



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P.N. WAKI, JA, (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 124 OF 2004

BETWEEN

HABO AGENCIES LIMITED APPELLANT

AND

WILFRED ODHIAMBO MUSINGO..... RESPONDENT

*(Appeal from the Ruling/Order of the High Court of Kenya at Nairobi at Milimani Commercial Courts
(Khamoni, J.) dated the 15th day of August 2001*

in

H.C.C.C. NO. 2047 OF 2000)

RULING

The matter before me is a notice of motion filed on 10th June 2014 by **M/S Habo**

Agencies Ltd (Habo) seeking an order under Rule 4 of the court's Rules:

“THAT the time for lodging an application for restoration of the appeal herein under the proviso to sub-rule (1) of Rule 102 of the Court of Appeal Rules be extended to 10th June, 2014.”

The application mentioned in that motion for restoration of the appeal was also filed on the same day under Rule 102(1) of the Court's Rules and is pending hearing depending on the outcome of the motion before me.

A short background to the motion is pertinent.

Since November 2000, which is now about 14 years ago, Habo has been attempting to file its defence to a suit filed against it by **Mr. Wilfred Odhiambo Musingo (Wilfred)**. In his suit filed on 17th November 2000, Wilfred averred that he agreed with Habo, a clearing and forwarding company based in Mombasa, to clear a motor vehicle which he had imported in 1996 from United Arab Emirates at a total cost of USD 5223 (at the time equivalent to Kshs. 417,840). He paid a sum of Ksh. 115,000 in part payment of

clearance charges and instructed Habo to deliver the vehicle to a prospective buyer in Nairobi who would pay the balance of the clearance charges direct to them. Instead of complying with those instructions, Habo demanded payment of some Ksh. 206, 706 on account of clearance charges which Wilfred disputed but undertook to pay upon release and sale of the vehicle. Unknown to Wilfred however, Habo had already sold the vehicle , hence the suit demanding the purchase price paid for it (Ksh. 417,840), the clearance costs paid (Ksh. 115,000) , and interest thereon at the rate of 25% pa, from the date of purchase of the vehicle in October 1996.

Habo instructed M/s Asige Keverenge & Anyanzwa Advocates to file defence to the suit and they did so on 4th January 2001. They denied any agreement in terms stated by Wilfred but contended that they did infact clear Wilfred's vehicle from Mombasa port and paid all customs duty, port charges, customs warehouse rent and other charges. When they demanded payment of these from Wilfred he failed to pay and so they sold the vehicle in an auction as bailees to recover their costs of Ksh 206,706 as well as their clearance fees.

That defence was not served on counsel on record for Wilfred in accordance with the Rules of procedure. By an application made in March 2001 seeking to strike out the defence and enter judgment, the defence was struck out on 30th May 2001 by Ringera J. (as he then was) for want of service but the judge declined to enter summary judgment. Judgment was instead entered by the Deputy Registrar on 31st May 2001 in default of filing defence. On 17th July 2001, Habo filed an application seeking to set aside the Judgment, stay execution and for leave to file the defence out of time. Khamoni J heard that application and on 15th August 2001 found that the prayers for setting aside judgment and stay of execution were misconceived and that the prayer seeking time to file defence was *res judicata* as it had been dealt with or ought properly to have been dealt with before Ringera J.

Habo were not satisfied with that decision and so they filed Civil Appeal No.285/2002. In the meantime, an order was issued by Mbaluto J. for the decretal amount to be deposited in an interest earning account pending the hearing of the appeal. The appeal was, however, struck out on 8th December 2003 for failure to include primary documents in the record. On application to reinstate the struck out appeal, Okubasu JA extended time for filing the appeal and Civil Appeal No. 124 of 2004 was filed on 22nd June 2004. It was due for hearing on 5th February 2013 but no one showed up on behalf of Habo despite service of hearing notices. After that dismissal, the motion to reinstate the appeal was filed on 10th June 2014 and the current motion was also filed for extension of time as earlier stated.

In the affidavit in support of the motion, Habo blamed all acts of omission and commission on its advocates on record at the relevant time. The Advocates were supposed to, but did not, serve the defence; did not apply for extension of time to serve the defence; did not file a valid appeal the first time round; and failed to attend court leading to the dismissal of the appeal the second time round. The affidavit further asserts that the Advocates did not inform Habo about the dismissal for more than one year until March 2014 when Habo somehow “became aware” of the dismissal and instructed the Advocates now on record to seek explanation from his erstwhile Advocates. The current Advocate wrote on 6th March 2014 and received the following response from the erstwhile Advocates:

Date: 11th March, 2014

“M/S Amuga & Co. Advocates,

4th Floor, PanAfrica House,

Kenyatta Avenue,

P.O. Box 13008-00100,

NAIROBI.

Dear Sirs,

RE: CIVIL APPEAL NO. 124 OF 2004 HABO AGENCIES LTD. VS. WILFRED ODHIAMBO

MUSINGO

Thank you for your letter dated 6th instant.

- 1. This appeal was handled by Mr. S.M. Keyonzo Advocate on our behalf in Nairobi.**
- 2. I have personally not seen any hearing notice. I have made enquiries in my office. None of our staff seems to have seen the hearing notice. The file was always with Mr. Keyonzo in Nairobi.**

Mr. Keyonzo informs me that he met you in Nairobi and briefed you over the matter.

- 4. I am prepared to swear an affidavit in support of your proposed application.**
- 5. I have called Mr. Keyonzo to swear a further affidavit. He has agreed to do so. Please contact him so that this can be done.**
- 6. Mr. Awiti is also aware that Mr. Keyonzo was the one handling the appeal in Nairobi.**

Please call me to expedite. I have been trying to reach you on phone without success.

7. You are free to take over the matter in the client instructs you. Yours faithfully,

ASIGE KEVERENBE & ANYANZWA J.S. ASIGE

C.C. S.M. Keyonzo Advocate, NAIROBI

Mr. Hezron Awiti,

MOMBASA

The said letter was copied to Habo's Hezron Awiti and Mr. Keyonzo, Advocate, but there is no Affidavit sworn by Mr. Keyonzo as envisaged in the letter. Further correspondence with the court Registry shows that the court file was not available until this motion was filed on 10th June 2014. In the meantime, the security placed in escrow pending the hearing of the main appeal, inclusive of accrued interest thereon in the sum of Shs.647,527.70 was, by consent of the parties, released to Wilfred and he commenced proceedings to recover the balance of the decretal amount. In submissions before me, learned counsel for Habo, Mr. Wambola who held brief for Mr. Paul Amuga on record, reiterated those facts and asserted that there would be no prejudice to Wilfred if the application was granted since Wilfred had already recouped part of the money which was in excess of his original claim. He further submitted that the acts of omission and commission were made by counsel on record for Habo and were thus excusable.

Opposing the application, by oral submissions, learned counsel for Wilfred, Mr. Osiemo referred to the letter from Habo's erstwhile Advocates which is reproduced above and submitted that it was crucial to have the affidavit of those Advocates on record to explain the inordinate delay but none was filed and there is no explanation for that omission. He further submitted that this was old litigation which should come to an end considering that after 11 years, Wilfred is still be awaiting full enjoyment of the fruits of his success in the litigation.

I have given full consideration to the application and the guiding principles applicable in applications made under **Rule 4** of this court's Rules. I am aware that the discretion I have to exercise under **Rule 4** is

unfettered and does not require establishment of “sufficient reasons”. Indeed I stated as much as a single judge and was upheld by the full court in **Fakir Mohamed v Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR)**, thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General, Civil Application No. Nai. 8 of 2000 (ur) and Murai vs Wainaina (NO. 4) [1982] KLR 38”.

I am also aware that there is a duty imposed on the Court under **Sections 3A** and

3B of the **Appellate Jurisdiction Act** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. As explained in the

case of **City Chemist (Nbi) & Ano. vs Oriental Commercial Bank Ltd Civil**

Application No. NAI 302 of 2008 (UR 199/2008):

“The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective.”

In the same case, however, the court cautioned thus:-

“That is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and un-ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and its application.”

Those Sections of the Appellate Jurisdiction Act came first in legislative time but have found legitimacy in **Article 159** of the **Constitution 2010** which deals with judicial authority and the administration of justice without regard to technicalities of procedure. The Supreme court has had occasion to interpret Article 159 and did so in the case of **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR** where it

agreed with the dicta of Kiage, JA in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** stating:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice.

This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

The Supreme Court further emphasized:

“Indeed, this Court has had occasion to remind litigants that

Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by -case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR”.

With those principles in mind, I now advert to the application before me. The application filed on 10th June 2014 for restoration of an appeal dismissed on 5th February 2013 was almost one year and three months late. Without any material to explain that period of delay, it would be inordinate and would not avail Habo. As the Privy Council stated in the case of Ratnam v. Cumarasamy [1964] 3 all e r 933 :-

"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion . If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

In Savill v Southend Health Authority [1995] 1 WLR 1254, Balcombe LJ, having considered various authorities, stated as follows at 1259:

"I have to say that the authorities are not all entirely easy to reconcile. I prefer to go back to first principles and to the statement made by Lord Guest in the Ratnam case that in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. He went on to say, and it is worth repeating: "If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation." Nevertheless, there must be some material on which the court can exercise its discretion.”

Habo’s explanation for the delay is that it erstwhile Advocates omitted to act for them as instructed and further failed to inform them that the appeal had been dismissed. Habo only came to know about the dismissal more than one year later in March 2014. Exactly when or how they “became aware” is not disclosed. Between March and June 2014, the court file was not readily available and so further delay was caused. I will say at once that there is material in the supporting affidavit, which is not controverted, to show that the attention of the court registry was drawn to the fact that the court file was not readily available and in those circumstances, I would excuse the delay between March and June 2014. What explanation is there for the rest of the delay? In my view, none.

It was incumbent on Habo to obtain and file an affidavit from the erstwhile Advocates to explain the

delay. Indeed from the affidavit in support of the application, it is indicated that the advocates were ready to do so and in their letter dated 11th March 2014, they state that Mr. Awiti of Habo was aware that Mr. Keyonzo was handling the matter and had briefed the new Advocates thereon. Why then was it difficult to place on record some explanatory affidavit from the Advocate? Why was Habo and its Managing Director cagey about exactly when and how it came to know that the appeal had been dismissed?

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. It is true as submitted by Mr. Wambola that mistakes of counsel may be excusable. The epic dicta of Madan, J.A. in Murai v. Wainaina (No.4) [1982] KLR 38, quickly come to mind:-

“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

In this case however, the erstwhile Advocates are simply accused of inaction. In the Case of Rajesh Rughani –Vs- Fifty Investment Ltd. & Another (2005) eKLR the Court of Appeal held,

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

Also in the Case of Bains Construction Co. Ltd. -Vs- John Mzare Ogowe 2011 eKLR the Court had this to observe:-

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences”.

In the circumstances of this case, I find and hold that the basis for the exercise of my discretion has not been laid properly or at all. Reliance is merely made on alleged inaction by counsel on record, but that does not avail the applicant. I further find that the applicant was not candid in explaining the delay and this deprives it of equitable relief. Furthermore, considering that it was with the consent of both sides that part of the decretal amount placed in escrow was released to Wilfred, I agree with Mr. Osiemo that the further prolongation of this litigation would be prejudicial to the decree holder and would violate the public policy that litigation must come to an end. The upshot is that this application is lacking in merit and I order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 16th day of January, 2015.

P.N. WAKI

JUDGE OF APPEAL

Explanatory note for delay:-

This application was heard on 24th September 2014 and the Ruling was due for delivery on 24th October

2014. The parties had been cautioned that the court was giving priority to Election Petitions Judgments and their understanding was sought if there was a delay in delivering this Ruling. However, with the permission of the Hon. the Chief Justice, I proceeded on leave from 1st November 2014 and was engaged in official duties overseas as President of the Residual Special Court for Sierra Leone until 30th November 2014. Upon return to the country, my father passed away on 2nd December 2014 and I was permitted to spend the rest of the court term in preparing for the funeral. The Ruling was completed during the Christmas vacation and delivered as soon as the new term commenced.

WAKI, J.A

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

DEPUTY REGISTRAR