



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, LAKHA & PALL J.J.A)

CIVIL APPLICATION NO. NAI.178 OF 1997

BETWEEN

KENYA COMMERCIAL FINANCE COMPANY LIMITED.....APPLICANT

AND

MULJI LALJI PINDOLIA.....RESPONDENT

(Application to strike out a Notice of Appeal in an intended
appeal from a judgment of the High Court of Kenya at Nairobi

(Justice Mwera) dated 4th July 1991

in

H.C.C.C. NO. 131 OF 1985

RULING OF THE COURT

By a notice of motion dated 30 June, 1997 filed on 15 July, 1997 Kenya Commercial Finance Company Ltd. (the applicant) has moved the court for an order that the notice of appeal filed by Mulji Lalji Pindolia (the respondent) on 13th July, 1991 be struck out. However the notice of appeal in question was in fact lodged on 17th July, 1991 and not 13th July, 1991. We amend the motion accordingly. One Isaac Lenaola, who has neither identified himself nor disclosed his capacity to make the said affidavit, but whom we know as an advocate of the High Court who has been obviously instructed by the applicant in the matter of this application before us, has by his affidavit sworn on 1st July, 1997 in support of the application stated that m/s Oraro & Rachier advocates who were then acting for the applicant were served with the notice of appeal in July 1991. He has further stated that no application for extension of time limited by the Court of Appeal Rules (the Rules) for filing the appeal has been made nor any appeal filed. He has also alleged that to his knowledge the respondent had never applied for copies of the proceedings. Before we proceed further with the motion we wish to stress that Mr Lenaola's affidavit is lacking as we have already pointed out and it also fails to disclose the source of his information and belief of the aforesaid allegations of fact made in his affidavit. However as Mr Havelock has not raised any objection to the validity of that affidavit, we regard it as a mere irregularity.

So far as the application for copies of the proceedings is concerned, the respondent has annexed to his replying affidavit, a copy of a letter dated 17th July, 1991 written to the Deputy Registrar of the High Court requesting for certified copies of the proceedings. A copy of that letter was marked for m/s Hamilton Harrison & Mathews who were then acting for the present applicant. We are therefore satisfied that the respondent did apply in good time for the said copies in accordance with r.81 of the Rules.

The respondent has stated that he is still waiting for copies of proceedings and the judgment which the High Court had not yet produced and delivered to him.

The other annexures to the respondent's said affidavit show that the respondent followed up the letter of 17th July, 1991 with another letter dated 1st August, 1991 addressed to the Deputy Registrar of the High Court for uncertified copies of the proceedings and certified copy of the judgment. Since then, the respondent has failed to disclose, if ever any reminder was written by him to the High Court or other efforts were made to expeditiously obtain the said documents.

Mr Havelock opposing the application on behalf of the respondent has argued that under rule 80, under which the present application had been made by the applicant, the applicant could rely only on the grounds set out in the rule itself in order to succeed in its application to strike out the notice of appeal. Rule 80 of our Rules reads:-

"80 A person affected by an appeal may, at any time either before or after the institution of the appeal, apply to the court to strike out the notice of the appeal or the appeal, as the case may be on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

Mr Havelock submitted that it was not the case of the applicant that the respondent did not have the right of appeal. Secondly, he said the respondent by applying for copies of the proceedings within the prescribed time and in accordance with rule 81 of the Rules, was not guilty of any other breach of the Rules. He urged us to dismiss the application with costs.

The respondent is 6 years out of time for filing the intended appeal from the judgment which was delivered on 4.7.1991. Although the respondent has complied with rule 80, yet it was his duty to expeditiously obtain copies of proceedings. It is not enough for him to apply for the said copies of the proceedings, and then sit back and wait until the court makes them available. In the normal course it does not take six years for the the Registry of the superior court to prepare and deliver the said copies. This inordinate delay is certainly going to cause serious prejudice to the applicant. As the things stand, apart from the two letters which counsel for the respondent had initially written to the High Court Registry requesting for the proceedings, he has neither written any reminder thereafter requesting the court to expedite the preparation and delivery of the said proceedings nor is there any evidence of diligent personal enquiries or other steps taken in order to expeditiously obtain the said proceedings. It is upto the respondent to satisfy us that despite his due diligence in the matter, the High Court had failed to provide the said proceedings to him and he, although still interested to file the intended appeal, is unable to do so for no fault of his own. We are far from satisfied that the respondent has shown proper diligence that this court has come to expect of those who seriously pursue their right to appeal . There is a certain limit upto when a successful party can be expected to wait and be deprived of the immediate fruits of the judgment in his favour.

It would be unfair to allow litigation hanging over the head of the applicant any longer. Otherwise, it would be a travesty of justice and gross abuse of the process of the court.

For these reasons exercising our powers under rule 1(3) of the Rules we hereby strike out the respondent's notice of appeal filed on 17 July 1991. We would award costs of the notice of motion to the applicant.

Dated and delivered at Nairobi this 22nd day of October, 1997

J.E. GICHERU

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

G.S. PALL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR