



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI.315 OF 1997
BETWEEN

JOSEPH NGWELE NDUSWA APPLICANT

AND

1.AHMED ABUBAKER T/A BAJABER SERVICE STATION IST RESPONDENT

2.SHADRACK KASOA MWANGI 2ND RESPONDENT

**(Being an application for extension of time to serve
Notice of Appeal and deem the appeal filed against
the judgment at the High Court of Kenya at Nairobi
J.V. Juma J.) delivered on 11th June 1997**

in

H.C.C.C. NO. 3009 of 1989)

R U L I N G

On 11th June, 1997, the superior court (Juma, J.) gave judgment in favour of Joseph Ngwele Nduwa, (the applicant) in which a sum of Kshs.5000/= by way of general damages and Kshs.130/= as special damages was awarded to him in a claim based on negligence. The respondents, Ahmed Abubaker and Shadrack Kasoa Mwangi, were the defendants in that action to wit Nairobi High Court Civil Case No. 3009 of 1989. The applicant was dismayed by the paucity of the damages, and on 12th June, 1997, he lodged a notice of appeal declaring his intention of appealing against the whole decision.

Under rule 76(1) of the Court of Appeal Rules a notice of appeal must be served within seven days after its lodgment in court on all persons directly affected by the intended appeal. The applicant did not comply with the mandatory requirement of the aforesaid rule, and has now applied under rule 4 of the aforesaid rules for an order extending the time within which to serve the notice of appeal. Besides, the applicant also prays that the notice of appeal as well as a request for certified copies of proceedings dated 11th June, 1997 be deemed to have been properly filed.

The court, as was rightly submitted by Mr Mbigi for the applicant, has wide powers under rule 4 to extend the time within which to take an essential step in an appeal or intended appeal. The exercise of the powers is discretionary which discretion is judicial and therefore exercisable on the basis of evidence and sound legal principles.

The second prayer in the application is not clear to me. The court has power to extend the time within which to lodge an appeal or put another way to file a record of appeal. The time stipulated for filing a

record of appeal is 60 days from the date of lodging a notice of appeal. The period is prescribed in rule 81(1) of the court rules. The applicant has however cited rule 81(2) of the aforesaid rules as one of the provisions under which his application has been brought. As was rightly pointed out by Mr Nanji for the respondents, the sub-rule merely makes provision to the effect that an appellant or intending appellant may only rely on the proviso to rule 81(1) of the rules if he had made a request for copies of proceedings and judgment or ruling within the period therein prescribed. In our case the applicant appears to me to have requested for copies of proceedings and judgment within time. The letter bespeaking the proceedings and judgment was written on 11th June 1997 and lodged in court on 13th June, 1997 which was within the 30 days prescribed in rule 81(1), aforesaid. That having been so the applicant was in time, and if he was late in filing his appeal he would be entitled to rely on the proviso to that sub-rule.

As for the question of the applicant's failure to serve a notice of appeal on time, the evidence before me is that the notice of appeal was filed timeously. Mr Mbigi in his affidavit in support of the application has deponed that the failure to serve the notice of appeal was due to its loss in the hands of or misplacement by either the process server one John Mwaura or a Mombasa advocate by the name Mrs Ndeche. The explanation Mr Mbigi has given is that he gave a copy of the notice of appeal to the process server with instructions to serve on same on Mr Nanji, but in the event that he would not be able to do so (because there were processes he was in addition to serve on other people) he was to leave the notice of appeal with Mrs Ndeche, an advocate who like Mr Nanji is based in Mombasa, who would then serve the same on Mr Nanji.

Mr Mwaura did not serve the notice of appeal on Mr Nanji. According to Mr Mbigi, Mwaura left the notice of appeal with Mrs Ndeche a fact which she later denied. She however admitted having been left with other documents.

Neither John Mwaura nor Mrs Ndeche swore any affidavit to explain their respective positions in the matter. Mr Mbigi was content with whatever explanations he says he got from them. He deponed in his affidavit that as soon as he was unable to establish with any certainty what happened to the notice of appeal which was to be served on Mr Nanji he sent a copy by ordinary mail to him, which Mr Nanji concedes he received even though he laments that it was sent to him without any forwarding letter or any explanation as to the delay in serving it. The notice of appeal was posted and received sometime in September, 1997. This application was not filed until 15th December, 1997, along with a record of appeal. The delay in bringing the application has not been explained, nor did Mr Mbigi explain why he did not obtain affidavits from both Mwaura and Mrs Ndeche on the issue of service. It is conceded by Mr Mbigi that by September 1997 he was aware that Mr Nanji had not been served with the notice of appeal. That having been so, I would have expected him to move fast to regularize the position; but he didn't.

Mr Nanji lamented that the application appears to be lacking in bona fides because the applicant, in his view, has no respect for rules of procedure having also failed to send to him a draft decree for approval before being filed in court. The applicant did not explain that failure in any way at all.

The conduct of an applicant prior to and after the application for an extension of time under rule 4 is a relevant consideration in determining whether or not to extend the time. The applicant has not explained both the delay in bringing this application and the failure to get an affidavit from particularly Mr Mwaura on the issue of service. As matters stand at the moment we do not know what happened to the notice of appeal which was to be served on Mr Nanji. It was incumbent upon the applicant to explain the failure to serve the process as required by rules. A court would be slow to exercise its discretion in favour of extending time unless an applicant demonstrates that his mistake is excusable. A bare statement that a notice of appeal was misplaced is insufficient.

It is also not quite clear to me, if what Mr Mbigi said is anything to go by, why a process server who travelled all the way from Nairobi to Mombasa purposely to serve the notice of appeal among other processes, would prefer to leave it in another advocate's office instead of serving Mr Nanji himself whose chambers are in the same area with those of Mrs Ndeche.

I agree with Mr Nanji that the applicant has failed to put such material before me as would constrain

me to exercise my discretion under rule 4, above, in his favour. I cannot extend time on the basis of whims or sympathy.

Mr Mbigi submitted before me that the failure to serve the notice of appeal on time was his own and the problem should not be visited on the applicant who is innocent in the matter. That may well be so. However, a court must act on evidence. No evidence is before me to show that the failure to serve the process is excusable. It is not every mistake or error which an advocate commits which is excusable. As I stated earlier there must be a basis for excusing the mistake which basis is lacking here.

In the above circumstances I am not persuaded that this is a proper case in which I should exercise my discretion in favour of extending the time to serve a notice of appeal. I dismiss the application with costs.

Dated and delivered at Nairobi this 20th day of February 1998.

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR