



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 84 OF 2011

BETWEEN

PULLIN HARAKCHAND SHAH APPLICANT

AND

SOUTHERN CREDIT BANKING CORPORATION RESPONDENT

(An application for extension of time within which to lodge the Notice of Appeal and Record of Appeal out of time against the Order and Ruling of the High Court of Kenya at Nairobi, Milimani Commerical Courts (Ringera, J) dated 14th March, 2002

In

H.C. C. Suit No. 759 of 1998)

RULING

The applicant before me is one **Pullin Harakchand Shah**. I shall hereinafter refer to him simply as “*the applicant.*” He proposes to appeal against the order of Mr. Justice A. Ringera, as he then was. That order was made way back on the 14th March, 2002. Accordingly as at the date of my present Ruling, it is approximately ten (10) years old. The respondent to the motion filed in this Court on the 6th April, 2011 is Southern Credit Banking Corporation. Some time in October, 1994, the respondent lent to the applicant the sum of **Shs.2,450,000/-** and thereafter in 1995 and 1996 various other advances or accommodation were made to the applicant and according to the plaint filed in the High Court by the applicant, as at the date of the plaint (24.11.1998) only **Shs.2,147,115.00** was outstanding. The applicant’s property known as L.R. No. 7158/425 and L.R. No. 7158/426 had been used as security for the loan. In July, 1998, the respondent instructed its lawyers to issue a statutory notice for the sale of the applicant’s property despite the applicant’s assertion that, based on an analysis by an accountant, the loans had been overpaid by **Shs.9,720,829/-**. The applicant, therefore, prayed for the refund of the said sum with interest thereon at **22%** per annum, the release of some vehicles to the applicant or payment of their value and the discharge and release of title documents to his property. The respondent filed a defence to the claim and the defence was subsequently amended to include a counterclaim in the sum of **Shs.26,972,441/90** with interest thereon at **30%** per annum. There was also a prayer for a declaration that the respondent was entitled to enforce the securities over the applicant’s property.

These rival claims came up for hearing before Ringera, J on the 14th March, 2002. Mr. Bhaskar Sheth

appeared for the applicant while Mr. Mungai appeared for the respondent. Mr. Sheth asked for an adjournment on the ground that the applicant was in the United Kingdom and was not able to travel to Kenya due to difficulties in air travel. Mr. Mungai opposed the application for adjournment and the learned Judge, in the exercise of his undoubted discretion refused to grant an adjournment. Mr. Sheth was unable to present any evidence in support of the applicant's claim and the Judge then ruled as follows:-

“As the plaintiff is unable to offer any evidence in support of his suit, I am constrained to dismiss his claim for want of prosecution. As regards the injunction issued herein, I am of the opinion the order cannot subsist independently of the plaintiff's claim against the defendant. I accordingly order that it be discharged. The defendant is also awarded the costs of the suit filed against it by the plaintiff. I will now proceed to hear the counterclaim.”

Evidence was then given on behalf of the respondent by one Wilfred Orok who was the respondent's legal officer. He was cross-examined by Mr. Sheth on behalf of the applicant after which proceedings were adjourned to a later date. I do not know what followed thereafter; what is clear from the record before me and which is sufficient for the purpose of this motion is that on the 20th March, 2002 the applicant filed a notice of appeal showing that he intended to appeal against the decision of Ringera, J given at Nairobi on the 14th March, 2002. That notice was clearly filed within the time prescribed by the Court's Rules. But the applicant, after the notice of appeal had been filed, dispensed with the services of Mr. Sheth and the law firm of Onsando, Ogonji & Tiego took over the case. The new lawyers read the record of appeal which had been filed pursuant to the notice of appeal of 20th March, 2002; the lawyers advised that certain pertinent documents had been left out of the record and the record of appeal was withdrawn. An application for extension of time, i.e. Civil Application No. NAI. 62 of 2007 was lodged; it was heard by O'Kubasu, J.A who allowed it on 16th July, 2007 and directed that a fresh notice of appeal be lodged within seven (7) days of his order and the record of appeal was to be lodged within fourteen days from the date the notice of appeal was filed. The applicant was unable to comply with the terms set in the order and once again lodged Civil Application No. 63 of 2008 asking for further extension of time. Onyango-Otieno, J.A. heard that application and allowed it on 27th June, 2008; he directed that the record of appeal was to be lodged within fifteen (15) days of the date of his order. Once again the applicant was unable to comply with that order and the next thing the Court heard of the matter was when the present motion was filed on 6th April, 2011, some three years after the orders made by Onyango-Otieno, J.A. In the motion, the applicant, still undeterred, asks me to once again extend for him the time within which to lodge the notice of appeal and the record of appeal.

Under **Rule 4** of the Court's Rules, I have the jurisdiction to extend the time as that rule does not prescribe the number of times a litigant may make such an application. Because the discretion of the Court is still intact, i.e. irrespective of the number of times an applicant may ask for the exercise of the discretion, I have found it necessary to set out the history of the litigation so that I can see, whether in all the circumstances of the case, I should still exercise my discretion in favour of the applicant. I am entitled to take into account the history of the litigation and in the case of this application, that history cannot be said to be in favour of the applicant. The decision he seeks to challenge on appeal was made in his absence because he had travelled out of the country when he knew or ought to have known that his case had been listed for hearing. The case had been filed way back in 1998, i.e. on 24th November, 2008; in the interim, the applicant had obtained an order of injunction restraining the respondent from enforcing its security. About four years later when the case was to be heard, the applicant was not available to present his case.

Then, not only once but two times, the applicant obtained orders from the court extending time for him. On both occasions he failed to comply with the orders. The last such order was made by Onyango-Otieno, J.A on 27th June, 2008; admittedly the applicant was in Kenya even if his health was failing. For all the delay between June, 2008 to the 6th April, 2011, when he filed the present motion, the applicant puts the blame wholly on his ill-health. I personally sympathize with the applicant's ill-health, but it would be wrong to let that factor over-ride the long history of default on the part of the applicant starting right from the time when his suit was heard in his absence. In the end, Mr. Rustram Hira, who urged the motion before me simply pleaded for the Court's mercy upon the applicant. Once again I sympathize with

the applicant's ill-health but having taken into account all the surrounding circumstances of the case, I am not inclined, and I hereby decline, to exercise my discretion in favour of the applicant. Accordingly the notice of motion dated and lodged in the Court on the 6th April, 2011 fails and I order that it be and is hereby dismissed. In view of Mr. Hira, passionate appeal based on the ill-health of the applicant, I order that each party shall bear its own costs.

Dated and delivered in Nairobi this 3rd day of February, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.