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

Civil Case 842 of 2006

CO-OPERATIVE BANK OF KENYA……..APPLICANT

VERSUS

PETER ATANDI NYABUTI……...…….RESPONDENT

RULING

The background information as gathered from the supporting affidavit is that pleadings were filed by parties in the lower court. Then the plaintiff filed an application by way of notice of motion under order 35 rule (110) the Civil Procedure Rules and other enabling provisions of law marked annexture A to the supporting affidavit. It was dated 14th day of February, 2001. It sought Summary Judgment to be entered for the plaintiff against the defendant for Kshs 136,189.00 together with costs and interest as prayed for in the plaint and that the defendant be condemned to pay costs.

Paragraph 2 of the supporting affidavit reveals that a consent was recorded in respect of that application along the following lines:-

(1) The Plaintiffs application for Summary Judgment dated 14th February 2001 be and is hereby allowed as prayed together with costs.

(2) The defendant to liquidate the decretal amount hereby by 4 equal monthly installments with effect from 30th June 2001 and thereafter on the last day of each succeeding month until payment in full.

(iii) In default of any one installment execution to issue. The consent was recorded on 27.6.1997.

It is further deponed that in pursuance of the said consent, 2 the respondent paid Kshs 140,000.00 as shown by copies of cheques comprised in the bundle of documents annexed as annexture B. It is deponed the Respondent defaulted where upon the consent letter in annexture c was filed in Court to pave the way for execution process. This prompted the Respondent to file an application contained in the bundle marked annexture D. It was dated 2.11.01 brought under order XLIV order XXI Section 3A and 63 of the Civil Procedure Rules and all other enabling provisions of the law seeking stay pending the hearing inter parties of the application and that the consent judgment entered therein against the defendant together with all the consequential orders resulting there from be reviewed and set aside and that costs be in the cause. That application gave birth to the ruling marked annexture E. In this ruling the learned magistrate made observations to the effect that in order for a consent judgment to be reviewed, it must be shown that there was fraud or collusion or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts or in apprehension or ignorance of material facts or in general for a reason which would enable the court to set aside the agreement. After due consideration the learned

magistrate made findings that the counsel had acted beyond his powers given by his client because he allowed interest at 110% which brought the decretal sum to a very high figure. In the magistrates learned opinion that amounted to entering into a consent without sufficient material facts of and course, colluding making the other counsel to defeat the interest of the applicant. On that account the court found there existed a fit case for setting aside the consent. The consent was duly set aside and the matter proceeded to hearing and a judgment was given thereto marked annexture F. This court has been informed that the said judgment dated 7.3.2002 dismissing the plaintiffs case gave birth to an appeal No.142 of 2002 which is still pending.

The memorandum of appeal is annexed as annexture G. Ground 1,2,3 and 4 relate to the consent entered into by the parties annexture C, the application to set aside the said consent part of the bundle annexture D, the ruling in respect of the same annexture E. This court will be doing disservice to this ruling if the same grounds were not set out herein. They state learned trial magistrate erred and misdirected herself in law and fact in finding that there was no proof of the consent agreement entered into between the appellant and the Respondent on 27th June 2001 when the same was exhibited at page 31 of Exhibit No.3, erred and misdirected herself in law and in fact in failing to find that pursuant to the said consent agreement, the respondent partly performed the said consent agreement by effecting two payments for a total sum of Kshs 100,000.00 to the appellant, erred and misdirected herself in law by failing to find the respondent was estopped debarred and precluded by equity and the doctrine of part performance from resiling from the said consent judgment, erred and misdirected herself in law in failing to find that the effect of a consent agreement is to supersede the previous agreements regardless of their imperfections if any.

This Court has been informed vide paragraph 14 of the supporting affidavit that when appeal No.142 of 2002 came for hearing is when the learned judge seized of the matter, Mr justice A. Visram drew to the applicants attention the omission of including grounds touching on the consent order when in fact they had not appealed against the ruling which had set it aside. When Counsel moved to file an appeal against that ruling is when they learned that the right of appeal was not reserved for at the time the ruling was delivered.

The foregoing prompted the filing of this application seeking an extension of time to file an appeal against the ruling setting aside the consent order. The application is dated 19th October, 2006 seeking orders that the court be pleased to extend the time for filing of an appeal against the ruling of the subordinate court delivered on 29.11.2001 in CMCC 897 OF 2000.

The major grounds are that it is the mistake of Counsel that right to appeal was not reserved, that appeal was not filed against the said ruling and that documentation in respect of the consent were produced in evidence and yet the consent had been set aside.

(2) That the Court is urged not to visit the sins of counsel on to the litigant.

(3) That the application is un opposed because Counsel for the respondent filed incompetent papers and when the court gave him leave to file proper ones none were filed as at the time the application was heard.

(4) That appeal no.142/2002 is coming for hearing this coming September, 2007 and hence the need to get leave before then so that they can regularize their appeal against orders setting aside the consent order.

(5) That without the leave to appeal the appellant will be prejudiced in his arguments of ground 1 -4 of the appeal which are crucial to the appeal.

(6) The Respondent will suffer no prejudice.

(7) It is now trite law that errors or mistakes of Counsel should not be visited on the innocent litigant.

The applicant referred the court to the case of GULAM HUSEN NUR MOHAMED CASSAM AND

ANOTHER VERSUS SHA SHIKANT RAMJI SACHANIA AND ANOTHER 1982 – 88) 1 KAR 24 where the Court of Appeal through Madan J.A. as he then was ruled that had it not been for the error on the part of the applicants legal advisor in misinterpreting the plain wording of the relevant rule, the notice of appeal could have been served well within time and the application for an extension of time therefore would have been unnecessary. That an error on the part of the legal advisor may help built up sufficient reason for an extension of time under Rule 4.

The case of CHUMO VERSUS KOECH [1991] KLR where it was held inter alia that a litigant should not be penalized for the mistake of his Counsel. That under rule 4 of the court of appeal rules the court has unfettered discretion to enlarge time but it was to be exercised judicially and that the delay in filing the record of appeal was not caused by the applicant himself but by his previous counsel. The case of MUCHINA VERSUS MUCHINA [2003] KLR 613 where it was held inter alia that the appellant should therefore not suffer due to the negligence and slovenliness of her advocate. The case of GITHIAKA VERSUS NDURIRI [2004] 2 KLR 67 where holding 5 provides that mistakes by Counsel are not a reason for denying an otherwise deserving appellant of a favorite exercise of discretion. The case of RUHARA VERSUS RUHARA AND 6 OTHERS [2002] 2 KLR 663 where it was held inter alia that though the Court agreed that in an appropriate case, litigation should come to an end, where the delay in concluding litigation as in the present case arose because of an excusable mistake of Counsel for the applicant and where the applicant has thereafter acted with promptitude on filing the application after the appeal was struck out the court would be inclined to exercise its discretion in extending the time as prayed. In the case of MWANGI VERSUS KENYA AIRWAYS LTD [2003] KLR 486 where it was held inter alia that matters which the court takes into account in deciding whether or not to grant an extension of time are:-

(i) the length of the delay

(ii) the reason for the delay

(iii) possibly, the chances of the appeal succeeding if the application is granted and

(iv) the degree of prejudice to the respondent if the application is granted.

(2). That in an application to extend time, there is no legal requirement that pleadings and a copy of the judgment should be attached to the application so as to enable the judge to determine the merits or otherwise of the proposed appeal. The case of NJUGUNA VERSUS MAGICHU AND 3 OTHERS [2003] KLR 507 where it was held inter alia that the discretion exercisable under rule 4 of the Court of Appeal Rules is unfettered and the main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially that is, on sound factual and legal basis. The miscalculation of figures and dates by the applicants advocate was a fairly known phenomenon which was excusable and the applicant could not be penalized for it. That the grant of further limited indulgence to the applicant would only be prejudicial to the respondents to the extend that it delayed the day when they would enjoy the fruits of their judgment. That however would be outweighed by the interests of justice in this land matter in the case of POTHILWALLA VERSUS KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY LTD AND 31 OTHERS [2003] KLR 733 where it was held inter alia that for an applicant to succeed in an application under rule 4 of the Court of appeal rules (Cap.9 of sub leg) he must satisfy the court that:-

(a) the delay was not inordinate

(b) the delay has been sufficiently explained

(c) the intended appeals is arguable

(d) no prejudice would be caused to the respondent if the application to extend time is allowed.

The case of WASIKE VERSUS KHISA AND ANOTHER [2004] 1 KLR 197 where it was held that

under rule 4 of the Court of Appeal Rules, the Court has a discretion to extend the time limited by any decision of the Court for doing any act authorized or required by the rules on such terms as the court thinks just. This discretion is unfettered and must be exercised judicially. In exercising its discretion, the court is guided by such factors as the merits or otherwise of the intended appeal, whether the extension of time will cause undue prejudice to the respondent and the length of the delay. That it would be a fetter on the wide discretion of the court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained. That it is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable and whether or not delay is reason able will depend on the evidence of the case. In the quoted case the applicant had given a reasonable explanation for the delay. It had also been rule that the respondent was unlikely to suffer any prejudice if the application was allowed and that costs would be adequate compensation for him. Lastly in the case of EGERTON UNIVERSITY VERSUS REPUBLIC EX PARTE RUGA [2004] KLR 132 it was held inter alia that the discretion of the Court to extend time is a discretion which is exercised judicially and these are matters which the court will consider. The court was satisfied that the intended appeal was not frivolous, the delay had been adequately explained and the certificate of delay exonerated the applicant for the delay. Further that even though there was a further delay of five months between the striking out of the notice of appeal and the bringing of this application, considering the nature and circumstances of the dispute and the previous proceedings, it would be in the interest of justice that the dispute between the parties should be concussively and finally settled by a allowing the applicant file a competent appeal.

Applying the foregoing principles to the facts of this application it is clear that they (principles) relate to applications under Rule 4 of the Court of Appeal rules. Although rule 4 does not apply to appeals from subordinate courts to the High Court, the underlying principles governing applications for leave to appeal out of time both from the subordinate court to the High Court and those from the High Court to the Court of Appeal are the same. They are basically to the effect that the Court to which the application is presented has to satisfy itself that:-

(1) It has a discretion to extend time which discretion is unfettered and the only fetter attached to it is that it has to be exercised judicially.

(2) Issues of frivolousness of the appeal may be looked at out.

(3) Explanation for the delay should also be considered without necessarily examining each and every explanation in minute detail.

(4) Where the delay is attributable to Counsel the litigant should not be punished for the same.

(5) Even where the delay is inordinate the interests of justice to both parties should be taken into consideration.

(6) Prejudice to the other side should also be considered.

(7) where compensation by way of costs can suffice, leave to file appeal should be allowed.

In the circumstances of this application it is evidently clear that after the Respondents replying affidavit was expunged from the record, and they respondents failed to file other papers in opposition, what is left on the record to be looked at are papers of the applicant which are in effect unopposed. Despite there being no opposition to the papers filed by the applicant the law requires that he/she has to bring herself/himself within the principles governing the granting of leave to appeal out of time which are already set out above. Since it is an intended appeal from the subordinate court to the High Court, Section 799/= of the Civil Procedure Act is called into play. It provides "*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 course that he*

had good and sufficient cause for not filing the appeal in time"

The ruling sought to be appealed against was delivered way back on 29.11.2001. Even leave to appeal was not reserved. The proceedings which had been terminated by the consent subject of that ruling were revived and proceeded to their logical conclusion in the lower court, giving rise appeal No.142/2202. Those proceedings were such that the consent order which had been set aside by the ruling of 29.11.2001 was made part of those proceedings and the resultant Judgment touched on the same thus inviting the framing of grounds 1 -4 of appeal No.142/2002. This making the issues applicable in the ruling of 29.11.2001 to be intertwined with those in the judgment giving rise to appeal No.142/2002.

The learned judged seized of that appeal rightly saw the irony of the whole situation as there is no way grounds 1 – 4 can be argued as presented without them playing the double role of being an appeal on both the judgment and the ruling of 29.11.201. The only logical way to resolve the matter was to advise that there should be leave to appeal out of time sought to pave the way for the filing of an appeal against that ruling with a view either to have those grounds severed and argued in the new appeal, or the two appeals be considered and argued as one.

The applicant as submitted had Counsel on record. It is this Counsel who should have reserved the right of appeal and sought instructions to appeal. The court appreciates that a litigant takes the risk of the poor workmanship or the incompetence or competence of Counsel hired by them in the discharge of their professional and functions but this does not out weight the need of the court confronted with such a situation from looking at the interests of justice to both parties in the matter.

Herein it is evidently clear that the issue of the consent, its validity or effect otherwise on the proceedings is a central issue. If it is not canvassed on appeal, appeal no 142/2002 will be rendered an empty shell and both parties herein will be denied justice. Therefore although the delay is inordinate and the application is belated ends of justice demand for the reasons given that leave be granted as sought herein. The Applicant has therefore shown sufficient cause why he should be granted leave to file appeal out of time. The Learned Judge who gave advice for this procedural step to be taken did so for the sake of the need for ends of justice to be done to both parties. If the learned Judge after looking through his judicial binoculars found the need to learn towards ends of substantial justice to parties as opposed to upholding technicalities who am I not to fall into step with the learned judge and dance to the same tune. This court is in agreement with the action the learned judge took to offer advice as opposed to proceedings or with the appeal and then dismiss it on the ground, that grounds 1-4 are displaced. It is the business of the courts to offer advice to envying litigants, provide guidance on the progression of the proceedings pointing out irregularities that can be rectified without necessarily appearing to be acting as an advocate for one litigant to the detriment of the other litigant.

The court observes that no prejudice will be suffered by the respondent as he will have a chance to respond to both appeals and will also be compensated for by way of payment of costs where appropriate. On that account the application dated 19.10.2006 be and is hereby allowed.

(2). The applicant given leave to file an appeal is within 30 days from the date of this application.

(3). Costs in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2007.

R. NAMBUYE

JUDGE

27.7.2007