

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIV. MISC. APPLICATION NO. 88 OF 2004

FARWAYS SAFARI CENTRE LTD APPLICANT

A N D

TRADE BANK LTD., (IN LIQUIDATION) RESPONDENT

Coram: Before Hon. Justice Mwera

Nyongesa for the Applicant

Miss Moolraj for the Respondent

Court clerk – Sango

R U L I N G

The applicant has this Notice of Motion dated 13.2.04 brought under SS.79 G, 95 Civil Procedure Act and O 49 r 5 Civil Procedure Rules. It seeks orders that it be granted extension of time to file an appeal out of time.

The application was supported by the affidavit of one Salim Jiva (or Jiwa) an operations manager of the applicant company. In the application he was described as the company's principal officer.

Mr. Nyongesa told the court that immediately the lower court delivered judgement on 3.4.02, the applicant's lawyer orally applied for certified copies of proceedings for the purposes of appeal. That these were not furnished until 16.10.03. That from that date the applicant had 30 days to appeal i.e. latest by 16th or 17th of November 2003 but this was not done because the said Jiva or Jiwa was taken ill on and off including being hospitalized and thus he could not instruct the applicant's lawyers to appeal. Medical documents (discharge summaries) were exhibited dated 19.7.03 to 31.7.03 (two covering the same period?), 2.8.03 to 4.8.03 and for one day on 29.11.03)

Miss Moolraj's position was that there is no material placed before this court that between 17th October and 16th November 2003 Jiwa was in hospital. And that this person was merely an employee of a limited company whose directors were always available and with the capacity and authority to give instructions regarding the appeal. That an employee (Jiwa) could not be expected to take management decisions for a company. Only directors do and nothing is said about their failure to do the needful.

That since the latest day to appeal went by, the applicant had lain back for a long time without either trying to file any appeal or bringing this application. While Miss Moolraj put the time lapse to some 5 months, Mr. Nyongesa said only two and half months had gone by. The court's attention was also drawn the letter dated 28.10.2003 from the application's lawyers to itself asking for money in order to file the appeal. That the issue is not indisposition of Jiwa but simply the applicant let time go by and has not explained why this court's discretion should be exercised in its favour. Further, and Mr. Nyongesa did not dispute this, that the application company had in the past been indulged with conditional stay orders which it did not honour. That it began with an order to deposit the decretal sum which was not honoured; then the applicant desired cash to be replaced with depositing log books. That the same was again granted and even when the log books were granted, it was long past the time given. That for about two years the respondent has been kept away from the fruits of its litigation. Mr. Nyongesa replied that logbooks were anyway deposited and thus the respondent is not likely to be prejudiced.

Having heard both sides, it is no doubt that this court has a wide discretion under the provisions of law to enlarge time but, that discretion ought to be exercised judicially and with reference to circumstances of each case. In this case the court was not satisfied that filing an appeal in the matter depended on Jiwa. He was an employee of the applicant and not a director thereof. However if a principal officer should be as good as a director in a corporation the court is not satisfied on material placed before it that Jiwa was indisposed during the time the appeal ought to have been filed i.e. 17/10/03 and 16/11/03. Indeed the period Jiwa was hospitalized as stated above even the registrar's certificate of delay had not issued yet. And the other admission, and for a day – on 19.11.03, the appeal period had expired. Even if this court were to accept that Jiwa was instrumental in seeing to the filing of the appeal herein, on the time basis no useful explanation has been put forth.

Indeed the court was intrigued by the letter dated 28.10.03 which the applicant's lawyers wrote to it. It said in part:

“Kindly let us have your cheque for sum of KSh.15,000/- towards the filing of the said intended appeal.”

It appears to this court that on the said date an appeal was already in the offing and what held up its filing was the applicant availing due funds, and not Jiwa's sickness.

All in all, this application lacks merit. It is dismissed with costs.

Orders accordingly.

Delivered on 26th May 2004.

J.W. MWERA

JUDGE