REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT KITALE

MISC CIVIL APPLI 15 OF 2007

SHAH RAMJI PUNJA ==========APPELLANT

V E R S U S

PETER WANJALA KILWAKE ==========RESPONDENT

R U L I N G

This is an application for leave to admit an appeal out of time.

The applicant, ***SHAH RAMJI PUNJA LIMITED***, was the defendant in ***KITALE PMCC. NO. 681 of 2004***, in which the learned trial magistrate found it to be liable to the plaintiff, ***PETER WANJALA KILWAKE.***

The judgment of the trial court was delivered on 17th January 2007, wherein the applicant was ordered to pay to the respondent, the sum of Kshs.180, 000/= as general damages; KShs.1, 500/= as special damages; and costs amounting to KShs.31, 680/=.

The applicant was dissatisfied with the judgment of the trial court, and therefore it wrote to its lawyers on 15th February 2007, instructing them to appeal against both liability and quantum.

Mr. Nandwa, Advocate for the applicant told the court that he needed to seek clarification from the applicant before he could lodge the appeal. The need to seek clarification is said to have emanated from the errors which were contained in the particulars of the case about which the applicant had issued instructions for the filing of an appeal.

In that regard, the applicant's letter dated 15th February 2007 was annexed to the affidavit in support of the application herein. A perusal of the said letter, from Kenindia Assurance Company Limited, reveals that the applicant had instructed its lawyers to lodge an appeal in respect of ***KITALE PMCC NO. 680 OF 2004).***

Secondly, the name of the person against whom the appeal was to be lodged was given as ***GEORGE KILWAKE KIMINGICHI (instead of PETER WANJALA KILWAKE).***

According to the applicant, the memorandum of appeal was filed on 19/2/2007, which was only two days late. Therefore, in the applicant's understanding, such a delay was not inordinate.

However, as the said appeal had been filed late, the applicant states that it had to be withdrawn.

Following the withdrawal of that appeal, the applicant now seeks leave of the court to lodge another appeal within such time as the court may extend for the filing thereof.

As far as the applicant is concerned, the intended appeal raises triable issues, with high chances of success.

The applicant also makes the point that it has a right to appeal, as it is aggrieved with the judgment on record. Therefore, the applicant seeks an opportunity to have its intended appeal heard on merit. As far as the applicant was concerned, its right to lodge an appeal could only be taken away in exceptional circumstances.

In this case the applicant believes that if it is allowed the opportunity to appeal, the respondent would not be prejudiced, as the applicant had already deposited the decretal amount in court.

In answer to the application, the respondent submitted that the application lacked merit, and ought therefore to be dismissed with costs.

When elaborating on his opposition to the application, the respondent first submitted that the application had been made under the wrong provisions of the law. The respondent's position was that the application should have been made pursuant to Order 49 rule 5 of the Civil Procedure Rules, yet it had been brought pursuant to Section 79G of the Civil Procedure Act.

Secondly, the respondent feels that the application had been made in bad faith, as it was only made after the respondent had applied to strike out the memorandum of appeal which had been filed earlier. To avoid the respondent's application to strike out the appeal, the applicant decided to withdraw the appeal.

For that reason, the respondent submits that this application should have been brought before the applicant had filed the memorandum of appeal, which it then withdrew.

And in any event, the respondent feels that the applicant had not explained its reason for appealing late. That is because, by their own documents, the applicant had demonstrated that its advocates had been duly instructed when there were still two more days before the period within which an appeal could have brought lapsed.

Of course, the applicant's advocates had explained that there was an error in the letter through which their client had given them instructions. However, the respondent feels that the purported explanation did not amount to much, as in his view, there was no error, as alleged by the applicant.

The reason advanced by the respondent for that contention is that the appeal which the applicant filed on 19th February 2007 had the following case title: -

> "***SHAH RAMJI PUNJA LTD ……, APPELLANT***
>
> ***=VERSUS=***
>
> ***PETER WANJALA KILWAKE ….. RESPONDENT***
>
> ***(Being an Appeal from the judgment and***
>
> ***decree of Principal Magistrate P.N Gichohi***
>
> ***in Kitale PMCC 681 of 2004 read and***
>
> ***delievered on the 17th day of January 2007.)"***

Of course, that memorandum of appeal cited the names of the persons who were the correct parties in

the suit from whose judgment the appeal arises. There was no mention of ***GEORGE KILWAKE KIMINGICHI, or of PMCC. NO.680 OF 2004.***

In my considered view, the memorandum of appeal did not need to name the wrong respondent or the wrong case, for one to appreciate that there had been a mistake in the letter from Kenindia Assurance Company Limited, dated 15th February 2007. The error in that letter is obvious, on the face thereof. It was written in respect of the following subject matter;

> *" **RE : KITALE PMCC NO. 680 OF 2004***
>
> ***GEORGE KILWAKE KIMINGICHI***
>
> ***Vs SHAH RAMJI PUNJA LTD."***

As the applicant has pointed out, it had no intention of mounting an appeal to challenge the decision in that case. If anything, the applicant had already settled that case, by paying the sum of Kshs. 80, 000/=, which had been awarded to the plaintiff therein.

In the circumstances, I find the applicant's explanation, that their lawyers had to seek clarification, reasonable. I say so because the advocates needed to ascertain whether the applicant still intended to lodge an appeal, notwithstanding the fact that they had settled the decree.

Following receipt of instructions, clarifying that the applicant actually intended to challenge the judgment in Kitale PMCC. No. 681 of 2004, their lawyers lodged the memorandum of appeal, and in the correct names. But the said appeal was filed late. Therefore, unless the applicant was able to regularize the said appeal, by obtaining an extension of time to have it lodged, that appeal was liable to being struck out.

The respondent has said that he did file an application to strike out the appeal. He therefore submits that by withdrawing the faulty memorandum of appeal, and then bringing this application, the applicant was motivated by bad faith.

However, as the applicant has, correctly, explained, there was no contention in the replying affidavit about the respondent having made an application to strike out the defective appeal.

Ideally, if the respondent had intended to urge that issue, in opposition to the application herein, he ought to have set out the facts giving rise thereto, in the replying affidavit.

But it is also noteworthy that the applicant did not go further, when pointing out to the court that that issue was not raised in the replying affidavit, to deny the ascertion that there had been filed an application to strike out the appeal. If no such an application had been filed, one would have expected the advocate for the applicant to make a categorical statement, from the bar, to that effect.

The fact that no such specific statement was made is suggestive of truth in the assertion by the respondent. However, such a suggestion cannot form the foundation of an informed decision by the court. The court needs facts and figures to create a proper foundation for its decisions.

But, assuming for the moment, that the applicant did withdraw the previous memorandum of appeal, so as to avoid having it struck out, that may well explain to the court that it is the said action of the respondent, of seeking to strike out the previous appeal, which put the applicant on notice regarding the late filing of the appeal.

However, it must be emphasized that the applicant did not tender such an explanation to the court.

In effect, there is no explanation from the applicant about its failure to withdraw the previous memorandum of appeal soon after it had been filed on 19th February 2007. Indeed, there is no explanation

as to why the applicant went ahead to lodge the appeal two days after the time for appealing had lapsed.

Nonetheless, once there was one memorandum of appeal on record, it was not in order for the applicant to file any other, arising from the same judgment. Neither of the parties herein have informed the court about the date of withdrawal of the earlier appeal. Consequently, I cannot make a finding as to whether or not there had been inordinate delay in bring this application, after the earlier appeal was withdrawn.

By virtue of Section 79G of the Civil Procedure Act;

*"**Every appeal from a subordinate court to the** High Court shall be filed within a period of **thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may***

certify as having been requisite for the preparation and delivery to the appellant of a

copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court

that he had good and sufficient cause for not filing the appeal on time."

In this case, the applicant had cited erroneous particulars of the intended appellant as well as of the case in respect to which the appeal was to be preferred. That explains why its lawyers could not appeal in time, because they still needed to obtain clarifications from the applicant. To my mind, that was a good and sufficient explanation for the failure to lodge the memorandum of appeal in time, as prescribed.

As it is section 79G of the Civil Procedure Act which empowers the court to allow an appeal to be filed out of time, I hold the view that it was not erroneous of the applicant to cite the said section as a basis for bringing this application.

The respondent's contention was that the application ought to have been brought pursuant to the provisions of Order XLIX rule 5 of the Civil Procedure Rules. That rule reads as follows;

*"**Where a limited time has been fixed for doing any act or taking any proceedings under those***

*Rules, or by summary notice or by order of **the court, the court shall have power to enlargesuch 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."***

Whereas ***Order XLIV rule 5*** of the Civil Procedure Rules makes reference to the court's power to enlarge time, as the justice of the court may require, I find nothing which could preclude a party from basing such an application on Section 79G of the Civil Procedure Act.

Indeed, in ***ESPAN AURIEN V E.A.T.C., ELDORET H.C. MISC. APPLICATION NO.52 OF 2002,*** the Hon. Omondi Tunya J. did grant leave to file an appeal out of time, on the basis of an application pursuant to Section 79 G of the Civil Procedure Act.

In my considered opinion, it was not fatal for the application to be made under that statutory provision.

I also hold that the justice of the case herein requires that the applicant be accorded an opportunity to file its intended appeal. Of course, if it does so, and if during the pendency of the appeal, there was an order for stay of execution, the respondent would be deprived of the right to promptly enjoy the fruits of the judgment passed by the trial court.

But, it is equally true that if any party is to meaningfully pursue his right of appeal, the court should strive to ensure that such a right is not rendered an academic exercise.

In this case, the decretal amount has been deposited in court. Therefore, if the appeal should fail, the respondent would be in a position to access the funds very quickly.

Of course, the applicant has conceded having deposited the decretal amount after the lapse of the interim order of stay. Should that preclude the applicant from obtaining an order of stay, as submitted by the respondent?

In my view, the delay in depositing the decretal amount should only have exposed the applicant to the risk of execution being levied against it. But the respondent did not make use of that opportunity.

Now that the decretal amount has been deposited in court, it has provided the respondent with an assurance that the Funds would be available almost immediately after the appeal is determined. I therefore do not find any reason for depriving the applicant the order of stay.

The fact that the advocate for the applicant was in court when the judgment was delivered does distinguish this case from that in ***ESPAN AURIEN -V- E.A.T.C.*** (above-cited), wherein the applicant was unaware of the date for the judgment. However, that distinction cannot, by itself, be sufficient ground for dismissing the application. I say so because under section 79 G of the Civil Procedure Act, the party seeking leave to have his appeal admitted out of time, only needs to satisfy the court that he had good and sufficient cause for not filing the appeal on time.

And in considering the application, the court is required to be guided by the justice of the case.

For all those reasons, the applicant is now granted unconditional leave to file its appeal within the next fourteen (14) days from to day. However, the applicant will bear the costs of the application, in any event.

Dated and Delivered at **KITALE**, this 19th day of June, 2007.

FRED A. OCHIENG

JUDGE