REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, WAKI & AGANYANYA, JJ.A.

CIVIL APPEAL/APPLICATION NO. 97 OF 2008

BETWEEN

CALTEX OIL (K) LIMITED.....APPLICANT/APPELLANT

AND

RONO LIMITED.....RESPONDENT

(An application seeking leave for extension of time as limited by the ruling of the Court of Appeal at Nairobi (Omolo, JA) dated 9th May, 2008 for service of Record of Appeal in respect of the ruling of the High Court of Kenya at Nairobi (Waweru, J) dated 24th February, 2005

in

H.C.C.C. NO. 1388 OF 1992)

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RULING OF THE COURT

This is a Reference to the full Court from the Ruling of a single Judge (Alnashir Visram, JA) dismissing an application by ***Caltex Oil (Kenya) Limited*** [applicant] for extension of time within which to serve a Record of Appeal.

The application for extension of time was made mainly under ***Rule 4 of the Court of Appeal Rules (Rules)***. The applicant sought two main orders thus:

1. That grant of leave for extension of time to serve the record of appeal out of time as limited by the decision of the Court of Appeal (Hon Mr Justice R S C Omolo made on 9th May, 2008;
2. ... the Record of appeal served on the Respondents on 30th May, 2008 be deemed to have been served within time...

The applicant has already filed **Civil Appeal No 97 of 2008**. For better appreciation of the nature of the appeal we set out, albeit in a nutshell, the history of the dispute.

Sometime in 1992, ***Rono Limited*** [respondent herein] filed a suit against the applicant for specific performance of agreement of sale dated 19th June, 1992 by which the applicant agreed to sell L.R. No:

209/4599 to the respondent. The respondent averred that the applicant subsequently repudiated the agreement and confirmed that it would not complete the sale. The reliefs sought in the plaint were:

1. *An injunction;*

2. *Order for specific performance of the agreement with all necessary consequential orders and directions;*

3. *Further or alternatively damages for breach of contract; and*

4. *Costs.*

The applicant filed a defence. It averred among other things that it did not repudiate the agreement but rather, gave notice of recission of the agreement and returned the deposit. The applicant further averred that, specific performance would be inequitable for the fact ***inter alia*** that, the price of Shs.55,000,000 agreed between the parties was substantially below the market value of the property and that the shareholders of the applicant who were USA corporations would be committing a criminal offence under USA law if they permitted the applicant to complete the sale.

The respondent subsequently applied for judgment on admissions contained in the defence in terms of prayers 2 and 4 of the plaint *"AND damages payable to the plaintiff for breach of contract be assessed by this court."*

The application was contested. However, the application was allowed on 15th February, 1999 and, the court entered judgment as prayed in the application together with costs. A notice of appeal was filed indicating that the applicant intended to appeal against the judgment, but, apparently, no appeal was filed against the judgment. Thereafter, a preliminary decree which did not include the award of damages was issued by the Deputy Registrar. Later, the respondent made an application for expunction of the preliminary decree on the ground that it omitted to include the award of damages which application was allowed despite strong objections by the applicant. Consequently, another preliminary decree was issued on 9th May, 2006 containing three orders, namely: specific performance; damages for breach of the agreement of sale to be assessed by court and, lastly, costs of the suit. It is apparent that the suit property was ultimately conveyed to the respondent by virtue of a court order.

The suit was ultimately listed for assessment of damages when the applicant raised a preliminary objection to the assessment of damages before Waweru J. By the preliminary objection the applicant contended ***inter alia*** that in terms of the judgment no damages fell to be assessed; that the court is ***functus officio***; that the judgment and order of the court dated 15th February, 1999 was null and void as it was made in excess of jurisdiction, in that, among other things, no damages were pleaded other than damages as an alternative to specific performance; that the order purported to allow judgment for time-barred claims; that the order of 15th February, 1999, being a nullity should be set aside ***ex debito justitiae,*** and, that the respondent was using the order to claim damages in abuse of the process of the court.

The preliminary objection was dismissed on 25th February, 2005, on the ground that the judgment could not be challenged through a preliminary objection. The superior court, however, observed thus:

"Of course the issues raised by the defendant in the second notice of preliminary objection are weighty and substantial and in all likelihood with much merit. But let them be brought in the proper forum."

Four months later, the applicant lodged **Civil Appeal No 128 of 2005** against the dismissal of the preliminary objection. The appeal was however struck out sometime in 2006 on the ground that some primary documents had not been incorporated in the record of appeal. A subsequent application for extension of time to file a fresh appeal was allowed and the applicant filed **Civil Appeal No 126 of 2006**. That appeal was again struck out on the application of the respondent on the ground that the record of appeal did not contain a certified copy of the order appealed against. Undeterred, the applicant filed a

fresh application for extension of time to lodge a fresh appeal. The application was allowed by a single Judge of the Court (Omolo JA) and the following orders were made:

1. The applicant shall file and serve upon the respondent the notice of appeal within seven (7) days of the date of this ruling;

2. The applicant shall file and serve upon the respondent the record of appeal within fourteen (14) days from the date of the filing of the notice of appeal;

3. The applicant shall pay to the respondent the costs of the motion, the same to be agreed or if not agreed to be assessed by the Deputy Registrar of the Court;

4. Should the applicant fail to comply with any or both of the orders in paragraphs (1) and (2) herein within the stated periods, then in the event of such failure the notice of motion shall stand dismissed with costs without any further order of the court. ..."

Following those orders the applicant lodged Civil Appeal No 97 of 2008. The notice of appeal was filed and served within the time stipulated in the order. Similarly, the record of appeal was filed within the time stipulated by the order. However, the record of appeal was not ***served*** within the stipulated time. It was served ***two*** days late. The application which was dismissed by the single Judge was intended to validate the belated service.

The application for extension of time limited by the order of Omolo, JA was dismissed by the single Judge for three reasons, namely, that the application was incompetent for two reasons, firstly because the matter was ***res judicata*** and no further application for extension of time, could be made until the orders made by Omolo, JA were set aside, and, secondly because the notice of appeal had lapsed by virtue of the orders of Omolo, JA and there was no application seeking the extension of time to revive the notice of appeal, thirdly, the applicant was not deserving of the court's discretion in its favour because the applicant had previously made two applications for extension of time, and, lastly, that, there was no explanation as to why the record of appeal could not have been served before the expiry of the fourteen days nor any explanation why another advocate could not have been appointed to oversee the service in Mr Gatonye's absence abroad.

Mr Munyalo, learned counsel for the applicant submitted among other things, that, the finding that the application was ***res judicata*** was wrong as the learned judge had to consider the new application; that the single judge failed to consider that the Court has power to extend time set by it even where there is a default clause, and, that the power remains so long as the main suit remains pending; that the application was for extending time set by Omolo, JA and was not a fresh application for extension of time; and lastly, that the single judge did not consider the application before him but other previous applications for which that applicant had been punished. On the other hand, Mr Esmail learned counsel, for the respondent submitted ***inter alia*** that the single judge directed himself properly on the law; that in view of order No. 4 of the orders of Omolo, JA, the applicant could not get an extension of time by another application; that the single judge took into account legitimate factors, and, that, there was no admissible explanation for the delay.

The firmly established general principle of law, is that a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that he misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the single judge was clearly wrong in the exercise of his discretion and that as a result there has been miscarriage of justice (see ***MBOGO VS SHAH [1968] EA 93***).

In making a finding that the application was misconceived, the learned single judge reasoned thus:

"First in accordance with the orders issued by Omolo, JA on 9th May, 2008, the record of appeal not having been served on time the notice of motion seeking extension of time stood dismissed. The orders by the learned Judge of Appeal on 9th May, 2008 are in force and have not been set

aside. What that means is that the notice of motion application seeking extension of time was heard and fully determined by Omolo, JA. The matter is now *res judicata* and until the orders made by Omolo, JA are set aside, no further application to extend time can be entertained. Secondly, even if I could, and did extend time to serve the record of appeal, that would not help the applicant because there is no prayer before me to seek the revival of the notice of appeal which has also lapsed pursuant to the orders made on 9th May, 2008".

Mr Munyalo submitted that the application was for extension of the time limited by the order of Omolo, JA and that it was not a fresh application for extension of time.

That is undoubtedly the correct position as the application specifically sought the extension of time *"as limited by the decision"* of Omolo, JA. ***Rule 4*** on which the application was based gives Court power to extend time limited by Court of Appeal Rules or *by any decision of the Court* or limited by the decision of the superior court for doing any act authorised or required by these rules *whether before or after the doing of the act*. Thus the time for doing an act could be extended either before the doing of the act or after the doing of the act. In the instant application the applicant had already served the record of appeal two days out of time and sought extension of time to validate the belated service. Furthermore, by ***section 59 of the Interpretation and General Provisions Act***, where the court is given power by a written law to extend time prescribed by such written law for doing an act or taking proceeding, the court can extend time *"although the application for extension of time is not made until after the expiration of the time prescribed."*

The learned single judge was apparently of the view that the Court had no jurisdiction to extend time because the default clause had taken effect and that until the default clause was set aside no further application to extend time could be entertained.

However, the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it always retains power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the court still retains control of the order notwithstanding that there has been default. That would necessarily depend on the true construction of the default clause.

The applicant's counsel relied on some passages in ***Mula: Code of Civil Procedure, Code 15th Ed page 907*** to the effect that a court has power to extend time even though the order has provided that, in default of compliance with a period specified therein the matter should stand dismissed and although the order has worked itself out as a result of default.

Indeed, in the Indian case of ***PERIASAMI ASARI VS ILLUPPUR PENCHAYAT BOARD: AIR 1973 MAD. 250***, it was held:

"The principle that when the effect of the order granting time (in the event of non-compliance) has to operate automatically the court has no power to extend time as it becomes ***functus officio*** *did apply when the suit is finally disposed of. If the order is not final and the court retains control over it and seized of the matter, it will have power to extend time."*

The passages cited by the applicant's counsel and the ***Periasami Asari Case*** interpret the ***Indian Rule 148*** which generally grants the court power to extend the time granted by the court. The Indian rule is identical to our ***S.95 of Civil Procedure Code*** and ***Rule 6 of Order 50 Civil Procedure Rules***. Although ***S.95 CPA*** and ***rule 6 of Order 50 CPR*** are applicable to proceedings in the High Court and in subordinate courts exercising civil jurisdiction, an order of this Court has the same status and the same principles, in our view, apply to the construction of orders made by this Court in exercise of jurisdiction to extend time under ***Rule 4*** and generally in exercise of its appellate jurisdiction.

It remains to consider whether or not order No: 4 of the orders of Omolo, JA made on 9th May, 2008 on

true construction exhausted the power and discretion of the Court to extend time limited by that order.

The purpose of the application which was allowed by Omolo, JA was to allow the applicant to file a fresh appeal, its two previous appeals having been struck out on technicalities. The order was substantially complied with in that the notice of appeal and the record of appeal were filed on 13th May, 2008 and 26th May, 2008 respectively and within the time stipulated by the order. The record of appeal was also served albeit late by two days. The filing of the notice of appeal and the appeal itself drastically affected the efficacy of the default clause in order 4, in that, upon the filing of the notice of appeal and the appeal, the enabling application substantially achieved its purpose and it cannot logically stand dismissed. If the default clause is construed as capable of rendering the notice of appeal and appeal already filed futile it would impliedly mean that the order of Omolo, JA as single judge had the effect of striking out both the notice of appeal and the appeal. Needless to say, a single judge has no jurisdiction to strike out a notice of appeal or appeal. That jurisdiction resides in the full Court. Thus the notice of appeal and the appeal can only be struck out by the full Court through a formal application. That is why the respondent on 25th June, 2008, in an application filed under ***rule 80 (now rule 84),*** which is still pending, sought orders to strike out notice of appeal and the appeal on the grounds ***inter alia*** that the record of appeal was served on 30th May, 2008 in breach of the orders of Omolo, JA.

From the foregoing, we are satisfied that in spite of the default clause the order did not finally dispose of the dispute and the Court still retained control over the orders and the appeal itself filed pursuant to the order. Until the appeal filed pursuant to the order is finally disposed of the Court is still seized of the matter and has jurisdiction to extend the time limited by the order of Omolo, JA to give efficacy to the appeal. We are respectfully, of the view that the learned single judge misdirected himself regarding jurisdiction to extend time limited by the order of Omolo, JA and as a result exercised judicial discretion wrongly.

The learned single judge further failed to appreciate that there was substantial compliance with the order of Omolo JA and that the omission committed was trivial and could not unduly prejudice the respondent. The omission was in serving the record of appeal already filed two days late.

The learned single judge further misdirected himself in failing to appreciate that there was reasonable explanation for the omission – that the clerk who was required to have served, was taken ill and that the supervising advocate was abroad at the material time.

Lastly, the learned single judge failed to consider the merits or otherwise of the appeal already lodged which is a relevant factor in the exercise of judicial discretion under ***Rule 4*** (see ***WASIKE VS SWALA [1984] KLR 591***. In essence, the applicant raises in the pending appeal the issue of jurisdiction of the superior court to assess and award damages for breach of contract in the light of the state of the pleadings and the law. The superior court (Waweru, J) observed that the issues raised by the applicant *"are weighty and substantial and in all likelihood with much merit"*. Omolo, JA while extending time by the ruling dated 9th May, 2008, observed that the applicant has always evinced an intention to appeal and that the respondent has always been aware of that fact. Indeed, the applicant has filed the appeal for the third time.

In the final analysis, we are satisfied that the learned single judge misdirected himself in several respects as shown above and as a result reached the wrong decision.

We allow the Reference, set aside the order of the single judge and substitute therefor, an order granting the extension of time limited by the order of Omolo, JA as prayed and deem the Record of Appeal served on 30th May, 2008 as having been served within time. The costs of the Reference and the application before the single judge shall be costs in the appeal.

Dated and delivered at Nairobi this 21st day of October, 2011.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

D. K. S. AGANYANYA
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR