



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: OMOLO, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 77 OF 1997 (35/97 UR)

BETWEEN

KENYA CONSUMERS ORGANIZATION

MIKE MILLS APPLICANTS

AND

THE MINISTER FOR TRANSPORT & COMMUNICATIONS

THE MINISTER FOR FINANCE

KENYA POSTS & TELECOMMUNICATIONS CORPORATION RESPONDENTS

(Application for extension of time to lodge appeal against the
orders of the High Court of Kenya at Nairobi (Bosire J &
Githinji J) dated 5th October, 1995
in
H.C.MISC.C. NO. 438 OF 1995)

R U L I N G

Since late March 1995, the Kenya Consumers Organization, the 1st applicant, and Mike Mills, the 2nd applicant, have engaged the Kenya Posts & Telecommunications Corporation, the 3rd respondent, in a never-ending and see-saw battle on whether the 3rd respondent should be allowed to increase certain of its charges levied for postal services. The 1st applicant claims it is suing for itself and on behalf of its members and all other consumers of postal services in Kenya, while the 2nd applicant claims he is suing on his own behalf and on behalf of all the members of Karen-Langata District Association of which he is the acting Chairman. On the 14th June, 1995, the two applicants applied to the High Court under Order 53 Rule 3 of the Civil Procedure (Revised) Rules for judicial review and they sought from the High Court an order of certiorari to remove into that court and quash a decision of the Minister for Transport & Communications approving major increases in tariffs for postal services and which increases were to take effect from the 2nd May, 1995. The motion for judicial review was heard by two judges of the High Court and on the 5th October, 1995, they dismissed that motion with costs. On the 6th October, 1995, the applicants lodged their notice of appeal and on the 18th December, 1996, they lodged the appeal itself, the latter being Civil Appeal No. 276 of 1996. That appeal was on the 15th April, 1997, struck with costs to the 3rd respondent as the same was held to have been lodged out of time and without leave.

Undeterred by that set-back, the applicants have once again returned to the court, this time under Rule 4 of the Court's Rules and their notice of motion lodged in this Court on the 17th April, 1997, two days after their previous appeal was struck out, asks me to exercise my discretion in their favour and extend for them the time within which to lodge a fresh notice of appeal and a fresh record of appeal. It is agreed on all sides that under Rule 4, my discretion to extend time in the manner sought is an unfettered one but that like all judicial discretion, it must be exercised upon reason and principle and not upon caprice or personal opinion. Mr. Inamdar for the 3rd respondent strenuously opposed the application and he did so on two grounds. The first ground urged by Mr. Inamdar was that the initial delay which led to the original appeal being struck out has not been explained satisfactorily. Let me say at once that I wholly agree with Mr. Inamdar that the rules of procedure are there to be obeyed and where there has been disobedience, no matter how little, there must be some explanation for that disobedience. That is not to say that the party in default has to give a sufficient cause for the delay; that requirement was removed a long way back. But as the matter is to be dealt with on discretion, the party in default must place before the court some material upon which the discretion can be exercised.

As I have said, the orders against which the applicants wish to appeal were made on the 5th October, 1995 and on the following day, they lodged their notice of appeal. They took some twelve days before bespeaking the proceedings from the superior court and that was part of the delay which led to their appeal being filed out of time and the subsequent striking out. I must, however, make a distinction here. When the court is considering the issue of whether or not an appeal has been filed in time, the length of the delay is wholly irrelevant. The delay may be for only one day and even if it were to be satisfactorily explained, that would not stop the court from striking out the appeal as having been filed out of time and without leave. But in this application, I am considering the issue of whether the twelve days constituted such an inordinate delay as would disentitle the applicants to the exercise of my discretion in their favour. I think not; it is to be remembered that the period set for bespeaking the proceedings is thirty days and of those thirty days, the applicant wasted only about twelve. This is not such a delay as would disentitle them to the exercise of the discretion in their favour. The longer delay was from the 8th October, 1996 when they were informed that the proceedings were ready, to the 4th November, 1996 when they did pay for the same. The explanation which the applicants give for this delay is wholly unacceptable, but the question I must ask myself is this: Is that delay so inordinate that it should disentitle them to the exercise of my discretion? Put another way, suppose Mr. Kibara for the applicants had not made a mistake and had come to the court to ask for leave to file their appeal out of time, would they have been refused leave? For my part, I do not think so and in that connection, I would respectfully repeat what was said by Lakha, JA in **GRINDALYS BANK INTERNATIONAL (K) LTD & ANOTHER VS GEORGE BARB OUR**, Civil Application NO. NAI 257 of 1995 (Unreported). There, the learned Judge said:-

"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."

And speaking on the same point, Shah, JA stated as follows in **JEREMIAH KARIUKI VS NATIONAL BANK OF KENYA LTD.**, Civil Application NO. NAI 138 of 1995 (Unreported):-

"He is exercising his undoubted statutory right of appeal which is his first as well as last appeal and my own view is that so long as an applicant is not dilatory and is seeking to exercise his statutory right to be heard on a proper appeal and so long as he has an arguable appeal, he ought not to be shut out."

These views broadly agree with those I expressed in **GICHUHI KIMIRA VS SAMUEL NGUNU KIMOTHO & ANOTHER**, Civil Application NO. NAI 243 of 1995 (Unreported) where I said:-

"... I am aware that litigation ought to come to an end and that it is unfair that one case should

hang over the heads of parties indefinitely. But that consideration must be weighed against the wider interests of justice, namely that where possible cases should be brought to a close after a hearing on the merits"

Looked at in the light of these observations, I do not think that the delay between 8th October, 1996 when the applicants were informed that the proceedings were ready and the 4th November, 1996 when they actually paid for the same, is such an inordinate delay as would deprive the applicants of the exercise of my discretion. I have said that the reason the applicants have given in explanation of the delay is not acceptable, but that, in my view is not the end of the matter.

The court is still entitled to look at the nature of the delay itself and if satisfied that the same is not inordinate, the court is still entitled to exercise its discretion in favour of an applicant. In this case, it is to be remembered that the delay was punished when the appeal was struck out and thereafter the applicants acted with reasonable promptitude.

The other ground urged by Mr. Inamdar in opposition to the application is that it would be unjust to the 3rd respondent to grant the orders sought. The increases to the postal tariffs were to come into force on the 2nd May, 1995. Since then the 3rd respondent has not been able to effect the increases and it is alleged the 3rd respondent is losing KShs. 3 million daily. If I extend the time, the 3rd respondent will continue to suffer that loss and the applicants will not be able to compensate the 3rd respondent. Costs in the High Court have been taxed at KShs.834,908.00; those costs have not been paid. The costs of the appeal which was struck out are likely to be taxed at Kshs.500,000.00. There is nothing to show that the applicants will be in a position to pay these costs, let alone the daily loss the 3rd respondent says it is suffering. It would be accordingly unjust for me to lengthen this litigation any further.

I think the answer to these contentions must be that the applicants have a right of appeal and these cannot be valid reasons for taking away that right from them. It is undoubtedly true that the 3rd respondent has the judgment of the High Court in its favour, but in this application, I am not dealing with the issue of whether or not that judgment ought to be enforced. That is a totally separate matter and if and when it comes up for consideration, I have no doubt it will be dealt with according to its merits. Again it is true that the orders sought to be challenged on appeal were made way back in 1995, but thereafter the proceedings were not made available to the applicants until the 8th October, 1996; the applicants cannot be blamed for that. The appeal was filed on the 18th December, 1996 and it was struck out on the 15th April, 1997. It was struck out on the application of the 3rd respondent. That application was not filed in court until the 8th April, 1997; that was just about one week before the hearing of the appeal. The application to strike out could have been filed much earlier. I think I have said enough to show that I am of the view the orders sought by the applicants ought to be granted. I have not found it necessary to refer to the authorities cited by Mr. Inamdar; this is not out of disrespect to his industry and research. It is just that we have sufficient authorities of our own on the subject and I see no occasion for seeking elucidation from elsewhere.

My decision on the motion before me shall be that the motion is allowed and the notice of appeal must be filed within three days from the date hereof. The record of appeal must be lodged within fourteen days from the date of filing the notice of appeal. The costs of the application shall be in the intended appeal. Those shall be my orders.

Dated and delivered at Nairobi this 25th day of April, 1997.

R. S. C. OMOLO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR