

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: BOSIRE, AG. J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 392 OF 1996 (147/96 UR)

BETWEEN

SOBHAG D. SHAH APPLICANT

AND

RELIANCE BANK LIMITED RESPONDENT

RULING

The applicant, Sobhag D. Shah applies under rule 4 of the Rules of this Court for leave to file and serve a notice of appeal against the ruling and judgment of the superior court (Wambiliyanga, J.), dated 13th September, 1996, but allegedly delivered on either 13th or 14th August, 1996, in its Civil Case No. 288 of 1995.

The applicant had filed an earlier notice which bore the date 28th August, 1996 and pursuant to that notice, the applicant, thereafter, brought an application before this Court for stay of execution under rule 5(2)(b), but the application was struck out for being incompetent the notice of appeal having borne a date which by computation, showed that it had been filed a day out of time.

In the present application, the applicant contends that the date on that earlier notice was erroneously shown to be 28th August, 1996, because the correct date of filing was 27th August, 1996. Consequently the notice was in time. The applicant, also, contends in the alternative, that since there exists a confusion as to the date the ruling against which an appeal is intended was delivered, the applicant's computation of the time within which to lodge a notice of appeal was compromised and, hence the one day delay in filing the notice.

The applicant's third argument is that the copy of the decree which the respondent served on him bears 14th August, 1996 as the date of judgment. Consequently, if that date is taken to be the actual date judgment was entered against him, then his notice of appeal dated 28th August, 1996 was in time.

Mr. Katwa, who urged the application on behalf of the applicant was at pains to explain his firm's frustration in its vain attempt to demonstrate to the superior court that the ruling dated 13th September, 1996, should actually bear the date either 13th or 14th August, 1996. He urged me to bear that in mind in exercising my judicial discretion in the application. Mr. Keyonzo for the respondent, did not think the applicant had sufficiently explained the delay in filing the notice of appeal. In his view, there is no error or ambiguity on the date of judgment.

Rule 4, above, does not include grounds which a court must consider before granting or refusing to extend time. The court is left with a discretion in the matter. The discretion being judicial, the court must consider all relevant facts and circumstances of the case before coming to a decision one way or the other. What are the circumstances in this matter?

The applicant was one of the three defendants in the High Court Civil Suit, above, in which the respondent herein, Reliance Bank Limited, as the plaintiff made a liquidated claim of KShs.4,354,382.30, against all the defendants jointly and severally. After the defendants entered appearance the plaintiff successfully applied for summary judgment under Order 35 rules 1 and 2 of the Civil Procedure Rules which application was argued, inter partes, and ruling was reserved to be delivered on 23rd July, 1996. It

was, however, not delivered on that day and there is a dispute as to when it was delivered. The applicant contends that although the ruling in the record of the superior court is dated 13th September, 1996, its actual date of delivery was in fact either 13th or 14th August, 1996. The respondent's counsel, Mr. Keyonzo, was of the view that the date of judgment is clear and no dispute arises.

The power of the court to extend time is exercised when the date from which the computation of time for the doing of any act or taking any step on record is ascertainable. The time prescribed under rule 74 for filing a notice of appeal is 14 days from the date of the judgment or ruling against which an appeal is intended. If that date is uncertain it may not be possible to say whether or not the time limited for the filing of a notice of appeal has expired. This Court may not properly speculate as to when the judgment or order against which an appeal is intended was delivered or made. The power under rule 4 above is exercised on the assumption that the date of judgment or order is certain. Where it is in dispute as here, only the court that gave the judgment or made the order may ascertain it and thereby pave the way for the taking of any essential step or action by either party.

In this matter the applicant is absolutely certain that the ruling intended to be appealed against was not given on 13th September, 1996. Nor was it given on 23rd July, 1996, when according to the notes of the judge, the ruling was supposed to be delivered. It is also uncertain whether it was given on 13th or 14th August, 1996. A copy of the decree on record is unhelpful in that respect as it bears two different dates, the first one being 14th August, 1996, and the second one, 21st August, 1996. In those circumstances I am unable to discern when the ruling against which an appeal is intended was delivered with the result that I am unable to exercise my discretion in favour of extending time within which to file a notice of appeal. I dismiss the application but make no order as to costs realizing that the applicant's problems appear to have been compounded by the superior court's incomprehensible record with regard to the date when the ruling giving the respondent judgment was delivered.

Dated and delivered at Nairobi this 13th day of February, 1997.

S. E. O. BOSIRE

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR