REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 295 OF 1998
BETWEEN

TONONOKA STEELS LIMITED .....APPLICANT

AND

THE EASTERN & SOUTHERN AFRICAN

TRADE AND DEVELOPMENT BANK (THE PTA BANK) .....RESPONDENT

(An application for extension of time to Lodge the Appeal against Ruling of the High Court of Kenya at Nairobi (Justice Ole-Keiwua, J.) dated 8th day of May, 1998

in

H.C.C.C. NO. 267 OF 1998)

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R U L I N G

This is an application by the unsuccessful plaintiff under rule 4 of the Rules of this Court (the Rules) for an extension of time for lodging the record of appeal to 19th November, 1998 against the ruling of the superior court (Ole- Keiwua, J.) given on May 8, 1998, whereby he refused the plaintiff's application for an injunction.

The applicant had originally filed an application being **CIVIL APPLICATION NO. 213 OF 1998** applying for extension of time to appeal. This application was filed on September 11, 1998 in the belief that the time for filing the appeal had already lapsed, time having started to run from the date of the ruling on May 8, 1998. This was clearly a mistaken view.

As time did not under the proviso to rule 81 of the Rules start running until the August 28, 1998 the time to prefer the appeal did not lapse until October 27, 1998. Accordingly, when the application came up for hearing, I dismissed the same as being premature and also observed that there had been no explanation for the delay in not filing the appeal within time. This provoked the present application which was filed on November 20, 1998 after the dismissal of the earlier application on November 4, 1998.

Applicant's counsel thought that he had all the documents necessary for filing the record of appeal by November 5, but once again according to his affidavit, it was a mistake as he had to extract and obtain certified copies of the decree and the order. Ultimately, he managed to file the present application on

November 20, 1998. He also depones that he lost a brother through a road accident on November 10, 1998 which kept him out of office for two weeks and some time was also taken up in pursuing the Application No. NAI. 119 being an application for a stay under rule 5(2)(b) of the Rules.All in all when the appeal was lodged on November 19, 1998, it was twenty-two days after the expiry of the period within which it should have been filed.

Mr. Muriithi for the respondent opposes the application primarily because, in his view, there was no bona fide mistake but simply non-compliance as distinguished from misreading or misconstruing the Rules of this Court and, once again, there was no explanation of the delay as to why the appeal was not filed within time. Finally, he contended that in saying that the earlier application had been dismissed only because it was premature, the applicant's counsel was not being truthful.

In these circumstances, it falls upon me to consider whether I should exercise my unfettered discretion in favour of the applicant. As has often been said, rule 4 confers upon the Court the widest measure of discretion and makes no distinction whatsoever between various classes of cases. But the first question is whether there was a bona fide mistake.I have no hesitation whatsoever in finding, as I do, that the failure to comply with the Rules in the instant case was a clear mistake on the part of the applicant's advocates.

As was said by Madan, J.A.(as he then was) in **BELINDA MURAI AND NINE OTHERS VS. AMOS WAINAINA IN CIVIL APPLICATION NO. NAI 9 OF 1978 (unreported):-**

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.***
>
> ***It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice."***

Mr. Muriithi suggested that when an advocate's mistake arises from carelessness or negligence the discretion should not be exercised. I think this proposition is too wide. I think that Mr. Muriithi's charge that the advocate concerned was negligent is one that can be questioned. He seemed to think that the applicant was deserving punishment and must be shut out for its advocate's negligence. Mistakes, after all, normally arise through negligence. There was clearly an oversight.

As I said in GRINDLAYS BANK INTERNATIONAL (K) LIMITED & ANOTHER VS. GEORGE BARBOUR, CIVIL APPLICATION NO. NAI. 257 OF 1995:-

> ***"Oversight has been defined to mean the omission or failure to see or notice; it is inadvertence.***
>
> ***Whilst ignorance may not be equated to mistake as was held by this court in BABER ALIBHAI MAWJI VS SULTAN HASHAM LALJI AND 2 OTHERS, CIVIL APPLICATION NO. NAI 236 OF 1992 (UNREPORTED) mistake may and normally does arise through negligence. Having carefully considered the submission made to me, I am satisfied that whatever it was, the omission to include a certified copy of the decree was a mistake."***

That being the view of the matter that commends itself to me, I have come to the clear conclusion that this case falls under the heading of those in which counsel's error is not necessarily a bar to his obtaining an extension of time.

This litigation is of recent origin and I am satisfied that the delay, if any, is not so inordinate as to disentitle the applicant to the exercise of the court's discretion. The delay involved is a short one. If it had been long, different considerations may apply. In this regard I quote what Lord Greene MR stated in GATTI VS. SHOESMITH (1939) 3 ALL ER 916 at 920:-

> ***"A mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors a misunderstanding which, to anyone who was reading the rule (emphasis added) without having the authorities in mind, might well have arisen. The period involved is a short one: it is only a matter of a few days and the appellant's solicitors within time, informed the respondent's solicitors by letter of their client's intention to appeal. This was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was entirely due to a misunderstanding."***

Finally, I am not persuaded that the applicant's counsel was less than truthful. Again, it was a mistake on his part, I think, in not referring to the absence of explanation upon which I had commented in my earlier ruling.

It is, of course, undesirable and indeed dangerous to enumerate all the cases in which the Court will exercise its discretion under rule 4 of the Rules. Broadly speaking, my view of the matter is that unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should, insofar as it may be reasonable, prefer, in the wider interests of justice, to have a case determined on its merits.

I have material before me on the basis of which I think this is a fit and proper case for exercising my discretion in favour of the applicant. As I said earlier, this is a case of mistake; the applicant has not been shown to be guilty of any delay.

For all the reasons above stated, I allow the application as prayed with costs of this application to abide the appeal.

Dated and delivered at Nairobi this 16th day of December, 1998.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR