



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 136 of 1996

MEGHJI VELJI CHHAYA APPLICANT

AND

- 1. THE ATTORNEY GENERAL**
- 2. SHIBWECHE WILFRED**
- 3. OGAIDA**
- 4. MWAI RESPONDENTS**

(Application for extension of time to serve a Notice of Appeal out of time in an intended appeal from a Ruling of the High Court of Kenya at Nairobi (Butler-Sloss, J.) dated 2/3/90

In

H.C.C.C. NO. 4025 OF 1983)

RULING OF THE COURT:

This reference from the decision of a single judge of this court (Kwach, JA) is before us pursuant to the provisions of rule 54(1) (b) of the rules of this court (the Rules). On 7th February, 1997 the learned single judge ruled that an omission by an advocate's clerk to enter a hearing date in the advocates diary may amount to sufficient cause within the meaning of rule 55(3) of the Rules to enable him to order reinstatement of the application which stood dismissed pursuant to the provisions of rule 55(1) of the Rules.

The original application was filed by Mr Hira on 24th April, 1996 whereby the applicant had sought extension of time to treat a notice of appeal filed late as having been filed in time. When that application came up for hearing before the learned single judge it was dismissed as the applicant or his counsel were

not present. That was on 2nd December, 1996. Mr Hira fortuitously came to know about the dismissal on the same day and he filed the reinstatement application on 3rd December, 1996. The reason Mr Hira advanced for non-attendance on 2nd December, 1996 was that his clerk having been present at the fixing of the hearing date forgot to note it down in Mr Hira's diary.

Mr Oyalo who appeared for the respondents at the hearing of the reinstatement application whilst not challenging the facts as deposed to by Mr Hira, objected to the application on the ground that the omission by an advocate's clerk to enter the hearing date in the diary of the advocate, was not a sufficient cause to enable the learned single judge to exercise his discretion to reinstate the application. Rule 55(3) of the Rules reads:

“(3) where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called for hearing.”

Therefore the discretion of the single judge is to be exercised provided there was any sufficient cause preventing the applicant (in this instance) from appearing when the application was called on for hearing.

Mr Oyalo for the referee sought the discharge of the order of the learned single judge on the basis that there was not any sufficient cause shown to the learned single judge to enable him to exercise such discretion.

What the learned single judge said was that it is not uncommon for an advocate's clerk to fail to enter hearing dates in his advocate's diary and if that happens to be the reason for non-attendance at the hearing, there is sufficient cause shown for reinstatement. The learned single judge, having accepted the reason advanced by Mr Hira for non-attendance, concluded that he had before him a sufficient cause to enable him to exercise his discretion in favour of the applicant.

We revert to Mr Oyalo's arguments before us. In support of his arguments he cited at least 5 authorities of this court and its predecessor on what constitutes, or does not, sufficient reason for enlargement of time under rule 4 of the Rules prior to its amendment by legal Notice No 14 of 1984. We wish to say at the outset that phrase “sufficient reason” is not synonymous with the phrase “any sufficient cause”. The word ‘any’ in our view expands the word “sufficient” to mean just any particular cause which may in a given set of circumstances, be sufficient. The word “cause” is generally used in a sense to denote that which produces an effect, that which gives rise to any action, phenomenon or condition whereas the word reason denotes a statement of some fact (real or alleged) employed as an argument to justify or condemn some act, prove or disprove some assertion, idea or belief. It can be seen therefore that the words “cause” and “reason” have different connotations.

All the authorities relied upon by Mr Oyalo turned on the effect of the phrase “sufficient reason”. In the case of Kiboro v Posts & Telecommunications Corporation [1974] EA 155 the predecessor of this court held inter alia, that, misreading of a simple rule by a clerk or advocate is not a “sufficient reason” within the meaning of old rule 4 of the Rules. Mustafa JA said that even a cursory look at 0.41 rule 1A of the Civil Procedure Rules makes it clear that it applies only to appeals to the High Court and the misreading thereof did not constitute “sufficient reason”.

In the case of Parbat Keshnrwal v Abdul Ismail Nurani [1976] KLR 80, the predecessor of this court held that the non-signing of the memorandum of appeal of counsel for the appellant and the later condonation thereof by advocate after he became aware of the error was not a “sufficient reason” to allow extension of time under the old rule 4.

In the case of Abdul Aziz Ngoma v Mungai Mathayo & Another [1976] KLR 61 the predecessor of this court held that late service of the memorandum and record of appeal for no apparent reason did not justify the grant of extension of time as there was no “sufficient reason” shown for grant of such extension of time, even if the other side suffered no prejudice.

It can be seen straight away that the above cases turned on the mistake of law by advocate or clerk in the understanding or application of a simple rule and which did not amount to “sufficient reason” why the simple procedure provided to be followed was not adhered to. The present case is on a very different footing. Mr Hira was not aware of the hearing date as his clerk had not entered the date in his diary. There was no question of misreading of a simple rule.

Mr Oyalo placed great reliance on the case of Menya vs McCraes Ltd [1978] KLR 97 (a decision of a single judge of this court). In that case the advocate who had advised his client that “an appeal was desirable” sought instructions to file a notice of appeal which instruction although given in good time by a letter were not followed up as the letter which had been misfiled, had not been brought to the attention of the advocate. A notice of appeal can be filed without instructions and requires no skill in the drawing of it. What the learned single judge ruled in that case was that the misfiling of the letter of instructions was not “a sufficient reason” to justify the non-filing of a notice of appeal. Mr Oyalo argued that like in the case of the law clerk in the Menya case, Mr Hira’s clerk’s omission to enter the hearing date in the diary was “no sufficient cause.” Mr Oyalo’s argument, is in our view, erroneous. In the reference before us, Mr Hira’s clerk merely forgot to make a diary entry (which fact was not challenged) and we think that the learned single judge correctly treated that factor as a “sufficient cause” in the given circumstances of the case, to enable him to exercise the undoubted discretion that he had.

But the issue of what amounts to a “sufficient reason” has not stood still. It has been given a wider meaning. In the case of Cassam & Another vs Sachania & Another [1982-88]1 KAR 24 Madan JA (as he then was), ruled as a single judge of this court that even a legal error on the part of a legal adviser may help to “build up” sufficient reason for the extension of time under the old rule 4 of the Rules. If such be the case, then the slip on the part of Mr Hira’s clerk would certainly, within the context of “any sufficient cause” more than qualify as sufficient cause for the extension of time. We think the learned single judge came to a correct conclusion and would therefore dismiss this reference with costs.

Dated and delivered at Nairobi this 11th day of June, 1997.

RSC OMOLO

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JUDGE OF APPEAL

AM AKIWUMI

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JUDGE OF APPEAL

AB SHAH

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JUDGE OF APPEAL