



IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: SHAH, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 153 OF 1997
BETWEEN

JOSEPH KAHUGU WAKARI.....APPLICANT

AND

1. BARCLAYS BANK OF KENYA LIMITED

2. BARCLAYS BANK PLC.....RESPONDENTS

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mr. Justice M. Ole Keiwua) dated 30th June, 1995)

in

H.C.C.C. NO. 87 OF 1994)

R U L I N G

This is an application by way of a Notice of Motion brought under rules 4, 74, 80 and 82 of the Rules of this Court for leave to:

1. Extend time to file a notice of appeal, already filed on 10th July, 1995, until date of such filing;

2. file a record of appeal thereafter.

The application is supported by an affidavit sworn by Mr. Joseph Kahugu Wakari the applicant and also by an affidavit sworn by Mr. Harmesh Kumar Mahan, advocate for the applicant.

The history of the matter is that the applicant was desirous of appealing to this Court against the decision of the superior court (Ole Keiwua, J.) given on 30th day of June, 1995. The notice of appeal was filed, in time, on 10th July, 1995 but the letter bespeaking requisite copies of proceedings and judgment omitted request for a copy of proceedings and hence when a copy of the judgment was available no copy of proceedings was available. The court below only supplied what was requested by the applicant's advocates letter dated 7th July, 1995.

Mr. Mahan says that in requesting copy of judgment by his letter of 7th July, 1995 he inadvertently omitted the words "proceedings" and that when he received a copy of the judgment on 7th February, 1997, he realized his omission. He then applied for copy of the proceedings.

The applicant's advocates received copy of proceedings on 6th May, 1997. In view of the omission of the word "proceedings" the applicant had no benefit of the proviso to rule 81(1) of the Rules of this Court and hence the time to lodge the record of appeal had expired on or about 10th September, 1995. If assuming the copies of proceedings and judgment were applied for at the same time and if assuming the same were supplied on 7th February, 1997 time would not have run against the applicant until then. It was on 6th May, 1997 that a copy of proceedings was available to the applicant. This Mar.p liFcraatzieorn fwoars tfhiel edr eosnp on2d6etnht Juancec,e p1t9s9 7t.h e fact that the notice of appeal was filed in time. He accepts that there could well have been an oversight by Mr. Mahan When he omitted the word "proceedings" in his letter of 7th July, 1995. Mr. Frazer however complains about the delay in making this application. He says that it took Mr. Mahan 51 days, after 6th May, 1997 to file this application. He urged that total combined delay of some two and half years in the filing of the appeal is far too long to enable me to extend the time for lodging the record of appeal.

There is some justification in Mr. Frazer's complaint about the 51 day period taken by Mahan to apply for extension of time to lodge the record of appeal although I do not think I can attribute to Mr. Mahan the whole of the overall two and a half year delay in wishing to lodge the record of appeal. If Mr. Mahan had, as I pointed out earlier, applied for copies of proceedings and judgment at the same time and obtained the same in February, 1997 time would not have run against the applicant. As it is now, as a result of Mr. Mahan's oversight, there was a further delay from 7th February, 1997 to 6th May, 1997. That delay is understandable.

What seems to me to be the real bone of contention is the 51 day period taken in filing this application itself. It could have been filed earlier. Is the period of this delay so inordinately long as to disentitle the applicant to have the benefit of the exercise of my discretion to extend time as sought? Mr. Mahan sought to explain this delay by saying that he had difficulties in obtaining the file of the superior court when he wanted a certificate of delay signed. A certificate of delay, of course, is not required for filing an application such as is before me. Whilst 51 days is a long time to prepare and file such an application as is before me I am not prepared to say that it is so inordinately long as to disentitle the applicant to lodge an appeal which appeal he could have otherwise lodged as of right. Perhaps an advocate practicing in Nyeri may take a little longer than a Nairobi based advocate to file such an application but the delay per se is not such as to disentitle the applicant to exercise his right of appeal. Although the intended appeal does not raise any matter of any public importance the intended appeal is important to the applicant and I am not prepared to say that the intended appeal would be unarguable. I have not been told of what prejudice the respondents will suffer if I allow this application. The respondents will have every opportunity to contest the appeal.

Considering all the circumstances I allow this application and order that the record of appeal be lodged in the registry of this court within the next 21 days. That record will contain a copy of this ruling. The applicant will however pay costs of this application to the respondents which I assess at shs.6,000/= to save time. This sum must be paid within the next twenty one (21) days failing which execution may issue.

Dated and delivered at Nairobi this 6th day of February, 1998.

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR