



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

Civil Case 1285 of 2003

SIMON IGECHA & 509 OTHERS.....PLAINTIFFS

VERSUS

KENYA BREWERIES LTD.....1ST DEFENDANT

THE HON. THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

The plaintiffs had filed a suit by way of a Plaint dated 18th December 2003 seeking judgment against the defendants jointly and severally for:

- (a) Specific performance by payment of various sums as indicated on the bottletops amounting to Shs.10,150,000/= plus general damages for breach of contract.
- (b) Costs of the suit plus interest at court rates.
- (c) Any other or further relief as this honourable court may deem fit or just to grant.

The first defendant on being served with summons filed a Notice of Motion on 19th August 2004 seeking orders:

- (1) That the suit be struck out
- (2) Alternatively, that such part of the claim by the plaintiffs remaining subsequent to the ruling and order of the court made on 30th July 2004 be struck out.
- (3) That the compromise reached between the plaintiffs and the defendants for payment of Shs.5000/= in full and final settlement be recorded and judgment entered accordingly.

Mr. Rumba Kinuthia counsel for the plaintiffs on being served with the above Notice of Motion filed an application by way of Chamber Summons under Order XVII Rule 1, 2 and 8 of the Civil Procedure Rules seeking orders that the plaintiffs be allowed to proceed with the 1st Defendant/Respondent Notice of Motion dated 19th August 2004 by way of Viva Voce evidence to be adduced by **RUMBA KINUTHIA** and **LEONARD GITAU CHEGE** and the first plaintiff **SIMON IGECHA**.

This Chamber Summons by the plaintiff was allowed by the Hon. Mr. Justice J.B. Ojwang in ruling

delivered on 3rd February 2006. The 1st Defendant being aggrieved by this ruling brought this application by way of Notice of Motion dated 20th March 2007 under Section 7 of the Appellate Jurisdiction Act Cap 9 and Order 41 Rule 4 of the Civil Procedure Rules seeking orders: (1) **That the time to file a Notice of Appeal against the Ruling and Order dated 3rd February 2006 by the Hon. Mr. Justice J.B. Ojwang be extended for such a period as this honourable Court may deem fit; and (2) That upon the extension of time and filing of the Notice of appeal any further proceedings on the hearing of the 1st Defendant's application dated 19th August 2004 and the suit be stayed pending the hearing and determination of the intended appeal.**

The application is based on the following grounds that:

- (1) The Hon. Mr. J.B. Ojwang on 3rd February 2006 ruled that the 1st Defendant's application dated 19th August 2004 be heard by way of viva voce evidence from the plaintiff and their counsel.
- (2) The court refused the applicants formal application for leave to appeal at the time of the delivery of the said ruling.
- (3) Leave to appeal was granted to the applicant by the Court of Appeal on 16th March 2006.
- (4) The 1st Defendant has good grounds to appeal against the ruling and order made on 3rd February 2006.
- (5) The failure to file a Notice of appeal within the stipulated period was caused by an inadvertent omission on the part of the 1st Defendant's advocate.
- (6) The mistake or failure to do certain acts and things timeously by the 1st defendant's advocate should not be visited upon the 1st defendant and the 1st defendant should not be penalized and/or deprived of his rights of filing and prosecuting the intended appeal on merits against the Ruling and Order made on 3rd February 2006 in HCCC NO. 1285 OF 2003
- (7) The Respondent will not suffer any prejudice should the time for filing of the Notice of Appeal be extended.
- (8) There has not been any inordinate delay in the bringing of this application.
- (9) It is in the interest of the ends of justice that this Honourable Court should exercise its discretion in favour of the 1st Defendant.

The application is also supported by an affidavit sworn by counsel Peter Mbutia Gachuhi on 20th March 2006 in which he avers on facts similar to those contained in the grounds stated on the body of the Notice of Motion. Learned counsel submitted that immediately the ruling was delivered he applied for leave to appeal which leave was refused. He made an application to the Court of Appeal for leave to appeal and also stay of proceedings but unfortunately when filing that application they inadvertently omitted to file Notice of Appeal.

This happened because of the rush and it was by mere oversight. Failure to file Notice of appeal led to the Court of Appeal granting leave to appeal but declining to grant stay since Notice of appeal had not been filed. He urged the court to grant stay of further proceedings until the intended appeal is heard and determined.

In conclusion he submitted that no prejudice will be suffered by the Respondent.

Miss Kimiti learned counsel for the Respondent in opposing the application relied on the Replying Affidavit filed herein by the Respondent and submitted that the applicant does not deserve the exercise of

the court's discretion in his favour.

The delay in bringing this application has not been explained. Further that the stay of the proceedings was rejected by the Court of Appeal. She further submitted that stay of proceedings would not be to the best interest of Justice taking into account that the suit involves over 500 litigants.

Counsel for the applicant concedes that he inadvertently omitted to file the Notice of appeal when he made an application to the Court of Appeal for leave to appeal and stay of proceedings which led to the Court of Appeal declining to grant stay of proceedings. But be that as it may, the Court of appeal has held and there are several authorities to the effect that a litigant should not be deemed the right to justice because of the mistake of his counsel. One such example, Madan JA as he then was said in **GITHEE VS. KIMUNGA 1984 KLR 387** at page 370:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to know better. The court may not forgive or condone it, but it ought to certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

It is well settled that the decision whether or not to extend the time for appeal is essentially discretionary. It is also well settled that in general the matter which the court takes into account in deciding whether to grant extension of time are first the length of delay. Secondly the reasons for the delay and thirdly (possibly) the chances of appeal succeeding if the application is granted.

The rules of the court must surely be complied with. In **RATMAN VS. CUMARASAMY 1964 3 ALL ER 933** Lord Guest delivering the opinion of the privy counsel at page 935 said:

“The rules of the court must prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.”

In the instant application, the applicant applied for leave to appeal immediately the ruling was delivered, which application was refused. He immediately filed a Notice of appeal and made an application in the Court of appeal for leave to appeal and stay of proceedings pending the hearing and determination of the intended appeal.

But inadvertently he omitted to include the Notice of appeal. This lead to the Court of Appeal granting leave to appeal but declined to grant stay of proceedings. In the present application I find that there was delay but it was not inordinate.

The intended appeal has merit and the extension of time will not cause prejudice to the Respondent.

In view of the foregoing, I am satisfied that this is a proper case in which to exercise my discretion in favour of the applicant.

Accordingly, the applicant's application is allowed in terms of

Prayers 2, 3 and 4 of the Notice of Motion dated 20th March 2006.

Dated at Nairobi this 23rd day of March 2007.

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J.L.A. OSIEMO

JUDGE