



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
(CORAM:PLATT JA)
CIVIL APPLICATION NO NAI 51 OF 1987

KENYA FILM CORPORATION.....APPELLANT

VERSUS

MUTHIKE.....RESPONDENT

Ruling.

The original application concerned the intended appeal against JS Patel J's order dated September 12, 1986, in which he struck out the defendant company's defence and entered judgment for the plaintiff Charles Kabanga Muthike. Patel J also ordered damages to be assessed. This proved to be awkward task. First, Cockar J on October 16, 1986, found that no damages were done to the plaintiff. The defendant then applied for a review of the judgment on October 29, 1986, which process commenced on December 9, 1986 and ended successfully on January 13, 1987. Assessment of damages was fixed before Patel J on February 11, 1987, but he was unable to oblige. It then came before Mr Commissioner Sampson, who commenced on March 2, 1987, and gave his assessment in the sum of Kshs 71,312 on March 24, 1987. The defendant thought the calculation incorrect and sought a review on April 9, 1987. But this time the plaintiff was not successful.

The result therefore is that Patel J gave an interim judgment for the plaintiff on liability and Mr Commissioner Sampson completed the proceedings on March 24, 1987 with his assessment of damages.

The prospects for the intended appellant/defendant were consequently these. The company, whose defence had been struck out, could appeal against the interlocutory decision of Patel J. If successful, the assessment of damages would fall away, and the suit would be heard fully, and damages assessed as part of the proceedings, on the basis of such liability found, if any. On the other hand, it was open to the defendant company to wait until judgment was complete, and appeal from both the finding of liability and the damages assessed. To do so would necessitate a notice of appeal against both orders, either contained compendiously in one general notice, or it could effected separately against each order.

The appellant chose to lodge a notice of appeal on September 24, 1986 against Patel J's orders. That was within the time allowed by rule 74 of the Court of Appeal Rules. The record would have to be lodged within 60 days of September 24, 1986 namely November 23, 1986. Two further steps were required by the rules. The defendant company should have served the plaintiff with a copy of this notice within 7 days (rule 76), and secondly it should have a copied its request for copies of proceedings and judgment, filed on September 24, 1986 to the plaintiff. It took neither of these steps.

But then if Cockar J's judgment on the first assessment of damages held good, there could hardly have been an appeal. The plaintiff simply had a pyrrhic victory in principle that he had been unlawfully dismissed, but he had no claim to damages. Nevertheless the appeal came alive on January 13, 1987 when the first assessment refusing to award damages was set aside. Further fuel was added to the fire when Mr Commissioner Sampson awarded damages of Kshs 71,312. This sum was confirmed after the unsuccessful review, aimed at raising that figure.

The first somewhat misguided application for extension of time was brought on June 26, 1987 after Mr Commissioner Sampson had refused to review his own assessment. The application for review was heard, as the parties agree, on May 4, 1987, and the ruling given on June 3, 1987. A stay of proceedings was also granted for two months from then. Thus during the pendency of these two months, the defendant company has applied to put the appeal process in order; but to do so the amended notice was filed dated July 2, 1987. There are now three prayers before the court:

- 1) Leave to serve the notice of appeal dated September 24, 1986 (not September 29, 1986 as it is written as may be seen from the notice CNK 2) out of time on the plaintiff.
- 2) Leave to lodge a notice of appeal against the assessment of damages dated March 24, 1987.
- 3) In the case of both notices leave to lodge the record of appeal out of time.

The result is that the defendant company is appealing against the whole judgment, that is the combined effect of Patel J's orders and Mr Commissioner Sampson's assessment of damages. That is an understandable move to put the whole appeal in order.

It means that the practical effect of the last review proceedings was that the assessment was confirmed on June 3, 1987. No doubt in theory the notice of appeal could have been lodged within 14 days of March 24, 1987.

But it is to my mind quite understandable that due to the plaintiff's insistence on the review lodged on March 27, 1987, the defendant awaited the outcome of that process. Once again, it could have happened that the appeal would be affected by the review decision, either by revising upwards or downwards the damages assessed. The practical date for the defendant company to act was the June 3, 1987. June 17, 1987 unfortunately passed by and this application was made 9 days later.

I survey this application from the point of view of the full appeal. The plaintiff had a good deal to say, and indeed explained his position very well, as to the non-service upon him of the first notice of appeal. But that is not now of importance because the full appeal is intended. If the plaintiff gets a notice of appeal now concerning the damages the tardy service of the notice on liability cannot prejudice him.

Similarly if the record of appeal is now lodged for the full appeal, the lack of an earlier record of appeal will not prejudice the appellant. That is because the defendant need not have lodged the first notice of appeal.

The company could have waited until judgment was complete and then appeal against all parts of it. Now that that has been done, the appellant has lost nothing.

Moreover the defendant was put to some confusion by the original refusal of Cockar J to assess damages and then his decision on review to vacate his judgment. The defendant was further hampered by the lost application for review against this assessment on March 24, 1987.

It was no doubt an oversight not to serve the first notice of appeal and request for the copies of proceedings and judgment. The plaintiff took the defendant's advocates to task severely on that point. I have endeavoured to explain that with the whole appeal now before the court those matters are no longer of significance. It is the 9 days of practical delay since June 17, 1987 that concern me most. That is not a long time. I would apply the principles in *Gatti v Shoosmith*, (1939) 3 All ER 916 at page 919.

Even so the plaintiff raised an important question, namely whether any appeal could possibly be effective if the defendant had no defence. I agree that if the appeal could not possibly be successful there would be no point in extending time, even under the free discretion of this court within rule 4 of the rules. But it appears to me that the contention of Patel, J was not free from doubt.

The plaintiff and defendant submitted their dispute, on the termination of the services of the plaintiff with the defendant company, to the investigation of a labour officer Mr Wanjohi. I am not certain that the suit could be based on the finding of Mr Wanjohi, that the plaintiff's services were unlawfully terminated, and then proceed to damages. Either the investigator acted as an arbitrator or he did not. There is nothing on the record before me to show in what capacity Mr Wanjohi acted. On the one hand the parties may have been bound by his award or on the other hand they were not, and all issues were open. Patel, J held they were bound. I am not clear why. But then if they were bound, what did the investigator award? He suggested reinstatement. What else did he award? Why did the parties come to the court? Why did they not return to the investigator? The argument puts forward the view that the defendant was not bound, that the fact that the defendant company acceded to the recommendation that the plaintiff be reinstated, was not an admission of fault nor liability for intervening wages. Which side is right cannot be assessed at this stage on the materials before me.

Consequently as far as I can judge, there is an important issue to be decided on this appeal, which may go either way, whether or not all issues in the dispute could be re-opened at the trial, and that therefore the defendant company could have the right to raise them in defence. It has pleaded that it did not unlawfully dismiss the plaintiff. If so, it might not be liable in the damages that the plaintiff seeks. On the other hand, I stress that is looking at the dispute in this application and not prejudging the appeal which may go either way.

There being, to my mind, a substantial issue to be decided, and good reasons for the delay I grant the application:

On prayer 1 The first notice of appeal will be served on the plaintiff within 7 days from today's date.

On prayer 3 Notice of appeal against the order of March 24, 1987 to be filed and served within 10 days of today's date.

On prayer 2 Together with the last line of prayer 3, the whole record of appeal to be filed and served within the usual 60 days of the date 10 days from today's date, unless, this court decides to extend 60 days further on application on notice to the plaintiff.

The costs of this amended application to be costs in the cause of this appeal,

The costs of the first application to be borne by the applicant in accordance with the order of this court given on July 1, 1987. Reference to the full bench explained.

July 30, 1987

PLATT JA