



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AGANYANYA, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 70 OF 2011

BETWEEN

CONSOLIDATED BANK OF KENYA LTD..... APPLICANT/APPELLANT

AND

SAMUEL OKOTHRESPONDENT

(An application for striking out notice of appeal and the record of appeal from the judgment and decree of the High Court of Kenya at Nairobi (Okwengu, J.) dated 12th May 2009

in

H.C.C.A.No.231 of 2005)

RULING

This application, expressed to have been filed under **rule 4** of the Court of Appeal Rules 2010 seeking the following orders:-

- 1. *The applicant be given leave to file its memorandum of appeal out of time.***
- 2. *That in the event that leave is granted, and time enlarged as prayed herein before then the memorandum of Appeal filed on 18th April 2011 be deemed to be properly filed and served on the respondent in compliance with the rules of this Honourable Court.***
- 3. *That the costs of this application abide with the result of the said appeal or be dealt with as the justice of the case shall seem to require.***

The grounds upon which the application was based are as follows:-

- a) *The memorandum of appeal filed on behalf of the applicant was so filed out of time prescribed by the rules of this Honourable Court as a result of which an essential step in the proceedings has not been taken within the prescribed time.***
- b) *The said non-compliance with the Rules aforesaid was due to a delay caused by circumstances beyond the control of the applicant or the advocate.***

c) ***The applicant risks having its memorandum of appeal on record struck out with costs for being incompetent having been filled out of time.***

The application as also supported by the affidavit sworn to by one *Gitwiri Mwongera* the advocate in the firm of advocates representing the applicant herein. In it he stated that by consent of counsel for his said firm, *M/s Mureithie Kibira Advocates* and that of *M/s Makhandia & Makhandia Advocates*, the former took over the conduct of this matter from the latter on 6th December, 2010. But by a judgment dated 12th May, 2009 *Okwengu, J.* had in favour of the respondent in ***Civil Appeal No. 231 of 2005***. Although the applicant/appellant had applied for copies of typed proceedings in the appeal on 26th May 2009. These had not been supplied. In the meantime the former firm of advocates had filed a Notice of Appeal on 2nd June, 2009. That on 17th January 2011 the latter firm of advocates applied for same copies of proceedings for the purpose of lodging the appeal and these were certified on 12th February 2011 while the judgment was certified on 21st February 2011.

That later while a clerk from that firm of advocates was in his course of duty he discovered that the proceedings had long been issued and notification thereof sent to the applicants' previous firm of advocates. It is then that the firm of *M/s Muriethie & Kabira Advocates* requested for the certified copy of the decree of the judgment for the purpose of preparing the record of appeal. The firm received a certified decree on 6th April 2011 and the memorandum of appeal was filed on 18th April, 2011.

Mr Mwongera avers in the affidavit that the delay in filing the appeal was wholly caused by the above reason and no prejudice will be occasioned to the respondent.

The respondent filed a replying affidavit on 26th June, 2011 and stated in paragraph 4 thereof that the applicant did not merit the exercise of the Court's discretion is their favour; as the deponent to the supporting affidavit in support of it was not truthful in explaining the cause of the delay by saying counsel for the applicant did not receive notification from the Registrar that the typed copy of proceedings were ready when in fact counsel on record then, *M/s Makhandia & Makhandia Advocates* received such notification. He averred further that the real reason for the delay was lack of due diligence on the part of counsel for the applicant as they should have followed up with former counsel to find out if they had received notification that typed proceedings/judgment were ready for collection.

The application was heard on 5th October, 2011 when ***Mr Mureithie*** learned counsel for the applicant and ***Mr Thigo*** learned counsel for the respondent highlighted what was contained in the supporting and replying affidavits respectively. *Mr Mureithie* reiterated that inordinate delay was caused by lack of cooperation from previous counsel for the applicant and the late certification of decree by the High Court. On the other hand *Mr Thiga* reiterated that the inordinate delay was not explained and that the appeal itself had no chances of success due to many errors or omissions which the counsel explained.

In an application of this nature the Judge has a wide and unfettered discretion under **rule 4** of the Rules to either grant or refuse to grant it according to the circumstances of each application. The judgment giving rise to the delay in filing the appeal was delivered on 12th May 2009. The notice of appeal was filed within the requisite time on 26th May 2009 – see **rule 75** of the Court of Appeal Rules. Under **rule 82(2)** the record of appeal was supposed to be filed within 60 days from the date the notice of appeal was filed. But this was not done for the reason that the appellant and his former counsel had a dispute which led to failure to do so until 18th April 2011. It has a memorandum of appeal dated 13th April 2011 – lodged in Court together with the record on 18th April, 2011. Had this been done within time, the appeal should have been filed by 27th July 2009. Thus there was a delay of about 1 year 9 months. This is what *Mr. Mwongera* attempts to explain by submitting about a dispute between the applicant and his former advocates. The nature of the dispute is not disclosed.

This aside, by consent of the present and former advocates of the applicant, dated 6th December, 2010, *M/s Mureithie & Kabira Advocates* took-over the conduct of this appeal on behalf of the

applicant. By then the appeal was already 1½ years late. If they were prudent and diligent enough Mr. Mureithie simply inquired from M/s Makhandia & Makhandia Advocates whether they had applied for and/or received typed proceedings for the purposes of lodging appeal. Instead they again applied for proceedings only to state in the affidavit and submission that they discovered later that proceedings had long been typed and judgment certified and that Messrs Makhandia & Makhandia Advocates notified of this. In view of this I agree with the submissions of Mr. Thiga for the respondent that the applicant's counsel was not diligent enough and this is why this inordinate delay was caused. Mr. Thiga has also punched holes in the record of appeal to indicate an uphill task the applicant has the success of the appeal. In the circumstances, I find this an unsuitable application for the Court to exercise its discretion in favour of the applicant. I dismiss the same with costs.

Dated and delivered at Nairobi this 27th day of January, 2012.

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR