

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION NO NAI 8 OF 1987

KENYA ARAB ORIENT INSURANCE.....APPELLANT

V

LOCHABTRANSPORTRESPONDENT

RULING

This is an application brought under rules 4 and 81 of the Court of Appeal Rules by Kenya Arab Orient Insurance Limited for an order that the applicant be given leave to file its appeal out of time and that the costs of the application be costs in the appeal. In a supporting affidavit sworn by Mr Wandaka the advocate who had the conduct of the suit, it is deponed that the applicant's firm of advocates applied for proceedings and judgment on June 5, 1986, two days after the judgment was read and copied the letter to the respondent's advocate, that despite regular checking on the typed copies of proceedings and judgement, it was not until October 1, 1986 that a letter inviting the applicant's advocate to collect the proceedings and judgment was received, that certified copies were collected on or about November 17, 1986 and that there were two interlocutory applications in the matter which slowed the preparation for the intended appeal.

A number of points derived from a certificate of delay filed pursuant to the proviso to rule 81(1) make it clear that certified proceedings and judgment became available on November 17, 1986 and that the time required for preparation and delivery to the applicant of uncertified copies is from June 5, 1986 to November 4, 1986 ie 149 days and for certified copies from June 5, 1986 to November 17, 1986 ie 162 days.

Mr Sampson for the applicant argued that if the period of 162 days is excluded the applicant would have had up to July 17, 1987 for filing the appeal which was in time as the applicant was required to file the intended appeal by January 20, 1987 and submitted that there was no delay in instituting the intended appeal.

Mr Jowhal for the respondent had a quarrel with the facts of the affidavit in support of the application. There was no explanation offered, said Mr Jowhal, why the proceedings etc were collected 37 days after intimation from the registry that copies were available and it is significant that it was not until November 23, 1986 that a certificate of delay was applied for. The respondent's advocate stressed that rule 4 is not intended to assist an applicant who is not serious and delays matters.

It is common ground – the advocates agreed – that the subject matter of this action is a claim in contract for the Kshs 352,703 out of which Ksh 50,000 was paid by the applicant on account according to an agreement to compensate the respondent for damage caused to its car. It is also common ground – and again the advocates told me so – that it would be an issue in any appeal whether or not the parties and their advocates were heard by Shields, J before judgment was given.

Mr Sampson's main argument is that there was no undue delay in the matter and that the applicant could not proceed with the appeal because there was delay in furnishing him with certified copies of the proceedings and judgment and also that the two interlocutory applications, the first on behalf of the applicant for a stay of execution and the second by the respondent in connection with the setting aside a consent order which was recorded by O'Connor, J. caused some delay.

The contention by Mr Jowhal that the proceedings etc were ready for collection 37 days before they were actually collected has some substance but, with respect, it tends to ignore practicalities. The copies had to be certified. One of the two interlocutory application was brought by the respondent. Notwithstanding that the letter dated October 1, 1986 states that certified and uncertified copies of the proceedings and judgment were ready, there is Mr Wandaka's affidavit whose paragraph 3 states that the proceedings were not ready when Kamoi went to collect them and that the proceedings and judgement were ready on or around November 17, 1986. Mr Jowhal did not controvert that and so I see no reason for not accepting it as the correct position. The applicant will benefit from the 162 days and in the end, as far as I can judge of the matter, the applicant, who had to institute the intended appeal within 60 days of the date when the notice of the appeal was lodged (the notice of appeal was lodged on August 5, 1986) had until January 17, 1987 to institute the intended appeal.

If however, I am wrong and the last date for filing the intended appeal was November 17, 1986, I would still exercise judicially the unfettered discretion I have in the matter and hold that in the circumstances the applicant was not dilatory and that the intended appeal which involves a claim for a large sum of money may be filed in order for the parties to be heard over the dispute whether or not the parties and their advocates were heard by the superior court before judgment was read.

In view of these conclusions the application is allowed, the time is extended for 14 days and the appeal shall be instituted within the next 14 days.

Costs of the application to be costs in the appeal. Mr Jowhal may apply informally etc vide rule 54(1)(b).

January 23, 1987

NYARANGI JA