East African Road Services v Nyanjui

Court of Appeal, at Nairobi

July 26, 1985

Platt Ag JA

Civil Application No NAI 62 of 1985

From an order of the High Court Civil Case No 2887 of 1981 Court of Appeal Rules - extension of time to lodge record of appeal – rule 4 Court of Appeal Rules – decree – whose responsibility is it to draw – delay in sealing by court – effect of – Court of Appeal rules – supplementary record of appeal – what can be included – rule 8(1) Court of Appeal Rules – certificate of delay – function of – delay – factors to consider on application to extend time.

The applicant, an unsuccessful plaintiff, intended to file an appeal to the Court of Appeal. A notice of appeal was file don time. That is to say on February 27, 1984, judgment having been delivered on February 15, 1984.

The proceedings were not ready on time prompting the advocate to apply for a certificate f delay.

However it transpire that by the time the proceedings were ready for collection the intended appellant's advocate had not concurrently prepared and presented for sealing by court the decree. The same was ready only on July 15, 1985, after the expiry of the period excluded by the certificate of delay.

Held:

1. The delay in sealing the decree from May 27, 1985 to July 15, 1985 interfered with the applicants compliance with the Rules of this court.

2. Rule 85(2A) allows any document required by rule 85(1) to be included in the record but which has been omitted to be filed in a supplementary record except for judgment or order as specified in rule 85(1)(g).

3. Plain reading of proviso to rile 8(A) f the Court of Appeal Rules shows that the certificate of delay concerns the time taken to obtain a copy of the proceedings. A decree is not part of the proceedings to be copied. It is an original document to be made after the copies of the proceedings are delivered.

4. As a general rule an appellant should not be deprived of his right of appeal and no question of the merits would arise so long as the court has the general picture of what the appeal is about. Application allowed.

Cases

Gatti v Shoosmith (1939 3 ALL ER 916

Palata Investments Ltd and Another v Burt & Sinfield Ltd and Others

Times May 28, 1985

July 26, 1985, Platt Ag JA delivered the following Ruling.

Mr Noad moved the court pursuant to his notice of July 19, 1985, asking that time be extended, under rule 4 of the Court of Appeal Rules, to lodge the record of appeal. Mrs Njuguna opposed the application for several reasons. Mr Noad represents the applicant, who as the unsuccessful plaintiff, intends to appeal from the judgment of the High Court.

It is not disputed that the chronological facts set out in Mr Noad's affidavit are correct. Neither the judgment nor grounds of appeal have been attached to the application; but it is not disputed that the defendants, and now respondents to this application, were successful in persuading'the trial court to dismiss the plaint of the present applicant, and give judgment for the defendants on their counterclaim. The judgment concerned liability in a motor accident case and damages covering the repair of the defendant's vehicle. The plaintiff had lost the damages he had claimed for the repair of his vehicle. Whilst these facts came out in the argument of both counsel in connection with the merits of this application it is better that the judgment and grounds of appeal are attached to the application. However, the defendants having obtained judgment, the plaintiff lodged notice of appeal within the prescribed time on February 27, 1984, and Mrs Njuguna acknowledges that she was served. It is for this reason that she did not draw up a decree, leaving that task to the intending appellant. On the same date, the applicant who intended to appeal applied for copies of proceedings and judgment, and exhibits, and served Mrs Njuguna's firm. In doing so the applicant aimed at using the proviso to rule 81 of the Court of Appeal Rules. But the computation of the time to be excluded fell into difficulties.

Mr Noad swore that copies of proceedings and judgment were available for collection on May 2, 1985, and the exhibits were made available for photocopying on May 3, 1985 to lodge the record of appeal. Apart from preparing the records, Mr Noad had to get a certificate of delay, and to get a decree drawn up, agreed by Mrs Njuguna, and certified. The decree was submitted to Mrs Njuguna's firm for approval on May 22, (as the parties agree), and the decree as approved was submitted to the Registrar until July 27, 1985. Unfortunately it took the Registrar until July 15, 1985 to seal the decree. That would have been accepted, if the Registrar refused to do so, and therefore being out of time, even on the basis of the computation of time excluding the period which the Registrar was agreeable to including in his certificate of delay, this application was brought quickly on July 19, 1985. Mr Noad will be ready with his record of appeal in about one week's time. He says that no date has yet been given for the hearing of the appeal, and therefore this extra time will cause no prejudice.

Mrs Njuguna took as her first point, the fact that she received a copy of a letter, written by the Registrar to the applicant, dated March 26, 1984, that the copies of proceedings were ready for collection. She had received it on April 1, 1985. Therefore she wondered why Mr Noad did not collect these documents before May 2, 1985.

Mrs Njuguna did not protest by affidavit, because she had been served late. I allowed the statement to be made from the bar and answered from the bar. Mr Noad's answer was that while proceedings were ready, certification had still to be done of the judgment, and that'took until May 2. Moreover the exhibits were only released on May 3, 1985 for photocopying. I accepted that explanation, and Mrs Njuguna proceeded to deal with the delays as if the datum line was May 3, although I do not mean to imply that she conceded the point. As a practical matter the rest of the argument proceeds upon the time of sixty days commencing from May 3, 1985.

Mrs Njuguna's second point was that Mr Noad had only himself to blame for dealing with the decree so late. He should first have thought of that when he decided to appeal. At least he should have thought of that on May 3, seeing that the decree was not included in the proceedings that he had been given. Mr Noad accepts his responsibility on this point. He says that he was under the mistaken misapprehension that the successful party would have drawn up the decree, especially as the successful party had moved on

May 2, 1985 to have the costs taxed. Mr Noad thought that that step could not be taken without the decree having been drawn up. But that was not the case. So Mr Noad was obliged to draw it up, and the defendants' advocates approved it, and returned it with their thanks. But then, unaccountably the Registrar had delayed in sealing it until July 15. It could have been expected back within a few days after May 27, 1985; but apparently long delays are not entirely unknown.

Looking at this issue from both sides, of course, Mrs Njuguna is right that the decree could have been drawn up immediately after February 27, 1984, and again after May 3, 1985. But while the Registrar could take his time after February 27, 1984, it is doubtful whether he would necessarily have made the deadline of July 3 if the decree had been submitted around July 15. It would have to be drawn up, and then submitted to Mrs Njuguna's firm for approval. There was not much time for manoeuvre. It seems to me that despite the oversight of not drawing up the decree at once, which the successful party is usually only too happy to do, the delay in sealing the decree from May 27, 1985 to July 15, 1985 is the real cause of all this trouble. Surely it does not need more than a week or ten days to do that at the outside. It can be done in half an hour, as far as the work of sealing goes. It is not really important if the plaintiff wrongly forgot to get the decree sealed before the proceedings were delivered, if there was plenty of time to take that step after they were delivered. There were 60 days from May 3, 1985. After May 27 there were still 37 days. That was ample time. It took the registry 49 days. In my opinion the registry's delay interfered with the appellant's compliance with the rules of this court, even though the appellant's counsel was initially wrong.

Mrs Njuguna's next point was that when the applicant saw that the time was running out he could have gone ahead and filed the record of appeal, and left the sealed decree to be filed in a supplementary record of appeal.

It appears that Mr Noad did not have this clearly to mind. Rule 85(2a) allows any document required by rule 85(1) to be included in the record but which has been omitted, to be filed in a supplementary appeal except for the judgment or order as specified in rule 85(1)(g). So Mrs Njuguna is right. Mr Noad was engaged in a quixotic battle against the wind mills of the registry, which kept revolving against him. It took so long to seal the decree, and then it took the view that the time taken to get the decree sealed was not a delay to be certified. On this last point, I doubt whether the registry can be faulted, because on the plain reading of the proviso of rule 8(a) of the rules the certificate of delay concerns the time taken to obtain a copy of the proceedings to be copied. It was an original document to be made after the copies of the proceedings had been delivered. Whether or not Mr Noad appreciated this point, he was advised by the registry that the extra delay could not be certified and he brought this application.

This part of the application then, resolves itself in this way. Mr Noad's battle with the registry has two parts; one part in which he was entitled to expect prompt sealing; but on the other part he could not expect the delay in sealing of the decree to be certified. That meant that he should either have applied for an extension of time before the sixty days period had expired, anticipating delay in the sealing of the decree or he should have filed his record of appeal in time without the decree and file a supplementary record afterwards. Mr Noad could have saved the situation, towards the end of the period of sixty days, by a little more flexibility of approach.

Finally, Mrs Njuguna has criticized Mr Noad for not annexing the grounds of appeal so as to help the court decide the merits of the application. She referred me to Civil Application No 53 of 1983, and No 30 of 1985. The latter decision by Gachuhi, Ag JA, does not lend any particular support to Mrs Njuguna's argument. Relying on Gatti v Shoosmith (1939 3 ALL ER 916 and Palata Investments Ltd and Another v Burt & Sinfield Ltd and Others Times May 28, 1985 the first consideration is the reason for the delay, and where the delay is short, and the excuse for the delay acceptable, as a general rule the appellant should not be deprived of his right of appeal, and no question of the merits would arise, so long as the court has the general picture of what the appeal is about. As I explained in another application last week, I regard the merits of the appeal and the question of prejudice as of secondary importance in these circumstances, because they would usually only play a part in the more extreme cases. No such consideration arise here.

In this case, the parties have agreed that the appeal concerns the question of liability in their motor vehicle

accident, and possibly quantum of damages. Mrs Njuguna does not press the point that no appeal could possibly arise. That being so it is an ordinary case.

I find that the delay is quite short and it is clear that Mr Noad has been trying to get his appeal forward, but made some slips in doing so, due to his misapprehension of the facts, and misapprehension of the rules. The discretion under rule 4 is free and I am quite clear that this is a case where the misapprehensions of counsel should be excused, and the party granted his right of appeal. No important question of the merits or prejudice arise.

I am content to say that to an effective degree the registry hampered Mr Noad, in the great delay in sealing the decree.

This being so, the application is allowed, and it was agreed that in that event, the costs should be the respondents' costs in any event. The applicant will file and serve the records of appeal on or before August 20, 1985.

Noad: If something goes wrong as in the printing may I apply.

Mrs Njuguna: I would not have much objection for leave. Let us see what his problem is.

Further Order: Leave to apply in case of difficulty with complying with the court's order. Notice to the parties of their right to refer this matter to the full court.

Both parties apply for copies of the ruling.

Order: Let ruling be supplied