



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: PALL JA. IN CHAMBERS)
CIVIL APPLICATION NO. NAI 182 OF 1994
BETWEEN

NJOROGE THINDI.....APPLICANT

AND

HANNINGTON ODUORI.....RESPONDENT

(Application for extension of time to file notice of appeal
out of time in an intended appeal from the order of the
High Court of Kenya at Nairobi (Mr. Justice Ole Keiwua)
undated in H.C.C.C. NO. 1140 OF 1990)

RULING

The applicant by a notice of motion brought under rule 4 of the Rules of this court for an order for extension of time to file notice of appeal against an undated ruling of superior court (Ole Keiwua J.) on the ground that the applicant was prevented from filing the requisite notice of appeal within the prescribed time. In the supporting affidavit he has said that upon receipt of summons to enter appearance he instructed m/s Mulwa & Mulwa advocates to file defence in High Court Civil Case No.1140 of 1990. Despite his instructions the said advocates entered appearance but did not file the defence. Consequently exparte judgment was entered in default of filing the defence and the suit was set down for assessment of damages arising out of an accident subject matter of that suit. Judgment was entered against him for Shs.344,000/=. Thereupon he applied for setting aside the said judgment but his application was dismissed. He has further said that the Judge of the superior court said that he would deliver his ruling on 19.4.1994 but the ruling was not ready on that date and therefore the Judge said that he would deliver his ruling on notice. Neither his advocates nor he received any intimation thereafter of the date of the ruling and ultimately on checking at the registry he came to know that the ruling had been delivered at the date not shown on the ruling. For that reason he has been unable to file the notice of appeal.

The applicant, it appears, has not put full facts before the court. He blames his advocate for not filing the defence. It was his duty to find out from his advocates within a reasonable period of time whether the defence had been filed or not. Apart from instructing his advocates to file the defence, he did nothing for a period of three years. The suit was against him and not his advocates. There is no correspondence to show that he ever wrote or otherwise protested to his previous advocates for not filing the defence and allowing exparte judgment on liability to be entered against him.

Mr Oyatsi for the respondent has stated in his affidavit in opposition of the motion that judgment on liability was entered on 14 May, 1990. When the suit came up for assessment of damages the applicant was represented by an advocate who fully participated in the formal proof. Infact, he said, he made arrangements for the respondent to be examined by the applicant's doctor twice which could not be without the applicant's knowledge. Probably he should be the one who paid the doctor's fee for that examination and thereafter his counsel made written submissions on the quantum of damages. Judgment on quantum of damages was pronounced on 3 August, 1993. The applicant being dissatisfied with that filed a notice of appeal on 5th August, 1993. But he never ever thereafter filed any appeal in pursuance of that notice.

Having participated actively in the hearing on the assessment issue and having failed to apply to set aside the judgment on liability before participating in the hearing on quantum of damages, on 17 December, 1993, the applicant applied through his present advocates more than 31/2 years after the initial judgment on liability had been entered and more than 4 months after the judgment on quantum of damages had been pronounced to set aside the said judgments. The said application was brought by way of chamber summons under O.9A r 10 of the Civil Procedure Rules. The applicant's advocates ought to have known that the applicant having participated in the hearing of the suit could not avail of the provisions of Order 9A r 10. The said application was dismissed according to Mr Oyatsi on 11.2.1994 on the ground of non attendance by the applicant and also that the application did not lie in view of the intended appeal. Undeterred by the said dismissal the applicant filed yet another application to set aside the said last ruling of 11.2.1994. The learned judge of the superior court heard that application but did not deliver the ruling in the presence of the parties.

The applicant has not given any reason why he failed to file his appeal in pursuance of the notice of appeal filed on 5th August, 1993.

On 26th October, 1994 at the request of both sides this application was stood over generally. On 28 November, 1994 the application was stood over generally as the applicant's advocate failed to appear. Again on 16 March, 1995 and yet again on 26th June, 1995 at the request of both sides the application did not proceed to hearing and was stood over generally.

When on 9 December, 1996 the application came before me Mr Nyakundi for the applicant applied for adjournment on the ground that he had not seen the applicant for a long time although he had been writing letters to him. He did not know why the applicant had failed to see him. He added that it could be that he had changed his postal address. I refused to grant his request for adjournment.

The applicant does not say as to when either he or his advocate came to know that his last application had been dismissed by Ole Keiwua J.

The applicant's conduct has been tantamount to an abuse of the process of the court. He had filed the notice of appeal against the judgment of the superior court. He did not pursue it. He instead having participated in the hearing on assessment of damages applied to set aside the judgment under Order IXA r 10 which he could not have availed as the judgment was no longer an *ex parte* judgment. His application was dismissed for non attendance by him or his advocate. He filed yet another application set aside that judgment which was again dismissed.

The business in the highest court of the Republic must be taken seriously by the parties and their legal advisers. The applicant's waywardness compels me to dismiss his notice of motion with costs. I however draw the applicant's attention to rule 54(1)(b) of the Rules of this court which gives him the right to apply to full court for a reference against this ruling.

Dated and delivered at Nairobi this 16th day of January, 1997.

G. S. PALL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR