision of the Deputy Registrar sought to be appealed against having been made on 20<sup>th</sup> March, 2008, the Applicant should have lodged his appeal on or before 27<sup>th</sup> March, 2008. The present application was filed on 5<sup>th</sup> June, 2008, more than two months after time to lodge appeal expired. In the context of the relevant rule, this is inordinate delay.

What is the explanation given in the supporting affidavit for this delay? It is that the Applicant's advocate was waiting for certified copies of the proceedings and ruling of the Deputy Registrar, which have not been supplied so far. It is further deponed that the advocate has now realized that he can lodge the appeal without waiting for certified copies of the proceedings and ruling. During hearing of the application it was disclosed that the Plaintiff's advocate was present during the proceedings before the

Deputy Registrar and at delivery of his ruling. As already seen the supporting affidavit is by the Applicant. There is no affidavit by the advocate explaining why he could not lodge appeal timeously, having been present during arguments before the Deputy Registrar and at delivery of his ruling.

The Applicant's advocate, Mr. Chege, conceded during arguments at the hearing of the present application that he could have appealed immediately without waiting for copies of proceedings and ruling. He did not explain why he did not do so. Instead, he pleaded that it was his mistake, and that a counsel's mistake should not be visited upon a party. I find that the inordinate delay herein has not been explained satisfactorily.

#### Effect of the Deputy Registrar's Order

Mr. Chege's view of the order of the Deputy Registrar was that it clearly purported to lift the Plaintiff's veil of incorporation by permitting the Defendants to pursue its directors personally for satisfaction of the decree against it. At the very least, Mr. Chege submitted, the order was open to such interpretation. That being the case, further argued Mr. Chege, the Deputy Registrar lacked jurisdiction to grant the order, especially when the proceedings before him were an examination under Order 21, rule 36.

I have read that rule. It provides for oral examination of, *inter alia*, any officer of a corporate judgment-debtor as to whether any or what debts, and whether the judgment-debtor has any and what property or means of satisfying the decree. For the purpose of such examination, the court may make orders for the attendance and examination of such officer and for the production of any books of account. The rule does not give power to the court to order personal pursuit of such officer in satisfaction of the decree.

Mr. Aswani, learned counsel for the Defendants, understood the order of the Deputy Registrar differently. He submitted that the Deputy Registrar did not purport to lift the veil of incorporation of the Plaintiff so as to make its directors personally liable to pay the decree against it. He submitted further that what the order did was to give the Defendants leave to further pursue the directors to disclose the assets of the Plaintiff.

I have closely read the order in question. The proceedings before the Deputy Registrar were intended to find out what assets the Plaintiff might have that may be attached in satisfaction of the decree against it. The Deputy Registrar found that the director examined, Samuel Mwaura, was, in effect, obstructing this exercise. He then gave leave to the Defendants to proceed against the directors as they may deem necessary to recover the fruits of their judgment from the Plaintiff. The order is, quite plainly, capable of interpretation as giving leave to the Defendants to pursue the directors personally in execution of the decree. This would be tantamount to lifting the veil of incorporation of the Plaintiff. That is why the Applicant is so alarmed at the prospect of being required to personally meet the decree against the Plaintiff. I must therefore respectfully differ with the view of Mr. Aswani of the Deputy Registrar's order.

#### Should the court's discretion be exercised in favour of the Plaintiff?

There is no doubt in my mind that the intended appeal is serious and eminently arguable. There is the issue whether the Deputy Registrar had the jurisdiction to issue an order that, at the very least, is capable of interpretation as lifting the Plaintiff's veil of incorporation to permit pursuit of its directors personally in satisfaction of the decree against it. There is also the issue whether such an order is just in the circumstances of this case.

The Applicant has an undoubted right of appeal. The court will not lightly deny a party the opportunity to exercise his undoubted right of appeal. There has been inordinate delay here which has not been satisfactorily explained. But in spite of it, the scales of justice weigh clearly in favour of granting leave to the Applicant to lodge appeal out of time. An award of costs will be sufficient recompense to the Defendants for the inconvenience they have suffered.

Having considered all the circumstances of this case, I will allow the notice of motion dated 5<sup>th</sup> June,

2008. The Applicant is granted leave to lodge appeal against the order of the Deputy Registrar of 20<sup>th</sup> March, 2008. He must lodge his memorandum of appeal within seven (7) days of delivery of this ruling. I will award costs of this application to the Defendants. I assess those costs at KShs. 35,000/00. This sum must be paid to the Defendants through their advocates of record within seven (7) days of delivery of this ruling. In default the Defendants may execute for the same against the Applicant, SAMUEL MWAURA. Those are the orders of the court.

DATED AT NAIROBI 27<sup>TH</sup> DAY OF NOVEMBER, 2008

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2008**