



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 85 OF 2011

BETWEEN

OCEANFREIGHT TRANSPORT CO. LTD.....APPLICANT/RESPONDENT

AND

PURITY GATHONI GITHAE.....1ST RESPONDENT/APPELLANT

SAMUEL KAMAU MACHARIA.....2ND RESPONDENT/APPELLANT

(An application to extend by three days, the time within which the Applicant was required to file its Application to strike out the Record of Appeal filed by the Respondent-Appellant from the Ruling and Decree of the High Court of Kenya at Nairobi (Rawal, J) dated 23rd October, 2001

in

H. C. C. C. No. 3958 of 1991)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules (the Rules) for extension of time for filing and serving an application under **Rule 84** of the Rules for striking out the record of appeal.

Oceanfreight Transport Co. Ltd, the applicant herein, and the respondent in the main appeal, filed a suit in the High Court by way of a plaint dated 23rd July, 1991 against the respondents, claiming refund of a deposit of Kshs.500,000/= paid by it to the respondents.

In a Judgment delivered on 23rd October, 2001, the High Court (Rawal, J.) found for the applicant, and awarded it the said sum. Aggrieved by that decision, the respondents filed a notice of appeal on 29th October, 2001. However, the record of appeal was filed on 6th May, 2011, some ten years later. It is that appeal that the applicant herein wants struck out for having been filed out of time.

Under **Rule 84** of the Rules an application to strike out a notice of appeal or appeal should not be brought after the expiry of 30 days from the date of service of the record of appeal on the respondent.

As the application is opposed the applicant has to demonstrate, among other things, that the intended application to strike out the appeal is not frivolous; that the delay is not inordinate and that the respondent will not suffer undue prejudice if the application is allowed.

It is not appropriate, at this time, to investigate in detail the merits of the applicant's intended application to strike out the appeal. Suffice it to say, that the applicant has prima facie a just ground to canvass his application, and should be given an opportunity to be heard on this ground.

This application was actually presented to the Court's registry on time, albeit on the last day – Friday, 10th June, 2011 according to the deposition in support of the application. However, the registry officials rejected it on the ground, according to the applicant, "that it did not have an index and that pagination of the documents should have began from page 1 of the motion." Although, the registry's refusal to accept the document is questionable, the applicant simply withdrew the documents, and corrected the bundles, re-paginating some 666 pages. This took time, and the documents were eventually filed on 16th June, 2011 (not 13th June, 2011 as stated in the applicant's application). Consequently they were late by six days after the expiry of the time limited by the proviso to **Rule 84**. Is this delay excusable?

Mr. R. Raiji, learned counsel for the applicant, citing the cases of **Kenya Commercial Bank Limited vs. Kenya Planters Union - Civil Application No. NAI. 85 of 2010, KLR** and **Wageche Mariyu vs. Muturi Mariyu - Civil Application No. 163 of 2009, (NYR. 16/2009) 2010 KLR** urged me to excuse the delay.

Dr. G.K. Kuria, learned counsel for the respondent, on the other hand, strongly argued that the time limit of 30 days imposed by **Rule 84** was mandatory; that the same could not be extended; and that the overriding objectives stipulated in **section 3A and 3B** of the Appellate Jurisdiction Act would not assist the applicant. He relied on the authorities of **Mombasa Development Ltd vs Jimba Credit Corporation, Court of Appeal at Mombasa, Civil Appl. No. 317 of 2005, Veronica Rwamba Mbogo vs Margaret Rachael Muthoni, Nairobi Civil Appeal (application) No. 311 of 2002, Karimi vs Khan, Court of Appeal at Nyeri, Civil Appeal No. 163 of 2009, Dorcas I. Wasike vs R. N. Khisa, Court of Appeal at Nairobi, Civil Appeal Application No. 87 of 2004 and Dickson Ndegwa Mbugua vs City Council of Nairobi, Civil Application No. 112 of 2009** to support his submissions.

Having considered the application, and the deposition in support of the same, and having heard counsel, I am of the view that the delay in bringing this application is minimal and is well explained. **Rule 4** of the Rules of this Court gives me unfettered discretion whether to extend time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated:

"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

Although these principles were set out in relation to an application to extend time for filing an appeal, they apply with equal force to the application before me.

I have taken into account all the factors indicated above, and am of the view that this application has merit, and I allow the same.

I extend the time for lodging an application for striking out the appeal to 16th June, 2011 and order the application filed on 16th June, 2011 be deemed to have been filed in time.

The costs of this application shall be in the intended application.

Dated and delivered at Nairobi this 9th day of December, 2011.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR