



IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: MARAGA, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. 64 OF 2014

BETWEEN

DAVID HOPDRAFT.....APPLICANT

AND

SALIM MANJI.....1ST RESPONDENT

INSTA PRODUCTS (EPZ) LTD.....2ND RESPONDENT

(Being an application for extension of time to file a Memorandum of appeal and record of Appeal in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi dated the 25th March 2012

in

HIGH COURT CIVIL SUIT NO. 643 OF 2010

R U L I N G

1. **David Hopcraft**, the applicant, seeks leave of this court to file the record of appeal out of time. He seeks to appeal against the ruling of the High Court (Kimondo J) dated 15th March 2013 dismissing his application to set aside the ex-parte judgment which had been entered against him in HCCC No. 643 of 2010.
2. The application is based on the ground that following the entry of that ex-parte judgment against the applicant and the second respondent, both of whom were defendants in that case, the applicant’s attention was focused on applications to set aside that judgment thus inadvertently causing him not to file the record of appeal in time. It is also based on the ground that he was under a misapprehension that his appeal could ride on the crest of the 2nd respondent’s appeal No. 265 of 2013 which has already been filed in this Court.
3. Relying on the affidavit of his colleague, Mr. James Torore Makori, counsel for the applicant argued that upon delivery of the

ruling on 15th March, 2013, the applicant filed a notice of appeal and applied for copies of the proceedings on 18th March 2013.

When counsel for the applicant were on 10th June 2013 advised that the proceedings were ready for collection, they were under a misapprehension that since the applicant's case is intricately intertwined with that of the second respondent, the applicant's appeal could ride on the crest of the 2nd respondent's hence the failure to lodge the record of appeal out of time. However, later, and on a second thought, they decided to file a record of appeal for the applicant hence this application.

4. Opposing the application, counsel for the 1st respondent submitted that the applicant has not explained the cause of the delay or given any plausible reason why he did not file the record of appeal in time. They submitted that under **Rule 80** of the **Court of Appeal Rules** (the Rules), the applicant having been the first to file the notice of appeal, he bore the responsibility of preparing and lodging the record of appeal. They argued that the applicant's apparent ignorance of this Rule and the procedure set out in Rules 92 and 93 is no defence and urged me to dismiss this application with costs.

5. I have considered these submissions and read the application and the supporting affidavit. The court has a wide discretion in applications **Rule 4** of the Rules but that discretion has, in the interest of justice in each case, to be exercised judiciously. The main consideration in such application is the period of delay and whether or not the applicant is able to satisfactorily explain the reason for the delay. The other consideration are the chances of the applicant's appeal succeeding if the application is allowed, and the prejudice, if any, that will be caused to the respondent. The applicant's main ground in this application is that he and his advisers were under a misapprehension that his appeal could ride on the crest of the 2nd respondent's appeal. That is a clear demonstration of ignorance of **Rule 80**. The applicant's advisers also seem to have overlooked the proviso to **Rule 82(1)**.

6. Clearly these are slips of counsel which should not be visited upon the client. It is common ground that this Court allowed the 2nd respondent to file its record of appeal out of time and it has filed Civil Appeal No. No. 265 of 2013. As that appeal arises from the same decision the applicant wishes to appeal against and since the applicant's case is intricately intertwined with that of the 2nd respondent, I am of the view that both the applicant and the 2nd respondent should be heard and the matter be determined on merit. If I grant this application, the applicant's appeal will most likely be consolidated and heard together with that of the 2nd respondent. In the circumstances, no prejudice will be caused to the 1st respondent which cannot be remedied by an order of costs.

7. For these reasons, I grant this application. The applicant shall file and serve his record of appeal within fourteen days of the date

hereof. The 1st respondent shall have the costs of this application which I assess at Shillings Fifteen Thousand (Kshs. 15,000/=) to be paid within 10 days of the date hereof failing which this application shall stand dismissed with costs.

DATED and delivered at Nairobi this 3rd day of October, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original

DEPUTY REGISTRAR

