



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appeal (Application) 261 of 2008

MIWANI SUGAR MILLS LIMITED1ST APPLICANT
**MIWANI SUGAR COMPANY (1989)
LIMITED (IN RECEIVERSHIP)2ND APPLICANT**

AND

NAGENDRA SAXENA1ST RESPONDENT
JOHN G. KIMANI T/A JOGI AUCTIONEERS2ND RESPONDENT
CROSSLEY HOLDING LIMITED3RD RESPONDENT

(An application to strike out the record of appeal from the ruling and order of the High Court of Kenya at Kisumu (Mwera, J.) dated 13th June, 2008

in

H.C.C.C. NO. 225 OF 1993)

RULING OF THE COURT

Before us is an application expressed as brought under “*Rule 80 of the Appeal Rules*”. In this application the applicants Miwani Sugar Mills Limited and Miwani Sugar Company (1989) Limited (In Receivership) seek the following orders:-

- “1. *The record of appeal and the appeal filed herein on 4th of December, 2008 be struck out with costs to the applicants.***
- 2. *Costs of this application be paid by the appellant.*”**

The application is brought on the following grounds:-

- “(a) *The record of appeal and the appeal have been filed out of time without leave of court.***
- (b) *The record of appeal does not contain all the notes of the superior court.*”**

The application came up for hearing before us on 3rd December, 2009 when Mr. D. Otieno appeared for the applicants. Mr. P. Nowrojee appeared for the 1st respondent/appellant, Mr. R.B.O. Onsongo appeared for the 2nd respondent while Mr. Zachariah Ngome appeared the 3rd respondent.

In urging the application Mr. Otieno relied on his two supporting affidavits in which the sequence of events leading to the filing of the application are set out. It was pointed out that the judgment of the

superior court was delivered on 13th June, 2008 after which the 1st respondent/appellant wrote to the Deputy Registrar asking for proceedings and judgment. The letter was copied to the other parties. Then on 1st August, 2008 the 1st respondent lodged an application (Civil Application No. 217 of 2008) seeking a stay of execution pending appeal. That application was allowed in a ruling delivered by this Court on 16th January, 2009. The 1st respondent then lodged its appeal on 4th December, 2008. The applicant now seeks the striking out of that appeal on the ground that it was filed out of time.

To counter the foregoing submissions Mr. Nowrojee agreed with Mr. Otieno's submission that the 1st respondent wrote to the Deputy Registrar on 13th June, 2008 asking for uncertified copies of proceedings and judgment which letter was followed by another one dated 25th June, 2008 asking for certified copies of those documents. Mr. Nowrojee pointed out that both letters were within 30 day-period as prescribed by the relevant rule of this Court. Three months later the Deputy Registrar wrote saying that all the parties could be supplied with the copies of proceedings and judgment. The copies were indeed collected on 8th October, 2008 and the appeal lodged on 4th December, 2008.

Mr. Nowrojee submitted that there was no delay in filing the appeal but went on to add that even if there was a delay **sections 3A and 3B** of the Appellate Jurisdiction Act would save the situation.

Mr. Onsongo and Mr. Ngome adopted the submissions of Mr. Nowrojee in asking us to dismiss this application.

We have set out briefly the facts leading to the filing of this application to strike out the appeal. The gist of this application is that the appeal was filed out of time without leave of the Court. It would appear that the main contention here is whether the appeal was filed within time prescribed by the Rules. From what has been submitted before us there is no dispute that the judgment of the superior court was delivered on 13th June, 2008 and almost immediately the 1st respondent/appellant indicated intention to appeal when its advocates applied for copies of proceedings and judgment. After some delay which was attributable to the Deputy Registrar not supplying the copies of proceedings and judgment, the appeal was eventually lodged on 4th December, 2008 and this was after the 1st respondent had obtained the documents from the Deputy Registrar on 8th October, 2008.

Rule 81 of this Court's Rules provides in mandatory terms that an appeal shall be instituted within sixty (60) days of the date when the notice of appeal was lodged. The proviso thereto however provides as follows:-

“Provided that where an application for a copy of the proceedings in the superior court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

In view of the foregoing and the submissions by Mr. Nowrojee as supported by his colleagues (Mr. Onsongo and Mr. Ngome) we are satisfied that the appeal which is sought to be struck out was not filed out of time.

There was then the ruling of this Court delivered on 16th January, 2009 in which the Court said:-

“In the foregoing circumstances we allow the application dated 31st July, 2008, and order that the status quo obtaining as at the date of the ruling dated 13th June, 2008, be maintained, pending the filing and determination of an intended appeal against that decision by the applicant herein. The costs of the application shall be in the intended appeal. Because of the circumstances of this matter, we order that the appeal be lodged within 45 days of the date hereof, if it has not by now been filed, failing which the aforesaid order shall lapse, and the application herein shall be deemed to have been dismissed with costs.”

We have noted that by the time the above ruling was delivered (16th January, 2009) the appeal had already been filed on 4th December, 2008. Hence, whichever way we look at this application we think that it lacked merit.

Finally, we would draw the attention of the advocates and litigants to the new amendments to the Appellate Jurisdiction Act which came into effect on 23rd July, 2009. After the amendments **section 3A** provides:-

“3A(1)The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeal governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.”

And **section 3B** of the same Act provides:-

“3B(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

(a) the just determination of the proceedings;

(b) the efficient use of the available judicial and administrative resources;

(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) the use of suitable technology.”

Mr. Otieno urged us to consider this application under the old rules. Even if we do so, as we have demonstrated, even under the old rules this application lacked merit.

For the foregoing reasons we are satisfied that the application for striking out fails and we order that the same be dismissed. As regards the costs of the application we are of the view that these shall be in the appeal. It is so ordered.

Dated and delivered at KISUMU this 5th day of February, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR