REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: PALL J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI.107 OF 1994 (NAI. 49/94 UR)
BETWEEN

NIFREDA MUDOLA.....APPLICANT

AND

VIHIGA MILLERS & HIGHES.....RESPONDENT

(Application to strike out a Notice of Appeal in an intended Appeal from a judgment of the High Court at Nairobi (Mr Justice Mbogholi Msagha) dated 14th May, 1992

in

H.C.C.C. NO. 637 OF 1987)

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RULING

By this application brought on 4th February, 1998 under rules 4, and 53(3) and (4) of the Rules of this Court VIHIGA MILLERS & HIGHES LTD. (the applicant) has sought the following orders:-

(a)That the Court be pleased to extend time limited by the Rules for the filing of an application to restore the application dated 11th April, 1994 for interparte hearing and

(b)The said application when restored should be heard on merits.

Two material grounds upon which this application has been made are that (a) for reasons unknown to the applicant, its advocates m/s Khamati Minishi & Co. (the advocates) failed or neglected to appear before the Court on 8th February, 1995 to oppose the aforesaid application of 11th April, 1994 which was to strike out the notice of appeal. Consequently the application was heard exparte and the notice of appeal was struck out with costs and (b) for reasons unknown to the applicant the said advocates although duly instructed by the applicant to file an appeal from the judgment of the superior court failed to file the record of appeal in time or at all.

Incidentally, r.53 is not relevant. The application shall be treated as having been made under r.55 instead of rule 53.

This litigation arose from a road accident which took place as far back as on 20th April, 1985 when the respondent was travelling as a passenger in the applicant's vehicle registration No. KDX 003. The respondent suffered injuries as a result of the accident and sued the applicant for damages in High Court

Civil Case No.634 of 1987.

On 10th November, 1987 interlocutory judgment was entered against the applicant in default of its filing its defence.On 26th May, 1988, the said interlocutory judgment was, however, set aside. The case proceeded to trial and ultimately judgment was entered in favour of the respondent against the applicant on 14th May, 1992 for Shs.520,000/= as general damages and Shs.850/= special damages with costs. The applicant filed notice of appeal dated 22nd May, 1992 but failed to file the record of appeal in accordance with the Rules of this Court.

On the said 11th April, 1994, the respondent moved the Court to strike out the notice of appeal on the ground that the notice of appeal was served on her advocates out of time.The respondent's said application came for hearing before the Court, as I have already said, on 8th February, 1995, when the applicant's advocates failed to appear to oppose the same.Accordingly the notice of appeal was struck out with costs.Nothing happened thereafter for almost three years and ultimately on 4th February, 1998 the present application was filedO.n e Joab Omido, by his supporting affidavit, sworn on 2nd February 1998, has deponed that the notice of appeal was in fact served in time on the respondent's advocates; and that he had instructed his advocates to file the intended appeal but for reasons unknown to him the advocates failed to file it and that it was only after he was served with a notice to show cause against execution of the decree that he was informed by his present advocates m/s Amolo & Company that the notice of appeal was struck out on 8th February, 1995.

Mr. Anthony H. Khamati, advocate of m/s Khamati Minishi & Co. has deponed by his affidavit sworn on 2nd February, 1998 that he failed to appear before the Court on 8th February, 1995 because his clerk, who has not been named by him, omitted to insert the said hearing date in his diary and that as such his failure to appear was inadvertent.

Under rule 55(4) of the Rules if an application is disposed of one way or the other, exparte, the party in default if aggrieved, may apply to set aside the exparte order within 30 days of the date of such order. Here, as I have said, the applicant has brought this application almost three years after the date of the said order and now seeks an order for extension of time to regularise the late filing of the application. Under r.4 of the Rules I do have an unfettered discretion to extend time for doing any act authorised or required by the Rules on such terms as appear to me to be just.

Under rule 55(3) of the Rules I may set aside an exparte order and restore the said application of 11th April, 1994 for hearing, and rehear it, if I am satisfied that the applicant has shown that it or its counsel was prevented by any sufficient cause from appearing when the application was called on for hearing. The onus to show that is fairly and squarely on the applicant.

Mr. Khamati has not identified the clerk who failed to insert the hearing date in his diary. Nor has he produced his diary to show that the date had not been entered into it. He has not said a word as to why he could not file the appeal in time if he had been so instructed by his client. The notice of appeal was struck out after 33 months of its having been filed.

Joab Omido has blamed the advocates for failing to appear before the court when the application was called on for hearing. He has also blamed them for not filing the appeal in accordance with his instructions. One would have expected him to write and ask for an explanation from the advocates for their gross negligence. No such correspondence has been produced. All that he has said, on the other hand, is that "for the reasons unknown to him," the advocates failed to do the job for which they had been engaged. It was the applicant who was interested in the intended appeal, it should have followed up the matter and not left it entirely to its advocates. The notice of appeal was filed on 22nd May, 1992 and for years no appeal had been filed and yet there is nothing before me to show that the applicant ever enquired from its advocates if the intended appeal had been filed and if not why it had not been filed. It is a case of complete callousness on the part of the applicant. The applicant cannot get away by simply saying: "it is the mistake of my counsel and it should not be visited on me" I am not satisfied with the explanation given by Mr. Khamati to say that he was prevented by a sufficient excuse from appearing at the hearing of the said application. Nor am I satisfied that the applicant has been diligent enough in pursuing his

intended appeal to be entitled to my discretion. The applicant and its legal advisers have been guilty to such a degree of deliberate inaction that to give them further indulgence would be tantamount to travesty of justice.

The accident took place some 13 years ago. The judgment sought to be challenged was given more than 6 years ago. It is not the respondent's fault that all these years the applicant has been unable to mount an appeal. The notice of appeal was struck out more than three years ago. Under rule 55(4) an application to restore the application as a result of which the notice of appeal was struck out must have been made within 30 days of the decision of the court. No reasonable excuse has been given for this delay. I am not prepared to exercise my discretion in favour of the applicant. The application is accordingly dismissed with costs.

Dated and delivered this 17th day of November 998.

G.S. PALL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR