



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL 171 OF 2010

DAIMA BANK LIMITED (IN LIQUIDATION) APPLICANT/APPELLANT

AND

PROF. DAVID MUSYIMI NDETEI RESPONDENT

(Application for extension of time to file and serve the Record of Appeal out of time arising from the judgment and decree of the High Court of Kenya at Nairobi (Milimani Commercial Courts) (Kasango, J.) dated 11th October, 2005

in

H.C.C.C. NO. 2198 OF 2000)

RULING

Before me is an application by way of Notice of Motion under “**Rule 4, 1(3) and 42** of the Court of Appeal Rules, **section 3A and 3B** of the *Appellate Jurisdiction Act (Chapter 9 Laws of Kenya and all other enabling provisions of the law*”, in which the applicant, **DAIMA BANK LIMITED (IN LIQUIDATION)** seeks the following orders:-

- “1. **THAT** *this Honourable Court be pleased to extend the time for filing and serving the record of appeal.*
2. **THAT** *the record of appeal lodged in this Court on 15th July, 2010 in Civil Appeal No. 171 of 2010 by the Applicant/Appellant be allowed and be deemed to have been filed within time.*
3. **THAT** *costs be provided for.”*

This application is brought on the following grounds:-

- “1. *The Applicant/Appellant applied for copies of proceedings and judgment on 27th October, 2005 and the same were supplied on 28th April, 2010.*

2. ***The Applicant was supplied with a certificate of delay on 24th May, 2010 and commenced the preparation of the record of appeal.***
3. ***The delay in obtaining proceedings from the Superior Court was occasioned by the numerous applications made by the Respondent in an attempt to execute the decree and therefore leaving no room for the typing of the proceedings which were voluminous in nature.***
4. ***The Applicant/Appellant filed the record of appeal on 15th July, 2010 on the mistaken but honest belief that the computation of time to file the record of appeal ran from the date when the certificate of delay was issued.***
5. ***The appeal has a public interest aspect as it seeks to challenge:-***
 - (a) *The Superior Court's decision that shifted the burden of proof from the plaintiff to the defendant.*
 - (b) *The Superior Court's decision that declared a contractual rate of interest as illegal.*
6. ***The outcome of the appeal will have a great impact on the entire Banking Industry and the application of bank interest rates on loans borrowed by customers.***
7. ***It is fair and just that the appeal be allowed so that parties may be heard on merit in support or in opposition of the Appeal."***

In support of the application is a lengthy supporting affidavit sworn by Mr. Muciimi Mbaka, who is the advocate having the conduct of this matter on behalf of the applicant.

The application came up for hearing before me on 8th November, 2010 when Mr. Muciimi Mbaka appeared for the applicant, while Mr. Kyalo Mbobu appeared for the respondent, **PROF. DAVID MUSYIMI NDETEI**.

In his submissions, Mr. Mbaka gave a detailed history of this matter in a bid to explain the delay in taking the necessary steps. He referred to the numerous applications made by the respondent in attempting to execute the decree and also to the fact that the applicant was later placed under statutory management and then put in liquidation. These numerous applications, so argued Mr. Mbaka, made it difficult to obtain the proceedings. Mr. Mbaka then relied on the certificate of delay issued by the Deputy Registrar of the High Court and went on to submit that he was wrong in computing the time hence leading to the delay in lodging the record of appeal.

As regards the appeal itself, Mr. Mbaka submitted that its outcome will have an impact on banking industry in this country.

To support his submissions, Mr. Mbaka referred me to his list of authorities as he went on to admit that the mistake in not taking appropriate steps was his and hence the Court should not shut the door of justice to his client.

This application was vehemently opposed by Mr. Kyalo who started his submissions by pointing out that it was upon the applicant's counsel to deal with the length of the delay, the explanation for that delay, the chances of the appeal succeeding and finally the degree of prejudice to the respondent in event that the application is granted.

Mr. Kyalo conceded that there were numerous applications in the High Court but was of the view that if, indeed, the matter was so important to the applicant then more serious effort should have been made in trying to obtain the proceedings and judgment. Mr. Kyalo was of the view that the delay was not of **25 days** as argued by Mr. Mbaka but five months which delay was not sufficiently explained. It was further submitted that the respondent would be prejudiced if the application was granted as he (*respondent*) would be denied the fruit of his judgment. For all these reasons, Mr. Kyalo asked me to

dismiss the application with costs.

Having considered the learned submissions by both counsel appearing for the parties herein, it is clear that they both understand the guiding principles in applications under **Rule 4** of this Court's Rules. It is now settled that an application under **Rule 4** of the Rules, a single Judge of this Court is called upon to exercise his unfettered discretion, but like any other judicial discretion, that discretion must be exercised upon reasons. The matters to be considered whether to grant an extension of time are first, the length of delay, the reason for the delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In this application before me, it is not in dispute that the judgment of the superior court was delivered on 11th October, 2005. The notice of appeal was filed on 25th October, 2005 which was within the period proscribed by **rule 74** of the Court of Appeal Rules. It has also been stated that thereafter there were several applications which made it difficult for the applicant to obtain copies of proceedings and judgment. There was then a certificate of delay which was in the following terms:-

“CERTIFICATE OF DELAY

- 1. An application for copies of proceedings and judgment delivered by this Honourable Court on 11th October, 2005 was orally made in Court on 11th October, 2005 and a follow up letter for the same was lodged in Court on 28th October, 2005 by Messrs. Muciimi Mbaka & Co., Advocates for the Defendant.**
- 2. By a letter dated 15th February, 2010 this Honourable Court notified Messrs. Muciimi Mbaka & Co., Advocates that certified copies of proceedings were ready for collection upon payment of requisite Court fees.**
- 3. The Court fees was paid on 17th February, 2010 and the certified copies of the proceedings were collected on 23rd February, 2010 and the certified copy of the decree and judgment were collected on 28th April, 2010.**
- 4. The time taken by this Honourable Court to prepare and supply the copies of proceedings, judgment and certified copy of the decree was from 11th October, 2005 to 28th April, 2010, this being 1660 days.**
- 5. This certificate of delay was prepared and was ready for collection on the 24th day of May, 2010.**

ISSUED at Nairobi this 24th day of May, 2010.”

The record of appeal was lodged on 15th July, 2010. Hence from what is stated in the certificate of delay it can fairly be stated that there was a delay of about one month and not five months as argued by Mr. Kyalo. Has that delay been explained? There was a long affidavit by Mr. Mbaka in which he set out in some detail the circumstances that led to the delay. In my view, that was a reasonable explanation. What about the chances of the appeal succeeding? In my view, the less I talk about this the better since there is a Memorandum of Appeal setting out eleven grounds of appeal. What prejudice would the respondent suffer if I granted this application? He will be kept away from the fruit of his judgment yes, but he has been patiently waiting since *October, 2005*. He can wait for a little bit longer.

In **MWANGI V. KENYA AIRWAYS LTD.** [2003] KLR 486 at pp. 489-490 this Court said:-

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported), the

Court expressed itself thus:-

“It is now well 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.”

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”

In view of the foregoing and what I have stated above, I am satisfied that this is a proper case in which to exercise my discretion in favour of the applicant. Accordingly, the application is allowed in terms of ***prayers 1 and 2*** of the notice of motion dated 20th July, 2010.

Costs of this application shall abide the outcome of the appeal.

Dated and delivered at NAIROBI this 19th day of November, 2010.

E.O. O’KUBASU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR