



REPUBLIC OF KENYA

THE COURT OF APPEAL

AT NAIROBI

(CORAM PALL J.A. IN CHAMBERS)

CIVIL APPLICATION NO. NAI 406 OF 1996 (157/96 UR)

BETWEEN

DEVELOPMENT FINANCE OF KENYA LTD.....APPLICANT

AND

KABANSORA LIMITED.....1ST RESPONDENT

PETER KURIA WAWERU T/A THOWEN BAKERY.....2ND RESPONDENT

Being an application for extension of time to file Notice of Appeal out of time

in an intended Appeal from the Ruling of the High Court of Kenya at
Nairobi (Justice Akiwumi) dated 22nd February, 1990

in

H.C.C.C. NO.2167 OF 1988)

RULING

By this notice of motion brought under rule 4 of the Rules of this court the applicant Development Finance Company of Kenya Ltd has applied for leave of the court to file a fresh notice of appeal and record of appeal out of time in respect of the ruling dated 22.2.1990 of Akiwumi J as he then was in H.C.C.C. No.2167 of 1988.

A brief history of the matter is that Kibansora Ltd (the Plaintiff) obtained judgment against Peter Kuria Waweru t/a Thowen Bakery (the Defendant). In execution of the decree the plaintiff attached certain property alleged to be the property of the Defendant. The applicant claiming that the property actually belonged to a third party and not the defendant and that the applicant had a debenture over that property and thus had an equitable interest in it gave a notice of objection under O.21 v 53 of the Civil Procedure Rules. The registrar of the High Court notified the Plaintiff of the notice under r.54 and required it to intimate the court whether it proposed to proceed with the attachment and sale wholly or in part. In pursuance of r 56 the plaintiff informed the court that it proposed to proceed with the attachment, whereupon the court required the applicant by a notice in writing to take proceedings to establish its claim within 10 days of the receipt of that notice. The applicant admittedly failed to take those proceedings

within the prescribed time. Consequently under rule 58(1) the objection was deemed to have been waived. Consequently the execution of the warrant of attachment and sale was ordered on 6.12.1989 to proceed.

The applicant applied under O.44 r 1 for review of the said order. An application for review can be entertained on three grounds only namely (1) the discovery of a new and important matter which after due diligence was not within the knowledge of the applicant when the order was made or (2) there is error or mistake on the face of the record or (3) that there is any other sufficient reason. Mr Kamweru for the applicant conceded that the first two grounds were not available to the applicant. But he said there was a sufficient reason why the applicant failed to take proceedings to establish its claim in the prescribed time. However it is by now a law settled beyond doubt that the sufficient reason has to be analogous to the first mentioned two grounds. It cannot be an independent ground not analogous to the said two grounds. The learned judge of the superior court was therefore right in rejecting the application. If the applicant had sufficient ground to explain its delay in filing the objection proceedings, it could only be a ground to set aside the order of 6.12.1989 but it could not be a ground for review. The applicant did file Civil Appeal No.2 of 1995 which came up for hearing on 29.11.1996 and was struck out as being incompetent for want of a certified copy of the order appealed against.

Now the applicant has applied for the orders for extension of time as hereinabove mentioned.

This court has an unfettered discretion under rule 4 of the Court of Appeal Rules (the Rules) to extend the time limited by the Rules for the doing of any act authorised or required by the Rules. It, however is a judicial discretion and therefore the orders sought by the applicant can be granted only if this court is satisfied that in the circumstances of this case it would be just to do so and it has to be just to both sides not only to the applicant but to the respondent as well.

For a start the intended appeal does not appear to be an arguable appeal. On the other hand I can only say that in view of the fact that the applicant could not bring itself within the provisions of Order 44 r 1, it would be, if the applicant is allowed to file the appeal out of time, a frivolous appeal which cannot hold any reasonable prospect of success.

Moreover, the Plaintiff obtained judgment on 2nd December, 1988 more than 8 years ago and it would be unjust to keep the Plaintiff back any longer from the fruits of the judgment in its favour. Also the applicant has not satisfied me that it had a good excuse for not complying with the very clear Rules of this Court in the first instance by filing an incompetent appeal without including a certified copy of the order appealed from as required by rule 85(1)(h) of the Rules. It is in the interest of justice that contentious litigation should be brought to end as soon as possible because as the adage goes justice delayed is justice denied. For these reasons I refuse to exercise my discretion in favour of the applicant and dismiss the notice of motion with costs.

Dated and delivered at Nairobi this 30th day of January 1997

G. S. PALL

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR