



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 404 OF 1996
BETWEEN

JOB OKUNA OYUGI APPLICANT

AND

L'RESH HOLDINGS LIMITED 1ST RESPONDENT

PARK ESTATE LIMITED 2ND RESPONDENT

BULLION BANK LIMITED 3RD RESPONDENT

PLAN CUSTODY LIMITED 4TH RESPONDENT

**(Application for leave to file an Appeal out of time in an
intended Appeal from the Ruling of the High Court of
Kenya at Nairobi (Hon. Aaron Ringera, J.) dated the 5th
day of November, 1996**

in

H.C.C.C. NO. 2068 OF 1996)

RULING

I have before me a motion on notice expressed to be brought under rule 4 of the Court of Appeal Rules (the Rules) by Mr. Owino for leave to lodge a notice of appeal out of time. It arises out of an application made by the applicant for injunction to restrain a lender (3rd respondent) from exercising its power of sale not by the chargor but by the chargor's predecessor in title on the ground that the chargor had obtained title to the charged property by fraud. The application was heard by the superior court (Ringera, J. as he then was) who, by his ruling dated and delivered on November 5, 1996, granted an inter-locutory injunction on conditions that:-

(a)The applicant files a written undertaking as to damages within 14 days; and

(b)The said undertaking is fortified by an insurer's bond of an amount not exceeding shillings five (5) million to be filed in court within the same period; and

(c)The applicant deposits in court a sum of Kshs.3,646,877 within 14 days which amount will be applied as directed by the court on application after the conclusion of the suit.

The applicant was dissatisfied and within a matter of days moved the superior court by a notice of motion dated November 8, 1996 for a review which was dismissed. The injunction was discharged as the superior court held that condition (c) aforesaid had not been complied with. Time spent to achieve compliance of conditions rendered the notice of appeal out of time. Hence, this application.

The application is supported by an affidavit sworn by Mr. Steven Owino, Advocate, having the conduct of this matter on behalf of the applicant here and before the superior court. In one of the paragraphs he depones as follows:

"10.THAT the omission to file a notice of appeal on time was due to the attempt of the applicant to try and first meet the conditions upon which the injunction of 5/10/96 was pegged."

In these circumstances one comes to the fundamental issue for decision in this case whether the Court should now exercise its discretion under **rule 4** of the Rules and grant the enlargement of time sought.

Rule 4 under which the application was made reads thus:-

"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference, to that time as extended."

The Court has a wide discretion in these matters. There is no doubt that the terms of rule 4 are sufficiently wide to confer a discretion on the Court to extend the time even where (as here) the time limited for filing the notice of appeal has already expired. But this discretion, howsoever wide it may be, is a discretion to be exercised judicially having regard to the particular circumstances of each case. I consider that a passage of the opinion of the Privy Council in *Ratman v. Cumarasamy*, [1964] 3 A11 E.R. 933, at p.935, correctly sets out the principle involved:

"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

In the present case, there is no serious suggestion that there was any delay in bringing this application after the application for review had been dismissed. But Mr. Sheth for the third and fourth respondents contended that the alleged omission to file the notice of appeal relied upon in support of the application cannot be classified by any standards as a mistake. Nor does it appear to me to be the result of any inadvertence or accident.

Notwithstanding the amendment to **rule 4** made in 1984, extension of time is not automatic; it is a matter of discretion vested in the Court. But I am unable to find any material on which I can exercise my discretion. If I was satisfied (which I am not) that there was a mistake, inadvertence or accident I may have taken a different or another view of this application but it appears to me that the omission to file the notice of appeal was based on the hope that the conditions of injunction would be met. The omission was a deliberate act on the part of the applicant. That being the view of the matter that commends itself to me, I have come to the conclusion that this does not appear to me to be a fit or proper case for the exercise of my discretion in favour of the applicant.

I may add that I am not, at this stage, required to assess or take the merit of the appeal into account: see *Attorney General vs. Theuri* (1982-88) 1 KAR 929. This is admittedly a land matter but Mr. Owino for the applicant stated that it was not the only property owned by the applicant. I must confess to some

difficulty in appreciating the omission to file the notice of appeal. As was said by Musoke, J.A. (as he then was) in Njagi vs. Munyiri [1975] E.A. 179 at 180:

"A notice of appeal under the Rules is nothing more than a formal written information to the court of an intention to appeal, and it may be withdrawn at any time. It is normally lodged as a matter of course, on payment of a small fee, by any person wishing to appeal against a decision of a superior court, irrespective of whether the intended appeal has merits or not, and no documents of the superior court are required at this stage."

I fully agree with these observations. Accordingly and, for the reasons above stated, I am disinclined to exercise my discretion to grant this application. It is dismissed with costs.

Dated and delivered at Nairobi this 21st day of January, 1997.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR