



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 469 of 2001

ABDUL SHAKOOR SHEIKH PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY DEFENDANT

RULING

On the 31st day of October 2003, Lady Justice Khaminwa struck out this suit on the ground that it was incompetent because it was filed outside the statutory period fixed under Section 66 of the Kenya Ports authority Act. Being dissatisfied, Abdul Shakoor Sheikh filed a notice of appeal to intimate his intention to challenge the decision in the court of appeal on the 19th day of December 2003 The plaintiff is now before this court under Order XLII rule 3 and Order XLIX rule 5 of the Civil Procedure Rules and under Section 75 of the Civil Procedure Act seeking for leave to appeal and for leave to do so out of time in a motion dated 12th March 2004. The main ground argued is that the appellant's advocate did not appreciate the fact that leave to appeal was necessary hence the delay. The plaintiff has beseeched this court not to allow the applicant to suffer for mistake of counsel. It is the submission of the applicant that when the applicant changed advocates it became clear that leave to appeal had not been obtained. It is further the submission of the applicant that the application was filed expeditiously and any apparent delay was not inordinate.

The motion is opposed on the ground that the applicant herein has no chance of success before the court of appeal. It is also claimed that the notice of appeal issued relate to a different order.

The background of this matter can be deduced from the pleadings on record. By a plaint dated 13th August 2001, Abdul shakoor sheikh sued Kenya Ports Authority claiming for payment or Kshs.4,127,509.60 which amount is said to have arisen out of a tenancy agreement between the duo over

L.R. No. Mombasa/Block XXI/447. The plaintiff had claimed in his plaint that he leased the above named premises to the defendant and the lease expired on 30th November 1995. It is said that the defendant continued to be in possession of the premises from the date of determination upto 31st January 1998 when the defendant moved out of the premises. The amount therefore claimed is in respect of mesne profits for the period the defendant illegally stayed over the plaintiff's premises, the cost of repairs and reimbursement of money spent to restore water and electricity to the premises. When served with the plaint, the defendant denied the plaintiff's claim. Further to that it raised a preliminary objection against the plaint. The preliminary objection was sustained with the result that the suit was struck out for contravening Section 66 of the Kenya Ports Authority. The plaintiff then issued a notice of appeal. There is evidence that certified copies of proceedings and the order were applied for. The record shows that the same were supplied to the plaintiff on 23rd July 2004. A certificate of delay duly signed by the Deputy Registrar is available.

The facts leading to the delay in filing the application for leave to appeal are enumerated in the affidavit of Charles B.G. Ouma sworn on the 15th day of March 2004. The defendant has not deemed it fit to file a replying affidavit to contest the facts deposed therein. I will take it to mean that the facts set out in the affidavit of Charles Ouma are true and unchallenged. One of the grounds raised to resist the application is to the effect that the appeal stands little chance of success. The view I have is that this ground can only be dealt with by the appellate court. It is not within the province of the court whose decision is being challenged to determine the likelihood of success or otherwise of the appeal. In view of the position I have over this ground then the only serious ground is whether or not there was mistake on the applicant's advocate.

Under section 75 of the Civil Procedure Act and Order XLII rule 1(3) of the Civil Procedure Rules the applicant was required to seek for leave to appeal against this court ruling within 14 days. It is said that the applicant's advocate thought leave was not necessary. The law does not prescribe the considerations which this court must consider in granting leave. This is a rather complicated matter in that the application seeks for 2 orders i.e. an order for leave to file an application for leave to appeal against a ruling outside the 14 days after which for an order for that leave to be granted. Let me first deal with the first limb. Under Order XLIX rule 5 of the Civil Procedure Rules, this court has the discretion extend time fixed by the rules for doing any act or taking any proceedings. The relevant provision relevant to the matter before this court is Order XLII rule 1(3) of the Civil Procedure Rules. The rules fixed the time for seeking for leave to appeal at 14 days. It is said the advocate thought leave was not necessary. In order for a court to exercise its discretion in favour of an applicant on the basis of mistake of counsel, there must be evidence that the mistake was a genuine one and not an act of counsel refusing to act or willfully failing to act on instructions of the applicant. To conclude this issue I will refer to the decision of Justice Omollo, J.A. in the case of **Adam Shaiya =vs= John Mwangi Kariuki C.APPL. No. 49 of 1995 (unreported)** in which Justice Omollo, learned Judge of Appeal said:

“... Mr. Aswani in the end told me the

mistake must be with his office and that being so, I should not visit the sins of his office upon his client. That may be so but Mr. Aswani did not tell me what mistake was made in his office which resulted in the application being filed some 3 months from the time the previous appeal was struck outI do not think that simple and pure in action can qualify as a Mistake on the part of counsel would be something like Thinking wrongly that an application had been filed while none had in fact been filed or thinking wrongly that one Needed a certified copy of the order to enable one file the. Application

In this case it is said that Miss Osili probably thought leave was not necessary. The assertion appears attractive but there was no affidavit from Miss Osili to confirm the averments of Mr. Charles Ouma. I am not convinced that the applicant's advocate took this matter seriously. I could have been a bit sympathetic if there was an explanation as to why the firm of Y.A. Ali did not secure an affidavit from Miss Osili. It is not enough to impute incompetence on the part of an advocate. Consequently I am unable to agree that there was a genuine mistake on the part of counsel. After all it is admitted that there was no reason why leave to appeal was not sought. This court will only exercise its discretion in favour

of a party to avoid injustice or hardship caused by excusable mistake or inadvertence but will not assist a party who has deliberately occasioned the delay. In the end I have not been shown sufficient cause why I should extend time under Order XLIX rule 5 of the Civil Procedure Rules. The delay of 3 ½ months is inordinate.

The second limb was that if the first limb is successful then leave should be granted to applicant to appeal against the decision of this court of 4.12.2003. Since I have already refused to extend time fixed by Order XLII rule 3 of the Civil Procedure Rules, then it is obvious that the substratum of the application has collapsed. Where there is no competent application then there is nothing to consider because it is a nullity *ab initio*. It was filed out of time without leave.

In the result, and for the foregoing reasons I have no hesitation in coming to the conclusion that the motion lacks merits. The same is dismissed and struck out with costs to the defendant.

Dated and delivered at Mombasa this 31st day of May 2006.

J.K. SERGON

JUDGE

In open court in the absence of Mr. Kinyua for Respondent and in the presence of Mr. Hamza for the applicant.