REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 117 OF 2001

KINGWAYS MOTORS (K) LIMITED ……APPELLANT

=VERSUS=

1. MOHAMMED SALE ALLADINAHI

2. PRIDELINE EXPRESS LIMITED ……..……RESPONDENTS

RULING

A notice of Motion dated 8.10.2001 was filed in this court on 16.10.2001 by Gichana & Co. Advocates who are acting for the J. Creditors / Applicants. They are the Respondents in Nairobi High Court Civil Appeal No. 148 of 2001 under which the above application is made. Judgment was delivered in Mombasa RMCC No. 3480 of 1999 by Hon. Mrs. Oseko, SRM on 9.2.2001 in favour of the two respondents who are the applicants in this application. Wahome & Co. Advocate appear to have represented the Defendants / Judgment debtors in the lower court. On 19.3.2001 the Advocate for the Defendants who are the ones who had lost the case and had judgment delivered against them for Kshs. 300,000/- with costs and interests, applied to the Deputy Registrar, Chief Magistrate's court for a certified copy of proceedings and judgment to enable them prepare for an appeal. This court is not aware however, that there is a court official in the Chief Magistrate's court known as Deputy Registrar. The latter is only found in the High Court.

It is not clear from the records whether or not and when M/S Wahome & Co. obtained a typed certified copy of proceedings and judgment. But on 23.3.2001 M/S Wahome & Co. Advocates filed a formal application to the trial Magistrate court under a certificate of urgency seeking a stay of execution of the referred to judgment pending the filing, hearing and determination of the intended appeal. The application for stay in the lower court was dismissed on 10.4.2001. Then Wahome & Company again applied orally for 14 day's stay to enable them file the intended appeal. This too, was refused.

Then what I can term a strange thing happened. Instead of filing an application for stay under O. XLI rule 4 (1) and 4 (2) in Mombasa High Court where the lower court's jurisdiction falls under, Wahome & Co. advocates filed the application in Nairobi High Court. The Chamber Summons containing the application are dated 12.4.2001 and are claimed to have been brought under S.3A and S. 75 of the Civil Procedure Act, and Order XLI rule 4 (2) of the Civil Procedure Rules. The accommodation was under S. 3 (2) of the High Court Practice and Procedure Vacation Rules, apparently because the time when the matter was filed was during the High Court vacation.

The prayers sought under the said application were as follows:-

"1. That the service of the Application be dispensed with and the same be heard ex parte in the first instance. The same be heard during this Vacation. (Emphasis is mine)

2.That the Applicant be granted leave to file his appeal out of time and the same leave to act as stay of execution of the Judgment / Decree and all consequential orders in PMCC No. 34 of 1999 pending the hearing and determination of the intended appeal

3. Costs of this application be provided for".

For the sake of argument and convenience I am assuming that PMCC No. 34 of 1999 is the same case as RMCC No. 3480 of 1999. I have quoted the prayers in full to remove any uncertainty as to what the applicant really wanted. A draft memorandum of appeal intended to be filed was annexed to the application. On the same day, M/s Wahome & Co. advocates under acertificate of urgency, appeared before his Lordship Justice Kasanga Mulwa who heard Mr. Paul Olando of Wahome & Co. Advocates state that he was asking for an order to allow them file the appeal annexed out of time as they were not aware of when the judgment was delivered and that there was no in ordinate delay. It will be noticed that Mr. Paul Olando for Wahome & Co. advocate did not inform the court that they had come before the court exparte. It can be assumed however, that the court which had the application and all related documents before it, was all the time aware of this fact. It is difficult to say right away under what provisions of the law Mr. Paul Olando for Wahome & Co. advocate moved to the court for the prayers. But once more I will assume that the court must have examined the application and if the orders sought were going to be granted, they would be so granted within the provisions of the Civil Procedure Act and the Rules made there under. Then the court made the following comments and orders:-

"*I have read the application (affidavit) in support of this application. I will allow the extension of time to file the appeal and that it shall be deemed as filed in time. I will allow a stay of execution of the decree until the appeal is determined. The applicant shall deposit as security the Log Book of the car which will cover the decretal sum within 14 days".*

The 1st issue is to establish under which provisions these orders were issued. Were they made under Order XLI rule 4 (1) or under S. 3A of Civil Procedure Act. Order XLI rule 4 (1) under both of which the applicant applied where it is relevant states:-

"*……. the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just…".*

It is my view that while that Appellant court had power to make and made the orders for extension and stay under the above Order XLI Rule 4 (1), the applicant made the formal application to be brought before the court under some other Orders or Provisions. The applicant on his application has shown S. 3A of the Civil Procedure Act as the vehicle that brought him before the court. Was this the proper vehicle which carried him to the court? Let us examine the facts. From the court records, it cannot be denied that the time to file the appeal had already long expired. M/S Wahome & Co. Advocates had not received the certified copy of proceedings applied for much earlier. The applicant having impressed the court of this fact persuaded it to order for delivery of the photocopies of the handwritten lower court proceedings. It then proceeded to extend the time for filing the intended appeal because the court must have noted that the delay to be supplied with typed copies had become inordinate and had contributed to the failure to file the appeal by the applicant before it.

All the above in my view, did not change the fact and the law and the consequences following those facts especially the fact that the applicant's application was ex parte and that the orders ensuing therefrom were exparte. The nature of the proceedings and orders were exparte not only by the fact that the pleadings of the same so clearly expressed so, but also because they had not been served upon the Respondent / Decree-holders and the further fact that practically, only one party in respect of these proceedings was present due to the fact that the other was not served. It is my view and I so hold, that the

orders made by His Lordship Justice Kasanga Mulwa were ex parte orders by the facts and under the circumstances stated above. They were made under an application filed in court generally in accordance with Order L of the Civil Procedure Rules. That order generally provides as to how all applications whether by motions or by Summons should be brought.

It is my further view that the Civil Procedure Rules provide almost or virtually for every situation that arises in the practice of Civil Law and that it is only where the rules are silent and the situation is such that the High Court has to exercise its inherent power that the court would very occasssionally invoke its powers under S. 3A of the Civil Procedure Act. While the Section appears very wide and could accommodate almost every kind of order, it is my view and I so hold that this court rarely finds need to use it in view of the fact that most situations are provided for under the Civil Procedure Rules.

Did His Lordship Justice Kasanga Mulwa therefore use S. 3A of the Civil Procedure Act to empower him to give the herein above orders? The court did not say which of its wide powers it used to give the ex parte orders. I will not for one moment, however, think that the court exercising its discretion as this one did, would deliberately make any order that would deny one of the parties a right to be heard. As it has been stated now and again by our courts of law and equity, the right of a citizen to be heard before any adverse order is made against him, is a foundamental right which is jealously guarded by our courts. That court, therefore, and it is so firmly assumed, must have kept that view in mind. If it chose to make an order such as it did, which in any case was ex parte, the same would under our Civil Procedure Rules be subject to other rules which would, at the end of the day, operate fairly and justly to both parties in the application.

The applicant in that application had filed an application seeking the orders we have seen above. He did this by filing a formal application whether by Motion or Summons. Such applications are intended under the Civil Procedure Rules to be the vehicles which usher the applicant before the court which is the seat of all justice. Only after the vehicle has brought the applicant before the court would the applicant now seek the prayers it seeks under procedural or substantive law. The said "applications" are provided for under Order L, Rule 1 and 2. Rule 1 states:-

> " *All applications to the court save where otherwise expressly provided for under these rules, shall be by Motion and shall be heard in open court*"

. Rule 2 states:-

> *"No motion shall be made without notice to the parties affected thereby. Provided, however, that if the court, is satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any as to the court seems just and the party affected by such order may move to set it aside"*

. In this case the applicant had since March 13th 2001 been trying to appeal. No certified copy of proceedings and judgment were made available to his counsel Wahome & Co. By 23.3.2001, Wahome & Co. through one of its advocates Mr. Paul Olando, filed an application before the subordinate court which had tried the matter and was refused a stay. Mr. Olando then desperately made an oral application to be given 14 days stay to enable him at least, just file the appeal, but once more the lower court refused despite the fact that it had yet to supply him with copy of certified proceedings applied for earlier.

That is when the counsel decided to file the matter in the High Court, Nairobi. As I have already observed earlier, the application should regularly have been filed at Mombasa High Court. However, that is now like water that has already passed under the bridge. What is important is that the desperate situation above mentioned was brought before my brother Justice Kasanga Mulwa who having been impressed by the facts deponed in the affidavits before him and realizing and appreciating the delay caused or which would be caused if the application would be left to run the ordinary way and also noting the irreparable damage and mischief the delay had and could cause, made the orders which are now subject of this application to set them aside. It is my opinion and I so hold that although his Lordship did

not specifically express it so, he must have exercised this courts' powers under Order L and particularly under the Provisions of Rule 2 which has been quoted hereinabove.

In my understanding, the above rule empowers this court under a formal or other application to make orders ex parte that it deems just, to avoid any bottle neck that has been caused by delay and to avoid irreparable damage or mischief that such delay has or could cause. In this case, the court allowed an extension of time to appeal outside the prescribed period, a delay clearly heavily contributed to by the lower court.

It is important to note, however, as I have all the time stressed, that the Applicant / Appellant went to that court ex parte. The pleadings which were filed on perusal clearly shouted loudly that they were ex parte. Indeed the first prayer in the said Chamber Summons was that the service of the Application be "dispensed with and the same be heard ex parte in the first instance…" And so the court proceeded to make orders which themselves were ex parte. They could not be otherwise. This is a case which in all fours, is fully covered under Order L, Rules 1 and 2 above.

The final question then is whether those orders made that day by my brother Justice Kasanga Mulwa, are capable of being set aside if satisfactory grounds are proved by the Applicant? My answer is in the affirmative.

Under this application, the applicant has satisfactorily proved through the supporting affidavit and by the submission by Counsel of the applicant that the appellant – defendants, filed the material application in this court at Nairobi. M/S Wahome & Co. Advocates, after obtaining the ex parte orders under the ex parte application, and after the court in the first instance (emphasis mine) dispensed with the service of the application for that purpose, should have found it incumbent upon themselves to fix the application for inter partes hearing within a reasonable period to give the applicant herein a chance to defend. This, M/S Wahome & Co. Advocates, have never done. The application, apart from the ex parte orders made in the interim, has really never been prosecuted. The Appellants became satisfied, and I dare say, fraudulently so as against the applicant herein when they took permanent refuge under the orders. The orders, it is admitted, appeared of a final nature but by their nature and in substance they were required under the law to be confirmed in an inter partes hearing. This must have been the intention of the court which in its equitable exercise of its powers under Order L rule 1 and 2 aforementioned, or even under S 3A of the Civil Procedure Act if, the latter was found applicable, granted them while, it assumed, guarding the rights of each party in that matter before it. As I have said hereinabove, that court could not deliberately countenance any order that would tend to take away the basic rights of a citizen which rights, the court has always sworn to protect. And so, as per the provisions of Order L Rule 2, any party aggrieved of the ex parte orders made by that court under the rule, can proceed to apply to set the said orders aside. This is what the applicant has done under this application. And I am satisfied that the applicant has proved sufficient grounds in support thereof in that he was not served with the application to defend inter partes his rights in respect to the matter, the subject of the appeal, which is also happens to be the subject of the lower court decree.

The upshot of all this canvassing is that the orders made by Kasanga Mulwa – J. dated 12th April 2001, and which are by nature and substance and by my ruling ex parte, are hereby set aside with the effect that the Appellant herein, who was the applicant in respect to that application, has to serve the pleadings of that application so that the application can be heard inter partes. Under these circumstances, the applicant herein who is the decree holder in the court below may if they so wish, apply to strike out the appeal unless this court validates the same by orders resulting from the inter partes hearing of the Nairobi application whose file by the orders of the chief Justice, was sent to this court under Nairobi High Court Civil Appeal No. 148 of 2001 and registered here at Mombasa as HCC Appeal No. 117 of 2001.

The costs of this application go to the applicant herein.

Dated and Delivered at Mombasa this 11th Day of December, 2001.

D. A. ONYANCHA

JUDGE