



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPLICATION 246 OF 2011
SOMKEN PETROLEUM COMPANY LIMITED APPLICANT
AND
NATIONAL OIL CORPORATION OF
KENYA LIMITED 1ST RESPONDENT
JULIA MUTUMBI 2ND RESPONDENT
FABIAN LIJOODI 3RD RESPONDENT

(sued as legal representatives of the Estate of the late
Isaac Mutumbi Lijoodi)
BRIAN LIJOODI 4TH RESPONDENT

(Being an application for extension of time for service of the notice of appeal and for directions that service need not be effected on JULIA MUTUMBI and BRIAN LIJOODI who took no part in the proceedings in the High Court of Kenya at Kakamega

in

H.C.C.C. No. 190 of 2010)

RULING

The notice of motion dated 9th August, 2011 and filed on 4th October, 2011 is pronounced to be based on **Rules 4** and **77** of the Court of Appeal Rules. The applicant seeks the following orders:-

- “1. The time for filing this application be extended and the application be deemed as properly filed.**
- 2. The time for service of the notice of appeal on the first and fourth respondents be extended to 22nd July, 2011 and 28th July, 2011 respectively and the said notice of appeal be deemed as properly served within time.**
- 3. Service of the notice of appeal and the record of appeal need not be effected on Julia Mutumbi and Fabian Lijoodi, being persons who did not take part in the proceedings in the Superior Court.**
- 4. In the alternative this court do give directions that service of the notice of appeal and the record of appeal be effected upon Julia Mutumbi and Fabian Lijoodi through post at their given postal address of P.O. Box 534, Kakamega.**
- 5. Costs of this application do abide the appeal.**

ON THE GROUNDS THAT:-

1. The time for filing this application pursuant to **Rule 77** of the Court of Appeal Rules has lapsed.
2. The time for service of the notice of appeal on the respondents pursuant to **Rule 77(1)** of the Court of Appeal Rules has lapsed.
3. The physical address of the second and third respondents is not known to the applicant and it is therefore impossible to effect personal service on them.
4. The second and third respondents did not take any part in the proceedings in the Superior Court.”

The notice of motion is supported by the supporting affidavit of one, **George Gitonga Murugara**, Advocate dated 8th August, 2011 and a supplementary affidavit sworn by **Kiragu Kimani**, Advocate dated 7th March, 2012. Both these advocates are from the firm of Hamilton Harrison and Mathews Advocates who represent the applicant herein.

There is no replying affidavit filed in respect of any of the Respondents.

It is also worth noting that although the supplementary affidavit and the hearing notice notifying counsel for the 1st respondent and 4th respondent of today’s date, there was no attendance from either of them. Indeed, Mr. Siganga, learned counsel for the applicant, informed the court that he had talked to counsel for the 4th respondent who had informed him that they were not opposing the application. The same is therefore unopposed.

The gist of the application is that the applicant, **Somken Petroleum Company Limited** is the 1st defendant in **High Court Civil Case No. 190 of 2010** at Kakamega. It filed an application dated 16th December, 2010 in which it sought orders of stay of proceedings of the civil case pending the reference of the matter to arbitration of the dispute between it and the plaintiff. The application was dismissed vide the court Ruling dated 4th July, 2011. It is that ruling that the 1st defendant now wants to appeal against. Indeed the Notice of Appeal was filed in Court but the same was served on the respondents late i.e. on 22nd July, 2011 and 28th July, 2011 respectively – hence the 2nd prayer in the application.

According to the applicant, the notice of appeal was served late on the Respondents due to the difficulties in tracing them but the delay is not inordinate and that the same has been adequately explained. Counsel further urged the Court that the appeal has high chances of success and is of great importance to commerce in this country as it seeks to entrench arbitration in this country.

I have considered the application in question along with the grounds raised. I have studied the contents

of the two affidavits and the annexures thereto. I am satisfied that the delay involved only a few days. The same has been sufficiently explained to the satisfaction of this Court. I also note that the application giving rise to the impugned ruling was basically against the applicant herein and did not affect the other defendants who were not privy to the arbitration clause which the applicant herein sought to invoke before the superior court.

That would explain why they had not participated in the proceedings before the superior court.

I have read the superior court's ruling and I am in agreement that although technically the 2nd, 3rd and 4th respondents were not parties in the said application, they would be affected by any arbitral proceedings affecting the property in question which is physically in their hands. For these reasons, I find that it is in the interest of justice that time be extended to serve the notice of appeal on the other respondents herein. I also find that it is important that the 2nd and 3rd respondents be served with the notice of appeal and the record of appeal so that they can make an informed decision as to whether they will need to participate in the appeal in question. Learned counsel for the applicant says that they have been difficult to trace. I will therefore allow the applicant to serve them through the postal address they have given in the Succession Cause No. 169 of 2010 at Kakamega High Court.

For the foregoing reasons and the fact that the application is not opposed, I am convinced that the orders sought will not be prejudicial to the respondents in any way. I therefore allow the notice of motion and grant *prayers 1, 2 and 4*. I also order that costs be in the appeal.

Dated and delivered at Kisumu this 21st day of June, 2012.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR