



**IN THE COURT OF APPEAL
AT NAKURU**

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

CIVIL APPLICATION NO. NAI. 60 OF 2011 (NAK.1/11)

BETWEEN

KENYAN ALLIANCE INSURANCE CO. LTD.....APPLICANT

AND

JAMES MURIITHI MUGO.....RESPONDENT

(An application for extension of time to file a notice of cross-appeal out of time in Civil Appeal NO. 203 of 2010 against the judgment and decree of the High Court of Kenya at Nakuru (Ouko, J) dated 24th June, 2010

In

H.C.C.C. NO. 129 OF 2008)

RULING

By their motion dated 1st March, 2011 *M/S KENYAN ALLIANCE INSURANCE CO. LTD* seek two orders under rule 4 of the Court of Appeal Rules 2010 (the rules) that:-

“1. That the time for filing a notice of cross appeal by the appellant be extended for such period as the court may deem appropriate.

2. That the costs of this application be awarded to the respondent in any event.”

The appeal referred to is now pending for hearing before this Court as Civil Appeal NO. 203 of 2010 and it emanated from the judgment of Ouko, J delivered on 24th June, 2010 in HCCC No. 129 of 2008. How did that suit arise?

The respondent herein *JAMES MURIITHI MUGO (MUGO)* was employed as a loader, or what is commonly referred to as “*a turnboy*”, by one Bernard *Macharia Mahungu* (the Insured) who owned a lorry, Registration No. KAN 160 C. Also employed by the insured as the driver of the lorry was *Francis Kimani Muni* (the driver). The vehicle was insured by *M/s Kenyan Alliance Insurance Co. Ltd* (“the Insurer”).

On 25th January, 2005, Mugo was travelling in the lorry with the driver when it collided with

another vehicle. Both his legs were crushed at the knee joints and they had to be amputated. He sued both the driver and the insured in Nakuru HCCC 261 of 2005 and obtained judgment against them for Shs.4.4 million and a decree issued forth on 7th March, 2008. Subsequently, Mugo filed Nakuru HCCC 129 of 2008 seeking to enforce the decree against the insurer.

The insurer raised various defences, among them; that the insurance policy was cancelled before the accident due to non-payment of premiums; that the policy did not cover the claim; that the insurer was not served with the Statutory Notice before institution of suit; that Mugo had no *locus standi* to file a claim for enforcement but for indemnity; and that only a sum of Shs.3 million was payable under the policy even if it was valid. The matter fell for hearing and determination before Ouko, J and on 24th June, 2010, the learned judge held that Mugo was travelling as an employee of the insured and was therefore covered by the policy under **Section 5(b)(i) and (ii)** of Cap 405. However, he held that the claim by Mugo was in excess of Shs.3 million which fell outside the requirements of **Section 5(b)(iv)** of the Act. Mugo's suit was dismissed although the court also found that the insurer was duly served with the statutory notice.

Mugo was aggrieved by that decision and filed a notice of appeal timeously. **Civil Appeal No.203 of 2010** aforesaid was subsequently filed and served in July 2010 and the insurer filed a notice of grounds for affirming the decision of Ouko J. The record of appeal is not before me, but it is common ground that it came up for hearing on 24th February 2011, when learned counsel for the insurer sought to advance arguments relating to **sections 5(b)(i) and (ii)** and **section 10(i)(a)** of the Act but was encumbered due to the absence of a notice of cross appeal on those issues, hence the decision to seek extension of time to do so in this motion.

The explanation for the delay is given in the Affidavit in support of the application sworn by learned counsel for the insurer, *Mr. Bonface Masinde* who also made submissions before me. He discloses that he handled the matter before the High Court and was initially of the view that a notice of cross-appeal was necessary and did in fact so advise the insurer in a letter dated 14th July 2010. Upon discussing the matter with other counsel in their offices internally, a decision to file a notice of affirming the High Court decision was reached instead. He also gave an opinion to the insurer to settle the claim on other considerations. He swears there was still time to file the notice of cross-appeal under the provisions of Rules 90 and 91 of the former Court of Appeal rules which allowed for filing "*not more than 30 days of service of the Memorandum of Appeal and record of appeal or not less than 30 days before the hearing of the appeal whichever is the later*", which are now **rules 93 and 94** of the Court of Appeal Rules 2010. He would have done so if the discussions with other counsel did not mislead him from his initial intention and therefore the omission to file the notice of cross-appeal was not intentional. In his view, the cross-appeal raises momentous issues of law, and of public interest in the interpretation and application of the two provisions of law under Cap 405 and will not prejudice the appellant who may well succeed on the issues.

In opposing the application, learned counsel for the respondent Mr J. Githui contended that there was a delay of seven months since the record of appeal was served in August 2010 upto the filing of the motion before me and that delay has not been explained. The only explanation was for counsel to blame third parties and his ignorance of the law but that was not a sufficient reason. In his view, the cross-appeal had no chance of success since there are numerous decisions interpreting the two sections of the law and the issues are settled. Furthermore, he submitted, the respondent has been waiting since 2008 for compensation of the serious injuries suffered and any further delay is prejudicial to him. At all events, he observed, there was a letter from the insurers' advocates advising them to settle the claim and therefore the cross-appeal is not only a belated afterthought but calculated to delay the hearing of the appeal.

I have anxiously considered the application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of "*sufficient reasons*". Nevertheless, it ought to be guided by consideration of the usual factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See **FAKIR MOHAMED V**

JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai 332 of 2004 (unreported). There is also a duty now imposed on the Court under **sections 3A** and **3B** of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of Civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.

The insurer's counsel, Mr Masinde has established that he was alive to the necessity to file a notice of cross appeal but was apparently dissuaded from that course of action by other advocates in his office. He pleads that it was a misconstruction of the relevant rules and was not shy to own up to that misconstruction. It is not unheard of for lawyers, even experienced ones, to misconstrue provisions of the law and in this case I would not condemn Mr Masinde nor the insurer for the mistake of his counsel. The appeal is ripe for hearing and any further delay in concluding it will cause obvious prejudice to the respondent who has endured serious injuries since 2005 and has been awaiting the fruits of his judgment for three years now. Whether or not he will succeed in the appeal, with or without the notice of cross-appeal, is, of course, in the province of the appellate court to decide. It is my view, however, that the issues intended to be raised in the cross appeal cannot be said to be unimportant as contended by Mr. Githui. On the contrary the appellate court's decision on the issues, whether in favour of or against the insurer, will enrich jurisprudence on Insurance Law and it is an opportunity that should not be lost.

For those reasons I would exercise my discretion in favour of allowing the notice of cross-appeal to be filed out of time. It shall be filed and served within fourteen (14) days of this ruling. The applicant Insurer shall bear the costs of this application which I assess at Kshs.30,000/= and shall be paid within fourteen (14) days of this ruling. In default of compliance with any of the timeliness set herein, the notice of motion shall stand dismissed with costs without further recourse to the Court.

Orders accordingly.

Dated and delivered at Nakuru this 11th day of November, 2011

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR