IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKIM, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 15 OF 2011 (UR. 10/2011)

BETWEEN

BI-MACH ENGINEERS LIMITED.....APPLICANT

AND

JAMES KAHORO MWANGI .....RESPONDENT

(An application for leave to extend the time for lodging an appeal out of time from the judgment and decree of the

High Court of Kenya at Nairobi (Maraga, J.) dated 2nd December, 2010

in

H.C.C.A. NO. 567 OF 2006)

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R U L I N G

The motion dated 21st January, 2011 originally sought one substantive prayer for extension of time to lodge an appeal against the judgment of the superior court dated 2nd December, 2010. It made no mention of any notice of appeal having been filed or extension of time to file it being sought. At the hearing of the application however, learned counsel for the applicant Mr. Ombwayo, made an informal application to amend the prayer to include extension of time to file a notice of appeal. That informal application was opposed by the respondent's counsel Mr. Nyagah but I overruled the objection, and thus granted the amendmend, the reasons for which I reserved for this ruling, which I now give.

In the first place ***rule 42 (3)*** of the Court's rules allows it and more importantly, the overriding objective under ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act which are invoked in the motion, require the just, expeditious, proportionate and affordable resolution of disputes.

So too ***Article 159 (d)*** of the Constitution which discourages technicalities. I take the view that rejection of the amendment by requiring a formal application would involve the parties in unnecessary costs and cause undue delay. Furthermore I do not discern any prejudice to the respondent by allowing the amendmend.

What is the background to the motion?

The respondent was employed as a *"fitter-general cum turner"* in the applicant's engineering plant between the years 1980 to 1999. In June that year the respondent voluntarily retired from employment and claimed some salary arrears as well as gratuity for the period of 19 years he had worked for the applicant. Three months later, the applicant wrote a letter to the respondent intimating that the *"service and arrears"* had been *"provisionally calculated"* at Shs.676,046.90 but that *"a schedule of payment"* would be sent to the respondent *"as soon as it is confirmed"*. Subsequently the applicant informed the respondent that all his salary arrears had been paid save for Shs.4,346.50, but no further payment was due to him since he had retired voluntarily.

The respondent was aggrieved by that turn of events and therefore went before the Chief Magistrate's Court on 8th March, 2005 and filed suit seeking to recover the sum of Shs.676,046.90 together with interest thereon from the date of retirement. The applicant filed a defence denying the claim whereupon the respondent filed a motion for summary judgment under ***Order 35 rule 1*** and ***2*** of the Civil Procedure Rules. In a considered ruling delivered on 10th August, 2006, the Chief Magistrate (T.W. Wamae (Mrs)) found that the applicant had made a commitment to pay the respondent the sum claimed and therefore there were no triable issues. Summary judgment was entered and a decree ensued for that sum together with interest from the date of retirement.

The applicant was not satisfied with the decision and appealed to the superior court. In the meantime an order for stay of execution was issued on terms that the decretal sum be deposited in an interest earning account in the names of counsel for both parties and the order was complied with. Upon hearing the appeal, and in a considered judgment delivered on 2nd December, 2010, the superior court (Maraga, J) upheld the decision of the Chief Magistrate that there was no triable issue and dismissed the appeal. He now intends to appeal further to this Court.

It is the applicant's assertion in the affidavit in support of the motion sworn by its Managing Director that the decision of the superior court was not communicated to the applicant by their advocates and that if he had known he would have filed a notice of appeal forthwith and proceeded to challenge the decision on further appeal. He only knew about the decision on 30th December, 2010 from an undisclosed nephew when he instructed counsel now on record who applied for copies of the *"proceedings, pleadings and record of appeal and judgment"* the following day. It is not stated in the affidavit when the copies were received but the motion was filed on 2nd February, 2011. The delay of 12 days before the filing is not explained.

In submissions before me, Mr. Ombwayo disclosed that the proceedings applied for were obtained on 17th January, 2011 and in his calculation, the delay occasioned is 60 days or 43 days if the Christmas holiday vacation is discounted. He further submitted that the intended appeal was meritorious as it would raise the point of law that summary judgment ought not to have been entered on the ground that there was admission of the debt as if the motion was taken out under ***Order 6 rule 13.*** The application had been based on ***Order 35*** which requires the establishment of a triable issue which was shown. The issue of interest was also triable. He further submitted that there would be no prejudice caused to the respondent since the full decretal sum was secured.

In response to the application, Mr. Nyagah submitted that there was no explanation given for the late realization that the appeal had been decided as there was no affidavit from the alleged nephew of the applicant's Managing Director or his erstwhile advocate. At all events if the advocate was negligent, the applicant is not without a remedy. Furthermore, he submitted, the applicant was still within time to file a notice of appeal and record of appeal after receiving the information and did not have to wait for another month to file the motion. There was no explanation therefore given for the inordinate delay of two months and no basis for the exercise of the court's discretion. As for the merits of the intended appeal, Mr. Nyagah submitted that it was spurious since the applicant was merely denying its own letter of commitment to pay gratuity. The commitment was made more than 12 years ago in 1999 and the respondent has since grown old awaiting the conclusion of his case. Further delay will therefore be

prejudicial to the respondent.

I have considered the motion, the affidavits and authorities on record, the submissions of both counsel, and I take the following view of the matter:-

Whether or not the order for extension of time should be granted lies entirely in my unfettered discretion. That discretion must however be judicially exercised and in doing so I recall the guiding principles often cited which I take from **Fakir Mohamed vs. Joseph Mugambi & two others**, **Civil application No. Nai. 332/04**; thus: -

"The exercise of this Court's discretion under rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of actors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustively factors....."

That decision was made long before the enactment of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act which introduced the "**Overriding objective**" of civil litigation and thus imposed a legal duty on the court to facilitate the *"just, expeditious, proportionate and affordable"* resolution of disputes. The exercise of my discretion under the guiding principles aforesaid must therefore be subject to that objective.

I have examined the affidavit in support of the application and it is my view that it falls short of candidness and betrays lack of expedition. There is no explanation at all about what the applicant was doing between 2nd December and 30th December, 2010 when an undisclosed informer gave out the information about the decision of the court. The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and the principles stated above. I would in the circumstances be disinclined to exercise my discretion in favour of the applicant. There must be an end to litigation and the 12 year delay in concluding the litigation is sufficiently prejudicial to the respondent.

The application is dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 3rd day of June, 2011.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR