



REPUBLIC OF KENYA

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

Civil Appeal 49 of 2006

MUNICIPAL COUNCIL OF LIMURU.....APPLICANT

VERSUS

GEORGE MBURU MUCHINA.....RESPONDENT

RULING

The Appellant who is the Respondent to the application under review filed this appeal to this Court by lodging the memorandum of appeal dated 30th January, 2006 and filed the same date. The record of appeal is already prepared and it is in place.

The Respondent to the appeal who is the applicant to this ruling moved to this Court by way of Notice of Motion under order L rule 1 Civil Procedure Rules and Section 79G and 3A of the Civil Procedure Act seeking orders that this honourable Court be pleaded to dismiss this appeal and that costs be provided for. The application is dated 8.5.2006 and filed the same date. The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court and the major ones are that:-

- (1). Judgment appealed from was delivered by the lower court on 26.10.2005 while the appeal was filed on 30.1.2006.
- (2) That the law allows such an appeal to be filed within 30 days from the date of delivery of the judgment.
- (3) That there was a delay of 94 days in filing the appeal.
- (4) That no leave was sought by the applicant to file the said appeal out of time.
- (5) That since the appeal was filed out of time and without leave the same should be dismissed for being incompetent
- (6) That no explanation has been given as to why the appeal was filed out of time.
- (7) That there is an admission by the defence that the filing of the appeal was late by 3 days.
- (8) The explanation that they were waiting for proceedings is not excusable as they have not annexed the certificate of delay to confirm that this was the correct position.

The appellant/respondent has opposed the application on the basis of the replying affidavit filed and oral submission in court. The sum total of the same are:-

- (1) That the application is incompetent as it seeks to dismiss the appeal instead of seeking to have it struck out since it is alleged that the appeal is incompetent
- (2) The application not to be sustained as no leave has been sought even to amend it orally.
- (3) On the merits they submit that if exclusion of days as per the Court calendar from the date the decree was issued is taken into account the appeal was late by 3 days in filing.
- (4) That on the basis of the authorities submitted to Court a delay of three days is not inordinate.
- (5) That there is justification for delay caused by failure to obtain proceedings in time.
- (6) That the said delay is excusable and this court should lean towards substantial justice and sustain the appeal as opposed to striking it out.
- (7) That this Court has power and the discretion to do justice to the people as opposed to resorting to points of technicalities.
- (8) That since this court has power and the discretion to extend time for the filing of the appeal it should extend that time by three days and validate the appeal.

In response to the appellant/respondent's submissions, Counsel for the Respondent/applicant submitted that this Court should ignore the preliminary objection on a point of law directed at her application as the same is belated and without notice.

- (2) She urged the Court to invoke order 50 rule 12 Civil Procedure Rules not to reject the application for want of form as failure to seek striking out as opposed to seeking dismissal goes to want of form and not substance.
- (3) As opposed to hers, the delay of three days is a question of law and not form and so it should not be ignored as allowing it to stand however small it will be a miscarriage of justice.

On the Court assessment of the facts herein after hearing both sides on this application the following facts are not in dispute.

- (1) That the appeal filed herein arises from a decision of the lower court.
- (2) That section 79 G applies to that appeal and its central theme is that it requires such appeals to be filed within 30 days from the date of judgment.
- (3) That the appeal subject of this ruling was filed out of time as it was 94 days late if statutory exclusion of time is not taken into consideration and 3 days if exercising of time is taken into consideration.
- (4) That since the appeal was filed out of time without leave it qualifies to be an incompetent appeal liable to be struck out.
- (5) That it is obvious and apparent on the face of the record that Counsel for the applicant seeks dismissal as opposed to striking out.
- (6) That there is room to excuse errors of want of form on record and even excuse delay in filing the appeal and extend time for filing the same with leave to the affected party to seek leave to have it properly filed or the court to deem it to be duly filed after extending time for filing of the same.
- (7) That there is a wealth of legal authorities emanating both from the High Court and Court of Appeal providing guidance on how such issues are to be dealt with. Such principles are found in the case of **SARAH HERSI ALI VERSUS KENYA COMMERCIAL BANK CIVIL APPLICATION No. NAI**

165/99 whose central theme is that Rules are hand maidens of this Court which court is called upon to ensure, that the hand maiden do not become bad masters". The case of **NDEGWA WACHIRA VERSUS RICARDA WANJIKU NDANJERU [1982] 1 KAR** whose holding No.7 is to the effect that "where a breach of the rules is not fundamental the proceedings will not be set aside". In the case of **CONSOLATA NDINDA OWIRA AND 4 OTHERS VERSUS BANUEL BOVIS OMAMBIA NAIROBI HCCC NO.2050/93 at page 6 B.P.** Kubo Judge quoting with approval Apaloo J.A. as he then was in the case of **WACHIRA VERSUS NDENJERU [1982 – 88] 1 KAR 1062** at page 6 of the said Ruling.

The second paragraph the learned judge stated "At all events it seems to me that the appellant is merely standing on bare technicalities. Nobody has vested right in procedure and a Court, must, at least at the present day structure to-do substantial justice to the parties undeterred by technical procedure rules"

On the same page also quoting with approval Shah J.A as he then was in Lt. Colonel **JOSEPH MWETERI IGWETA VERSUS MUKIRA M E** there and Attorney General C.A. **270/2001** the learned judge had this to say "if I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice whilst I do not condone errors on the part of counsel, I must consider the interest of a Kenyans seeking justice in our courts. He is bewildered at the twists and turns the hearing of appeal take"

On the basis of the above principles the learned judge made observation that "errors or omissions should not always enjoy clemency but court procedures are made for a purpose i.e. to ensure orderly, effective and predictable management of cases. But there will from time to time be cases where substantive justice demands priority over technicalities of procedure" on that basis the judge allowed the application.

Lastly, this court was referred to Nairobi C.A. NAI 12 of 97 **MACHAKOS, RANCHING COMPANY LIMITED VERSUS JOSEPH KYALO MUTISO** so consolidated with NAI C.A. 123/97 **MACHAKOS RANCHING COMPANY LTD VERSUS WAEMA ITUMO MUOKA**. At page 3 of the ruling A.B. Shah J.A. as he then was had this to say "I am of the view that when no prejudice is caused to the objector, the application ought to be sustained and heard. It did appear to be that the respondent was standing on technicalities, want of compliance with procedural rules (unless fundamental and going to the jurisdiction of this court) I do not and cannot call for striking out of the kind that is before me. It is the duty of the Curt to strive to do justice between the parties un deterred by technical procedural rules. Rules of procedure are good servants but bad masters. This has been said often by various eminent judges.

*Our rules of procedure have their origin in England where the tendency now is as I understand it to move from form to substance. It was stated quite categorically by Upjohn LJ. In the case of in **Re PRITCHARD DEED [1963] 2 W.L.R.685** at page 698:*

I do not think that the earlier cases or latter dicta upon them prevent me from saying that in my judgment the law when properly understood is that order 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceeding. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of Order 70 when justice can be done as a matter of discretion still bearing in mind that many cases must be decided in favour of the persons entitled to complain of the defect *ex debito justitiae*"

This Court has applied the foregoing principles to the facts of this application and find that what this court is faced with is breach of rules of procedure by both sides. I say both sides because the rules require that where a pleading is said to be incompetent a proper way of bringing it to an end is by applying for striking out. Here in instead of applying for striking out, counsel sought dismissal a term prserved for bringing down a competent pleading for whatever reason.

As for the respondent to this application his is that his breach relates to filing an appeal, which is out of

time without leave of court. It is trite law that litigants walk the corridors of justice and stand before the law on equal footing.

The task of this court is simple, which way is it to go, the technical path or the substantial justice way. In doing so the Court is not supposed to lose sight of matters of inconvenience and injustice either to one or both parties. This court has peeped through both using the justice binoculars and finds that neither party will be prejudiced, inconvenienced or suffer injustice if this court walks the path of substantial justice by excusing the framing of the application to read dismissal instead of striking out and then on that account sustain it. However on the same tone in sustaining the application fail to strike out the appeal but extend time to the filing time by the three days Counsel was late in filing it and then deem it to be properly filed in order to quicken the judicial process. In doing so the Court takes judicial notice of the fact that the appellant already has a record of appeal in place and is ready to proceed. There is therefore no justification to deny him a hearing on merit. The applicant/respondent as the whistle blower on this irregularity will be handsomely rewarded by way of costs.

In the result application dated 8.5.2006 and filed on 8.5.2006 be and is hereby refused as room exists to extend time.

(2) Time for filing the appeal extended to the date the current appeal was filed and the filed appeal is to be treated as being properly filed.

(3) None allowance of the application notwithstanding the Respondent/applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE