IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & SICHALE, JJ.A.) CIVIL APPEAL (APPLICATION) NO. 124 OF 2004 BETWEEN

HABO AGENCIES LIMITED..APPELLANT

AND

WILFRED ODHIAMBO MUSINGO…......…..…......................…RESPONDENT

*(Being an application for extension of time within which to apply for restoration of the appeal from the ruling/order of the High Court of Kenya at Nairobi (**Khamoni, J.**) dated 15th day of August, 2001*

in

H.C.C.C. No. 2047 of 2000)

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RULING OF THE COURT

This is a reference from the decision of a single judge (**Waki, JA**) dismissing an application for extension of time to apply for restoration of a dismissed appeal for hearing.

The applicant lodged **Civil Appeal No. 124 of 2004** on 22nd June 2004 through his advocates ***Asige Keverenge & Anyanzwa Advocates*** of Mombasa. The appeal was listed for hearing on 5th February, 2013 but the applicant's advocates did not attend the hearing. From the "Order of the Court" made on 5th February, 2013, the Court noted that the applicant's advocates were served with the hearing notice on 23rd January, 2013 but endorsed on the back of the hearing notice that the receipt was without prejudice. The court proceeded to dismiss the appeal for non attendance of the applicant's advocates under **Rule 102(1)** of the Court of Appeal Rules. The proviso to **Rule 101** as read with **sub-rule 3** of **rule 101** allows an appellant whose appeal has been so dismissed to make an application for restoration of the appeal for hearing, if he can show that he was prevented by any sufficient cause from appearing for hearing. However, as provided by **Rule 102 (3),** such an application should be made within 30 days of the decision of the Court or in case of a party who should have been served with a hearing notice but was not served, within 30 days of his first hearing of the decision.

The firm of **Amuga & Company advocate** filed a notice of change of advocates indicating that they have been appointed by the applicant on 10th June 2014. On the same day they lodged two applications. The first is an application under Rule 4 of the Court's rules for extension of time to 10th June, 2014 for lodging an application for restoration of the appeal for hearing. The second application was made under

Rule 102(1) for review of the order dismissing the appeal and restoration of the appeal for hearing.

The single judge heard the application for extension of time and dismissed it on 16th January 2015 precipitating the reference under consideration. The application for extension of time is supported by the grounds on the body of the application and by the supporting affidavit of **Wilfred Oluga**, the Managing Director of the applicant company. In a nutshell, the applicant states in support of the application that:

i. It was never informed by its former advocates and was not aware that the appeal was set down for hearing on 5th February 2013, and became aware that the appeal had been dismissed for non attendance in about March 2014.

ii. Failure to make an application for restoration of the appeal for hearing within 30 days was due to failure on the part of the applicant's legal advisors.

iii. Even after the applicant became aware that the appeal has been dismissed and sought an explanation from its advocates, no explanation was proffered.

iv. The appeal is arguable and has high chances of success.

v. The respondent is now seeking to execute a decree to recover a whopping Kshs.3,027,712/- against the initial claim of only Kshs.532,840.

vi. The respondent stands to suffer no prejudice if the application is allowed because he has already received Kshs. 647,527/70 from the fixed deposit escrow account which had been opened in the joint names of the parties' advocates as a condition for granting an order for stay of execution of the decree.

The respondent did not file a replying affidavit to the application. However, his advocate attended the hearing and opposed the application.

The learned single judge excused the delay between March 2014 and June 2014 when the court file was not available but made a finding that there was no explanation for the rest of the delay. The learned single judge concluded:

"…. I find and hold that the basis for exercise of my discretion has not been laid properly or at all. Reliance is merely made of the alleged inaction by counsel on record, but that does not avail the applicant. I further find that the applicant has not been candid in explaining the delay and this deprives it of equitable relief. Further, considering that it was with consent of both sides that part of the decretal amount placed in escrow account was released to Wilfred, I agree with Mr. Osiemo that 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."

Mr. Amuga for the applicant submitted in support of the reference that learned single judge made wrong factual findings; that there was sufficient explanation for delay between February 2013 and March 2014 as the delay was because the applicant was not aware that the appeal had come up for hearing on 5th

February, 2013; that the Kshs. 647,522/70 was retrieved without the knowledge of the applicant as a result of dismissal of the appeal and not by consent; that it was not necessary to file a replying affidavit from the applicant's former advocates as they claimed that they were not served with a hearing notice; that the appeal has merit as the claim for interest at 25% p.a. backdated for nearly 5 years was not a liquidated claim for which *ex parte* judgment could have been entered.

On the other hand**, Mr. Tiego** for the respondent submitted, in essence, that the learned single judge correctly addressed himself on the facts and the law and exercised his discretion properly.

In his ruling, the learned single judge correctly stated the principles upon which the Court exercises

discretion to extend time under rule 4 of the Court Rules. The Court is required to consider all the relevant factors including the merits of the intended appeal or appeal; the degree of prejudice which may be occasioned to the respondent if the application is allowed, the length of delay and the reasons for delay. In **Wasike v Swala [1984] KLR 91**, the Court said that an applicant must show in descending scale of importance that there is merit in the appeal, that extension of time would not cause undue prejudice to the respondent and, lastly, that the delay has not been inordinate. It is however important to bear in mind that the discretion of the Court to extend time is unfettered and that the duty of the Court to administer substantial justice without undue procedural technicalities as embodied in the overriding objective principle in section 3A and 3B of the Appellate Jurisdiction Act and in Article 159(2) (d) of the Constitution is now a paramount factor which should be given due weight.

We are also aware that a reference is not an appeal and the fact that the Court would have exercised its discretion differently is not a sufficient ground for interfering with the exercise of discretion by a single judge. The Court can only interfere with the exercise of discretion for misdirection or non-direction.

In the instant case, it is true that there was inordinate delay in filing the application for extension of time considering that the appeal was dismissed on 5th February 2013. Although the Court said that the hearing notice was served on the applicant's advocates, M/s Asige Keverenge & Anyanzwa, the copy of the hearing notice alleged to have been served was not availed to the single judge. The appellant's advocates by a letter dated 11th March 2014 stated that they had not seen the hearing notice and inquiries in their office indicated that none of the staff seems to have seen the hearing notice. It is apparent from the record that the applicant's advocates who are based in Mombasa had instructed **Mr. Keyonzo** who is based in Nairobi to handle the appeal which was lodged in Nairobi. As the issue of non service was raised, and in the absence of verification from the record of the Court that service was indeed effected, the learned single should have considered the issue in favour of the appellant and compute the time from the date the applicant first heard of the dismissal of the appeal as stipulated by Rule 102(3). The applicant deponed that he became aware of the dismissal of the appeal in or about March 2014. As the respondent did not file a replying affidavit, that fact was not controverted. There were no facts to show otherwise.

The history of the litigation shows that the applicant has relentlessly pursued his right to be heard in defence of the respondent's claim. It filed a defence to the claim within time. However, the defence was struck out for failure to serve it in time. The applicant immediately filed an application for extension of time within which to file and serve a defence but on realising that the Deputy Registrar had entered *ex parte* judgment just two days after the defence was struck out, withdrew the application. The applicant, again, promptly filed an application to set aside the *ex parte* judgment. The application was however dismissed by the High Court (**Khamoni, J**.) on 15th August 2001. The applicant filed Civil Appeal No. 285 of 2002 against the ruling. However, the applicant's advocates failed to include a primary document in the record of appeal leading to the striking out of the appeal on 8th December, 2003. The applicant then filed Civil Application No. NAI 336 of 2003 for extension of time to lodge a fresh appeal. That application was allowed on 4th June 2004 and Civil Appeal No. 124 of 2004 was lodged on 22nd June, 2004. That is the appeal which was struck out on the 5th February, 2013.

From the foregoing, it is plausible that the applicant learnt of the dismissal of the appeal on or about March 2014. The learned judge misdirected himself in holding that the applicant was not candid in explaining the delay. If the period between March and June 2014 when court file was missing is discounted, it is apparent that the application was filed within time or within reasonable time after the applicant heard of the dismissal of the appeal.

Furthermore, the learned single judge failed to consider the merits of the dismissed appeal on *prima facie* basis, which was an important factor and whether the applicant would suffer great financial loss or grave injustice if the application was not allowed.

The respondent's suit was filed on 17th November, 2000. He claimed a total of Kshs. 532,840/- with interest at commercial rate of 25% p.a. from 16th October,1996 until payment in full. The Deputy Registrar entered *ex parte* judgment in accordance with the claim. Now the applicant states that the

backdated claim for interest at commercial rate was not a liquidated claim. In **Kimani v. Attorney General [1969] EA 502,** the predecessor of this Court held *inter alia* that the loss of use of an article (represented by a rate of interest) for a period prior to the date of the plaint is a special damage which must be pleaded and proved. The applicant indicated in the application that the respondent has already been paid Kshs. 647,527/70 and is now seeking to recover more than Kshs. 3,000,000/-. It is apparent from the memorandum of appeal and from the foregoing that the intended appeal is not frivolous and failure to allow the applicant to pursue the application for restoration of the appeal to hearing is likely to cause grave injustice to the applicant.

Lastly, the learned judge misdirected himself in finding without evidence that, part of the decretal amount was released with the consent of both parties, when it is apparent that the applicant has all along contested the respondent's claim.

For those reasons, the reference is allowed, the ruling of the single judge is set aside and the application for extension of time is allowed with the result that the application for restoration of the appeal for hearing is deemed as filed within time.

The costs of the application for extension of time and the costs of reference shall be costs in the pending application for restoration of the appeal for hearing.

Dated and delivered at Nairobi this 3rd day of July, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR