



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J.A. (In chambers))

CIVIL APPEAL NO. 195 OF 2011

BETWEEN

RASHID NASORO T/A KAKAMEGA SERVICE STATION 1ST APPLICANT

RASHID NASORO T/A BROADWAYS DISTRIBUTORS2ND APPLICANT

AND

MOBIL OIL KENYA LIMITED RESPONDENT

***(Being an appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Koome J)
delivered on 26th day of March 2010***

in

H.C.C.C. NO.233 OF 2005)

RULING

1. This ruling relates to the application seeking enlargement of time to file record of appeal from the decision of the High Court.
2. On 26th March 2010, the High Court (Koome J, *as she then was*) delivered judgment in Nbi Milimani Civil Suit No.233 of 2005 in which the respondent, Mobil Oil Kenya Ltd, was plaintiff and Messrs Rashid Nasoro T/A Kakamega Service Station and Rashid Nasoro T/A Broadways Distributors, the applicants, were 1st and 2nd Defendants respectively.
3. The claim by Mobil Oil Kenya Ltd against the said defendants was for a liquidated sum of Shs.2,053,474.05.
4. The learned Judge found that the defendants had not controverted the evidence adduced in support of the claim and accordingly, entered judgment in favour of Mobil Oil Kenya Limited in the sum claimed plus costs.
5. Aggrieved by and dissatisfied with the High Court judgment the applicants filed on 3rd April 2010, Notice of Appeal pursuant to rule 75 of the rules of this Court manifesting their intention to

- appeal against the whole of the said judgment. The notice of appeal was served on Mobil Oil Kenya Ltd, the intended respondent, as required by the rules of this Court.
6. Under rule 82 of the rules of this Court, the record of appeal should have been lodged within 60 days of the date of filing the notice of appeal. But the proviso to rule 82(1) (supra) excludes in computation of the 60 days such time as may be certified by the Registrar of the High Court as having been required for preparation and delivery to the intending appellant of a copy of the proceedings provided that the application letter seeking such copy was made as required by rule 82 (2) within 30 days of the date of delivery of the judgment to be appealed against and was copied to the other party.
 7. It seems that the applicants as the intending appellants did not lodge the record of appeal within the time prescribed by the rules.
 8. Consequently on 24th November 2011 the applicants filed in this Court an application by way of notice of motion dated 21st November 2011 through their advocates, Messrs Lubulellah & Associates, in which they sought an order that this Court

“be pleased to order the enlargement of the time for filing the record of appeal by such time as may be deemed appropriate and that the record of appeal filed on 16th September 2011 be deemed as having been properly filed in court.”

9. The applicants rely on rule 4 of the rules this Court and on Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9, of the Laws of Kenya in seeking enlargement of time to file the record of appeal. Rule 4 (supra) states:

“the Court may, on such terms as it thinks just, by order extend the time limited by these rules, or by any decision of the Court or of a Superior Court, for the doing of any act authorized or required by these rules, whether before or after the doing of any act, and a reference in these rules to any such time shall be construed as a reference t that time as extended.”

10. Sections 3A and 3B of the Appellate Jurisdiction Act Stipulate

“3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) an advocate in appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court to comply with directions and orders of the Court.”

“3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

- a. ***the just determination of the proceedings;***
- b. ***the efficient use of the available judicial and administrative resources;***
- c. ***the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
- d. ***the use of suitable technology”***

11. The application was supported by an affidavit sworn on 21.11.2011 by Rashid Nasoro. It was based on the grounds appearing on its face which included the assertion that the appellants stand to suffer substantial loss unless time is enlarged as prayed and further, that the enlargement of time will not prejudice Mobil Oil Ltd, the respondent, in the intended appeal.

12. In his brief supporting affidavit, Rashid Nasoro averred that he was unable to file the record of appeal within the prescribed time because he was unwell and that for the same reason he was not able to raise Court filing fees. He further averred that the delay in complying with rule 82 of the Rules of this Court was caused by reasons beyond his control. It was also his averment that he had acted with due diligence in trying to comply with rule 82 and that the enlargement of time sought would not occasion any prejudice to the respondent.
13. **Ms Ngeresa**, the learned counsel holding brief for Mr. Wilfred Mutubwa for the applicants, presented the application before me in Chambers on 20th November 2013 and urged me to grant the application and allow the filed record of appeal to be deemed to be duly filed. She conceded that the record was filed after a period exceeding 250 days from the date it became due. She blamed counsel then on record for the applicants for the delay in lodgment of the record of appeal and urged the Court to exercise its discretion in favour of granting the application.
14. **Mr. James Okeyo**, the learned counsel for the respondent, opposed the application and in doing so relied on the replying affidavit sworn on 9th March 2012 by Stephen Kiiyuru, the “General Counsel” of the respondent authorized by the latter to swear the affidavit. He submitted that the proceedings were ready by 5th November 2010 but payment for them was not made until 14.01.2011, a fact, he said, which was reflected in the certificate of delay. By 14th January 2011, 60 days (from the date of filing the notice of appeal) within which the appeal should have been lodged had expired. In his view, the cost of the proceedings was meagre. It was Mr. Okeyo’s submission that the applicants needlessly pursued certification of the proceedings and thereby wasted time. He referred to the certificate of delay dated 19.5.2011, in respect of which he said, although collected on 19.05.2011, no action was taken until 16.9.2011 when the record of appeal was lodged in Court out of time and without leave. The present application was not made until 24.11.2011. It was Mr. Okeyo’s submission that the delay has not been satisfactorily explained and that it is in any case inordinate. Nor, he said, is the issue of lack of money explained. It was Mr. Okeyo’s contention that the Court was being called upon to exercise judicial discretion without any basis being laid. It was also his view that after the instant application was filed on 16.9.2011, the applicants went into a slumber and were awoken by the respondent’s application said to have been filed on 21.10.2011 seeking to strike out the filed record of appeal. They made the present application on 24.11.2011.
15. Section 3A is explicit that the overriding objective of the Appellate Jurisdiction Act and the rules of this Court is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act. This Court is enjoined under Section 3B (supra) to handle all matters presented before it for the purpose of attaining, inter alia, the just determination of the proceedings and their timely disposal at a cost affordable by the respective parties.
16. The applicants seek a discretionary relief in their application. The Court has unfettered discretion to grant the relief. The days when the stricture of “sufficient reason” obtained as a factor for the exercise of that discretion are long gone. As circumstances in each case invariably always vary, and as there is no specific standard category of factors to be considered in determining the merit or otherwise of applications in this regard, each application must therefore be determined on its own merits. But the pertinent parameters now accepted for consideration in determining an application such as the instant one include the requirement that the applicant must show firstly; that the delay militating against filing record of appeal in time is not inordinate or, has been explained satisfactorily. Secondly; the applicant must show that he has an arguable appeal, but this does not mean an appeal that must necessarily succeed. It is enough even if there be only one arguable point of law. Thirdly; the court must be satisfied that the extension of time will not cause undue prejudice to the respondent and fourthly; that the application should not be frivolous.
17. In the instant application, the applicants took judgment on 26th March 2010. They gave notice of appeal on 3rd April 2010. Subject to the proviso to rule 82(1) of the rules of this Court, record of appeal should have been filed within 60 days from 3rd April 2010. It was not. The applicants appear to have applied for a copy of the proceedings within 30 days of the date of delivery of the judgment and were accordingly entitled to have excluded in the computation of the 60 days period stipulated for lodging record of appeal such time as was required for preparation and delivery of the proceedings provided that the Registrar of the High Court so certified. The certificate of delay was issued on 19th May 2011. It shows that by a letter dated 5.11.2010, the applicants through

their advocates on record, Lubulellah & Associates, were notified by the Registrar that the proceedings were ready for collection on payment of the requisite charges. The applicants do not deny the fact of that notification but it was not until 14.01.2011 (two months and 9 days later) that they paid for the proceedings which were certified and collected on 27.1.2011 (exactly two months and 21 days later). The Registrar states in the certificate of delay that the extracted decree was forwarded to him by the applicants' advocates on 29th March 2011 for sealing and signing and that it was certified on 7th April 2011 and collected on 14.4.2011. In the registrar's view, the time required for the preparation and delivery of the typed proceedings and judgment and a certified copy of the decree was from 12th April 2010 to 14th April 2011, a total of 364 days.

18. After collecting the certified decree on 14.4.2011, and having earlier collected the certified proceedings on 27.1.2011 (although there was no requirement for the proceedings to be certified) the applicants did not lodge record of appeal until 16.9.2011 nor did they apply for extension of time until 24.11.2011 yet they were on notice and ought to have known that time for lodging record of appeal (after excluding the time certified by the Registrar as having been required for preparation and delivery of the proceedings) was 60 days from 14.4.2011 which would expire on 15 June 2011. By the time the applicants lodged the record of appeal on 16.9.2011, three months or 90 days had elapsed. They had no leave to file the record of appeal as they did. The delay in doing so seemed inordinate. Was it explained satisfactorily? In paragraph 2 of the supporting affidavit, the deponent/applicant merely states:

“2. That I have not been able to put in the Record of Appeal within the prescribed time for reasons that I was unwell and therefore not able to raise court filing fees requested for filing.”

19. That averment does not say much. It does not show when the deponent became unwell or the seriousness or otherwise of his illness nor whether he was hospitalised or not, nor does it show when, or what sum, the court officers advised him to pay for the record of appeal. The burden was on the applicants to show the Court what the circumstances were that militated against their ability to file the record of appeal within 60 days from 14th April 2011 and also that they were beyond the deponent's control. It was not enough for the deponent to merely state that the circumstances were beyond his control. He was enjoined to show how this was so. Without doing that, his statement remained hollow. In my view, the applicants have failed to satisfactorily explain the delay of more than three months and for this reason, their application dated 24.11.2011 which was made close to five months after the time for lodging record of appeal run out on 14.6.2011 is clearly without merit. Moreover, the intended appeal has not been shown to be arguable. The learned Judge who entered judgment against the applicants did so after making a finding that the applicants had not controverted the evidence adduced in support of the claim by the respondent. There is not a whimper by the applicants to show arguability of the appeal save that the appeal is said to be arguable without more although there is a memorandum of appeal in the record of appeal filed without leave.

20. For these reasons, the application is bound to fail even if no prejudice would be occasioned to the respondent if extension of time was granted. I so find. Accordingly, I hereby dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 31st day of January 2014.

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR