REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Civil Misc Appli 85 of 2006

PAN AFRICAN PAPER MILLS E.A. LIMITED…...…..APPLICANT

V E R S U S

MARTIN CHEROBEN MASAI………...…………..RESPONDENT

R U L I N G

Following the delivery of a judgment on 31st May, 2006, the applicant has moved this court with an application for leave to lodge an appeal out of time.

The judgment in issue was delivered in the case of *MARTIN CHEROBEN MASAI –VS- PAN AFRICAN PAPER MILLS LTD, KITALE SPMCC.NO.41 OF 2004.*

It is common ground that the learned trial magistrate had set the 3rd of August 2005 as the date when he was to deliver his judgment.

According to the applicant, the judgment was not delivered on that date, as the trial court was not sitting. Thereafter, the applicant says that it waited, in vain, for a notification from the court regarding the new date when judgment was to have been delivered.

Instead of receiving a notice from the court in respect of the new date for judgment, the applicant received a notification, on 27th June 2006, that judgment had already been delivered on 31st May 2006.

The applicant's advocates contacted their client by a letter dated 29/6/2006, to inform them about the judgment, and to ask them if they had any further instructions.

According to the advocates for the applicant, they were instructed, on 3/7/2006, to lodge an appeal against the judgment. However, by that date, the time for lodging an appeal had lapsed, thus necessitating this application for leave to appeal out of time.

The primary reason offered by the applicant for being unable to appeal within the period stipulated by Section 79 G of the Civil Procedure Act, is that the trial court had failed to give to them a prior notice of the date when it was to deliver judgment. Secondly, the applicant also points an accusing finger at the respondent herein, for having only served a notification of entry of judgment, upon the applicant, some 28 days after the judgment had been entered.

In answer to the application, the respondent contends that the advocate for the applicant had been indolent. Indeed, he accuses the said advocates of having been disinterested in the judgment.

It was the respondent’s submission that had the applicant been interested in the judgment, the would have sought to know from the trial court, either on 3/8/2005 or soon thereafter, when it was to deliver the judgment. But the respondent also failed to demonstrate its own interest in the judgment in the manner he suggests that the applicant ought to have done.

In any event, there is no legal or procedural requirement that any party to a case should show that he has an interest in the judgment, which the court is expected to pronounce after it, has had the case. If anything, a trial court is under an obligation to pronounce judgment either at once or within 42 days from the conclusion of the trial. The said obligation is supposed to be discharged by the trial court regardless of whether or not the parties had demonstrated an interest in the judgment.

The respondent’s second line of attack was that the supporting affidavit was defective, as it had been sworn by the advocate acting for the applicant.

According to the respondent, the depositions were about facts which the advocate could not prove of his own knowledge. Examples of such depositions were said to be about the applicant being aggrieved or about the applicant receiving a letter.

The court was therefore asked to strike out the affidavit.

However, the applicant finds nothing wrong with the fact that the supporting affidavit was sworn by Isaac Simiyu Kuloba. The applicant pointed out that their advocates were the firm of Nyairo & Company Advocates, wherefrom the deponent practices. That being the case, the applicant submitted that there was nothing which the deponent had sworn to, but which was not within his knowledge.

I have perused the affidavit in issue. I noted that at paragraph 9 of the said affidavit, Mr. Kuloba advocate stated that the applicant was aggrieved, the question that then arises is whether or not Mr. Kuloba could have known of that fact from his personal knowledge.

In order to answer that question, it is imperative to place the deposition within its proper context, by setting out the whole paragraph, which reads as follows;

“9. ***THAT the Applicant being aggrieved of the said judgment instructed us to appeal against the whole decision on the 3rd day of July 2006 by which time, the 30 days period within which to file an appeal had lapsed.”***

Clearly, the applicant did instruct their lawyers to lodge an appeal against the judgment. The respondent has not asserted that no such instructions were issued by the applicant.

If that be the case, there can be no doubt at all that the applicant must have been dissatisfied with the judgment. To my mind, that connotes one who was aggrieved.

I therefore hold that Mr. Kuloba advocate was well within the rules to have deponed that the applicant was aggrieved by the judgment.

Meanwhile, I failed to trace any deposition, in the supporting affidavit, regarding the receipt of a letter, by the applicant.

However, if the respondent’s complaint was about the receipt of a letter by the applicant’s advocates, then the answer to that complaint has already been sufficiently provided. I say so because Mr. Kuloba did expressly state that he practices as an advocate, with the firm of Nyairo & Company Advocates, who have the conduct of the applicant’s case.

In my considered opinion, there was nothing so contentious that the advocate ought not to have incorporated in his affidavit. I also found nothing that constituted inadmissible hearsay.

Accordingly, I find that the supporting affidavit was not defective. It shall thus not be struck out.

The third issue raised by the respondent was as regards the failure by the applicant to annex to the application, the judgment and the decree appealed against.

In the light of the said omission, the respondent submitted that this court would be unable to determine whether or not the intended appeal had good chances of success. Therefore, the respondent expressed the view that the said omission rendered the application fatally defective.

The respondent placed reliance on the authority of ***PATRICK NGANGA KAMAU V ISAAC RIBIRO KAMERE, CIVIL APPLICATION NO. 183 OF 2003***, to support his contention about the need to annex copies of the judgment and decree, to the application.

In that case, the applicant had failed to include in his application, a copy of the plaint and the judgment which he was appealing from. The learned single judge who heard the application for extension of time to file a fresh Notice of Appeal held that the said omission precluded the making of any meaningful assessment of possible merits of the intended appeal.

There is no doubt that in the absence of the judgment which the applicant hopes to challenge by an appeal, this court cannot make any meaningful assessment of the merits of the intended appeal.

However, pursuant to Section 79 G of the Civil Procedure Act, there is no requirement that before granting an extension of time to lodge an appeal, the High Court should satisfy itself that the appeal intended to be filed from a decision of the subordinate court had merits. That section only enjoins the High Court to satisfy itself that the applicant had a good and sufficient cause for not filing the appeal in time. In the circumstances, the omission of the judgment and decree from the application before me, is not fatal to the application.

Another issue raised by the respondent was to the effect that the applicant's advocates failed to explain why they wrote to their client on either 27/6/2006 or on 28/6/2006. As far as the respondent was concerned, once the applicant's advocates received a letter from the respondent's advocates, at 11.00 a.m, on 27/6/2006, they ought to have immediately thereafter notified the applicant about the fact that judgment had been entered.

Instead, the supporting affidavit states that the advocates wrote to their client, (the applicant herein) on 29/6/2006. Furthermore, the respondent faults the applicant for not exhibiting the letter which their advocates wrote to them.

To my mind, for a person who waited for a whole of 28 days before giving information that judgment had been delivered, the respondent was setting very high standards for another party, whilst failing to take note of his own failure to have regard to similar standards.

In any event, by writing to their client on the second day after receiving notification about the entry of judgment, the advocates for the applicant cannot be said to have been indolent.

And whilst it may be prudent to provide copies of correspondence exchanged, I find no reason to support the respondent's contention that possibly no letter was written at all. Or to put the matter differently; I find no reason to cast any doubt on the deposition by Mr. Kuloba advocate, that the advocates for the applicant wrote to their said client on 29/6/2006.

In this case, the respondent has failed to answer to the primary issue raised by the applicant. That issue pertains to the failure by the trial court to notify the applicant of the date when, after 3/8/2005, the court was due to deliver its judgment.

In my considered opinion, that was a fundamental error, which flies in the face of the provisions of Order 20 Rule 1 of the Civil Procedure Rules. The rule requires the court to pronounce judgment either at once or within 42 days from the conclusion of the trial, of which due notice shall be given to the parties or their advocates.

As the applicant's advocates were only notified by the advocates for the respondent, that judgment had already been delivered some 28 days earlier, that too contributed directly to the failure by the applicant to appeal within the prescribed period of 30 days.

Having given consideration to all the factors prevailing in this case, I hold that the interests of justice dictate that the applicant be allowed to file its appeal out of time. In the result, the application dated 10/7/2006 is granted as prayed.

The applicant shall file its appeal within the next 15 days.

Dated and Delivered at Kitale, this 10th day of July, 2007.

FRED A. OCHIENG

JUDGE