IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION NO. 299 OF 2007

BETWEEN

JOHN GAKURE & 148 OTHERS ....APPLICANTS

AND

DAWA PHARMACEUTICAL CO. LTD. & 7 OTHERS..........RESPONDENTS

(An application seeking for extension of time to lodge and serve record of appeal against the ruling and order of the High Court of Kenya at Nairobi (Nyamu, J.) dated 2nd March, 2007)

in

NAIROBI H.C.CC. NO. 1612 OF 2005)

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R U L I N G

Although the matter before me appears to be voluminous due to the multiplicity of the parties to it, it is a straightforward application under ***rule 4*** of the rules of this Court for grant of an order that the applicants be allowed to lodge a record of appeal out of time.

The principles upon which I have to consider the application are also well settled despite the overarching provisions of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act. I have already commented on the construction of those provisions in an earlier application in this matter when I referred to some decisions of this Court and I need not rehash them. The new Constitution has also spelt out some guiding principles on the dispensation of justice, and that too will be borne in mind. I will take the principles from **Fakir Mohammed v Joseph Mugambi & 2 others – Civil Application Nai. 332/04 (ur)**, thus:

"The exercise of this Court's discretion under *Rule 4* has followed a well-beaten path since the stricture of "*sufficient reason*" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd

[2003] KLR 486, <u>Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General</u> Civil Appl. NAI. 8/2000 (ur) and <u>Murai v Wainaina</u> (No 4) [1982] KLR 38."

What is the background to the application?

In November 2005 some 149 employees (*"the employees")* of **M/S. Dawa Pharmaceuticals Ltd** (*"the employer"*) went before the superior court and took out an Originating Summons (O/S) invoking various provisions of the Constitution of Kenya (as applicable at the time) as a basis for several declarations and orders against eight respondents and three interested parties. It would appear that the employer was placed under receivership in the year 2001 at the behest of the National Bank of Kenya Ltd (NBK) and the Industrial and Commercial Development Corporation (ICDC). Three Receivers were then appointed to manage the employer: Eng. Kanyanja, Mr. Ngoi (now deceased) and Engineer Nyagisere (*"the Receivers"*). The first thing the receivers did upon taking office was to terminate the services of the employees in May 2001, but the employees have always insisted that the appointment of the Receivers was wrongful, since they were employees of NBK and ICDC and there were no registered debentures to support the receivership; and that the termination of their employment was unlawful. They claimed huge sums of money due to them for arrears of salaries, non-remission of their salary deductions to the Retirement Benefits Scheme, NSSF, NHIF, and their Workers' Union. They also joined their erstwhile advocate, Kamotho Waiganjo, in the suit for filing another suit and purporting to settle it with the employer without their instructions.

Upon being served, NBK took out a chamber summons seeking to strike out the *O/S* on the grounds that it was a constitutional abuse of process, it raised no constitutional issues and there were other available mechanisms for redress. There was support from the other respondents for that application. The employees opposed that application contending that there were valid constitutional issues for investigation and determination by a Constitutional Court, and that there was no bar to resorting to the Constitutional Court even when another remedy was available.

The chamber summons fell for hearing and determination before Nyamu J (as he then was) who on 2nd March, 2007 struck out the *O/S* on the basis, *inter alia*, that the claims made therein are wholly premised on private law and not public law; that it was outside the purview of ***section 84*** of the Constitution; that it was filed in abuse of the court process; and that there were alternative common law and statute law remedies available to the employees.

The employees were aggrieved by that order and immediately intimated by filing a notice of appeal on 8th March, 2007 that they intended to challenge it before this Court. The notice of appeal was served on all the respondents, and in accordance with ***rule 81 (1)*** of the rules, the appeal ought to have been instituted within 60 days of lodging the notice of appeal, that is on or before 7th May, 2007. But no appeal was filed by that date; hence the application now before me.

The application was filed on 5th December, 2007, about 7 months after the expiry of the due date for appeal. An explanation for that delay is therefore called for otherwise I would have no basis for the exercise of my discretion. It cannot be exercised as a favour or on whim or caprice.

The explanation put forward for the delay is in the affidavit sworn by learned counsel for the employees, Mr. Ngoge on 3rd December, 2007 and a further affidavit sworn by him on 10th June, 2008 and filed with leave of court on 16th June, 2008. In essence, Mr. Ngoge swore that after drawing up the notice of appeal on 8th March, 2007, he also wrote to the Deputy Registrar for supply of copies of the proceedings and ruling of the superior court and copied that letter to all the advocates on record. By an omission which he blamed on his court clerk, one Joseph Mangaui Muli, who subsequently left his employment and is probably dead, only the notice of appeal was filed in court while the letter was not. The clerk however served the respondents with copies of the notice of appeal and the letter. Mr. Ngoge further swore that the clerk did not bring this omission to his attention and only filed the letter in court on 12th April, 2007, ten days outside the period allowed under the proviso to ***rule 81 (1)***. He thereafter pursued the copies applied for until he was notified by the registry on 3rd October, 2007 that

they were ready and he paid and collected them on 9th October, 2007 (not 10th October, 2007 which was a public holiday at the time). As for the period between the collection of the copies and the filing of this motion, Mr. Ngoge deponed as follows: -

"(10) That I received the letter dated 10th September, 2007 drawn by the Deputy Registry High court from my post office box on the 15th October, 2007 five days after collecting certified copies of proceedings and ruling and after signing for it in the court file.

(11) That between the 3rd October, 2007 when the letter dated 30th August, 2007 was brought to my attention and the 10th October, 2007 when I received proceedings and the ruling of superior court and 26th November, 2007 when I finally traced the letter dated 8.3.07 I have been searching for the service (sic) copy of the letter dated 8th March, 2007, from the folders of my former clerk Joseph Muli who is no longer in our employment and from my office files and cabinet in order to verify the contents of the letter dated 30th August, 2007 by the registrar and to make it part of record of this application as I consider it material for the purpose of this application."

He further deponed that the major delay was caused by his office and therefore the applicants herein ought not to be penalised for it. The further affidavit was meant to correct the date when the copies of proceedings and ruling were received (9th October, 2007) but most of the 44 paragraphs of it were devoted towards arguments on the merits of the employees' case and the observation that one of the respondents had admitted owing over Shs.22 million to the poor employees who now have to be given free legal service by Mr. Ngoge. In passing I must say that it is not in the nature of affidavits to contain legal arguments and expressions of opinion. It is a statement of facts on oath. Be that as it may, Mr. Ngoge submitted before me that the delay was not inordinate and was excusable; that there were good grounds of appeal to be placed before this Court; and that there is no prejudice caused to the respondents or any of them by granting the prayer sought.

The application was vehemently opposed by all the respondents, through affidavits placed on record and through submissions of counsel appearing for them: M/S. Ngugi Mwenda for ICDC and the Receivers; Onyango for NBK, Muchigi for Kamotho Waiganjo; Mubea for NSSF; Karanja for NHIF; Ouma for ICEA and C.N. Menge for the A.G. The thrust of their combined submissions was that the application is a non-starter because the notice of appeal upon which it is predicated was deemed to have been withdrawn upon expiry of the period allowed to appeal; that there was inordinate and unexplained delay in obtaining the copies of proceedings and ruling, and even if that delay was explained, there was no explanation for the period of 2 months before this application was filed; that there was no proof that the advocate's court clerk was dead or was to blame; that the intended appeal had no merits; and that the respondents will be prejudiced since they will be drawn into expensive and time consuming litigation by the applicants who confess that they are not able to pay costs of the litigation.

Several authorities were cited on both sides of the argument and I have considered these together with the material placed before me. I must first deal with the legal issue raised by all counsel for the respondents that the notice of appeal was deemed to have been withdrawn under ***rule 82 (a)*** of the rules of this Court and therefore the submission that it would be futile to grant the application for filing a record of appeal when there was no notice of appeal in the first place. It is common ground that there was no order sought or issued by the court striking out the notice of appeal but the submission is that no such order was necessary. Among the cases cited in aid of that submission were **Dolphin Palms Ltd v Al Nasibh Trading Co. & others Civil Appl. NAI. 112/99**; **South Nyanza Sugar Co. Ltd v Heshon Onyoro Civil Appl. NAI. 233/2000** and **Major Joseph Mweteri Igweta v Mukira E'Ethare & Anor. Civil Appl. NAI. 8/2000 (ur).** Fortunately I had occasion in June 2005 to discuss the same issue at some length in the ***Fakir Mohamed case*** (supra) which subsequently went to the full court on a reference and was upheld on 12th June, 2006. Since all counsel for the respondents persisted in arguing the issue despite my indication that I held a different view, I will reproduce the view *in extenso*: -

"The only legal point raised by Mr. Kioga which is worth considering is the submission that the application would be granted in vain in view of the provisions of *Rule 82(a)* (supra). No authority

was cited to me for that profound proposition, but, for a period of time now, the construction of the rule has not been without difficulty. My efforts at locating an authoritative decision have only unearthed an unsettled construction of the rule and I need only cite some examples.

On 09.03.92, a majority of this Court (Cocker JA and Omolo Ag. JA, Gachuhi JA dissenting) considered the submission by counsel that the provision that a notice of appeal was *"deemed to be withdrawn"* was mandatory. The majority so agreed, stating through Cockar JA: -

"This is a novel point which I must confess has given me anxious moments. The rule itself, in my view, makes it mandatory for the notice of appeal to be deemed withdrawn by the appellant if the appeal is not instituted within the prescribed period. So, after expiry of 60 days from 28th October, 1987, when the notice of appeal was filed, the said notice of appeal for all purposes was, by virtue of the automatic operation of the provisions of the rule, withdrawn as if by the party itself. Therefore, the copy of the notice of appeal that formed a part of the record of appeal (rule 85 (1)(j) that was lodged on 12th May, 1988, on behalf of the appellant/applicant was a copy of a non-existent notice of appeal. It was a copy of what had by then become a worthless piece of paper in the appeal file. The record of appeal, therefore, was incomplete and the court could not have granted prayer 2 of the said notice of motion application which had prayed that the appeal filed on 12th May, 1988, be deemed to have been filed within time. How can the court make an order that an incomplete record of appeal be deemed to have been filed within time?

To my mind the practical effect of the automatic withdrawal envisaged in rule 82(a) is that an appellant who has filed the notice of appeal and has not instituted an appeal within 60 days thereafter is debarred from taking any further steps in pursuit of his appeal. Any application or document filed, thereafter, will not be deemed to be properly before the court. The only way left for the appellant who thereafter wants to pursue the appeal would be for him first to have a proper and competent notice of appeal filed, obviously on order of the court."

That was in Kamau Kibunja v Noordin Construction (k) Ltd C.Appl. NAI. 172/88 (UR).

Several years later on 18.02.98 and without making reference to that Court's majority decision, a single judge (Kwach J.A) expressed an opposite view in Bullion Bank Ltd v Fulchand Manek & Brothers Civil Appl. NAI 239/97 (ur) thus: -

"Mr. Sheth for the respondents submitted that by the time the Notice of Motion was taken out on 11.9.97, the Notice of Appeal had lapsed and was deemed to have been withdrawn under rule 82 of the Rules, but I do not agree because a notice cannot be deemed to have been withdrawn without an order of the Court to that effect".

On 04.06.99, another single judge (Omolo J.A) without making reference to those earlier decisions, held that the withdrawal was not automatic. That was in Dolphin Palms Ltd vs Al-Nasibh Trading & Co. Ltd & 2 others, Civil Appl. NAI. 112/99 (UR) where he stated: -

"The prayer is that I should extend time to enable the applicant file a notice of appeal. There is, in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single judge; that is a province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 52 (b) an application to strike out a notice of appeal can only be heard and determined by the Court, not by a single judge. By deeming a notice of appeal to have been withdrawn, the single judge may well be usurping the powers reserved for the Court."

That decision was referred to the full Court (KWACH, LAKHA, BOSIRE JJ.A) which Court in a decision made on 27.01.2000, agreed with Omollo JA and stated: -

"Regarding the submission by Mrs. Gudka, Counsel for the applicant, that the notice of appeal dated 31st July, 1997, was deemed to have been withdrawn under rule 82 of our rules, the learned single Judge ruled that an order of a full bench was necessary to either so declare or to strike it out. In his view before such an order was made he could not properly deem a notice of appeal to have been withdrawn and proceed to act as though there was in fact no notice of appeal. It is against those holdings that this reference has been made.

Before us, Mrs. Gudka, submitted, on the main, that a plain reading of rule 82 shows that no declaration is necessary before a notice of appeal is deemed to be withdrawn, provided that default in taking the essential step on record is shown. She cited two decisions of this Court in support of her submission to wit <u>Attorney General v. Kamlesh Mansukhlal Damji Pattni and 2 Others</u> (Civil Application No. NAI.59 of 1999) (unreported), and <u>Gibson Mugwe Murathi v. Wangari Kanyiri and Another</u>, (Civil Application No. NAI.343 of 1996) unreported. With due respect to learned Counsel the two decisions are not in point. As rightly pointed out by Mr. Khatib, for the first respondent, the court must be moved to make the order declaring a notice of appeal "deemed to have been withdrawn." Rule 82, in pertinent part, provides that:-………………………………………..

We concede there is no express provision requiring a party to move the Court in that regard, however, a careful reading of rule 82 clearly reveals that such an application is necessary. The phrase "unless the court otherwise orders…."clearly shows that a court order is necessary and such order can only be validly made by a full bench in an application brought under rule 80 of the Court of Appeal Rules."

That was a holding in direct conflict with the earlier decision of the same Court in the <u>Kamau Kibunja</u> case (supra) and therefore when subsequently a single judge (Lakha JA) considered the same rule in the <u>Major Joseph Mweteri igweta</u> case (supra) on 29.06.2000, he chose to follow the Court's decision in the first case, the Kamau Kibunja case, reasoning: -

"On this state of the authorities, the existence of two conflicting decisions of the court, in my judgment, meant that I was entirely free to choose between them and did not have to start with any preference for one over the other. This is particularly so when the second decision of the Court was given as was the case in ignorance or forgetfulness of the first and the first decision had not been fully considered in the second.

I am not convinced on a fuller consideration and reflection that the first decision of the Court was wrong. In the circumstances, I need say only that I propose to follow and apply the first decision of the Court."

Unfortunately none of all those decisions was cited before O'Kubasu JA in the latest decision available to me, made on 30.05.03. The single judge in <u>K & K Amman Ltd vs Mount Kenya Game Ranch &</u> <u>Others</u> (2003) 1 EA 106, stated: -

"since the applicant did not lodge its record of appeal within the appointed time, the notice of appeal must be deemed to have been withdrawn pursuant to rule 82(a) of the Courts Rules."

In such state of affairs which provides no conclusive or binding decision, and since I cannot overrule the construction placed on *Rule 82(a)* by the full Court, I will follow the decision that commends itself to me. In making that decision I am guided by the provisions of *Rule 81* which allows the institution of a valid appeal record within 60 days of lodging the notice of appeal or, subject to compliance with the proviso thereto, any time beyond the 60 days after excluding the period required for preparation and delivery of copies of proceedings in the superior court. A certificate of delay from the registrar filed with the record is sufficient and the appellant need not make any application for extension of time. In my view, a construction of *Rule 82(a*) which would automatically deem the notice of appeal as automatically withdrawn would make non-sense of such a useful provision that is tailored towards saving the time of the parties and the Court. Furthermore *Rule 80* was amended on 04.07.2002 to shorten the period within which a respondent to the appeal may apply to strike out the notice of appeal if, amongst other things, there

is reason to believe that the record of appeal was not being filed expeditiously. That would be the right and just moment when the Court would consider the validity of the notice of appeal and the order as to costs if the notice is deemed as withdrawn or struck out. It is instructive that there is no single rule allowing a party to withdraw a notice of appeal. Such reasoning obviously leads me towards the construction followed by the full Court in the Dolphin Palms Ltd case (supra)."

The full court for its part stated in the subsequent reference as follows: -

"We think that without making elaborate remarks on the matter, which may further complicate the situation, we unhesitantly agree that the Judge was right in following the decision of the full Court in DOLPHIN PALMS LTD VS AL-NASIBH TRADING CO. LTD, *Civil Application No. Nai. 112 of 1999* (unreported) rather than the majority decision in KAMAU KIBUNGA VS NOORDIN CONSTRUCTION (K) LTD, *Civil Application No. Nai. 173 of 1988* (unreported). As those two decisions are directly in conflict with each other, the learned single Judge was perfectly entitled to choose which of them to follow. We are satisfied he was right in following the Dolphin Palms Ltd case."

The position is therefore that an order of the court is necessary to deem the notice of appeal as having been withdrawn but there was admittedly no such order in this case. The difficulty in construction has however been resolved in the new "**Court of Appeal rules 2010**" gazetted in September, 2010 but which will, hopefully, become operative in December, 2010. The respondents' arguments on that score are therefore rejected.

The crux of the matter is really whether the explanation given for the delay will avail the applicants and whether there was any explanation at all for the two months' delay after receipt of the copies applied for. The other two factors raised before me on the merits of the intended appeal and the likely prejudice to the respondents will also be considered.

There is no argument that the letter bespeaking copies did not reach the court registry until after the period allowed under the proviso to ***rule 81 (1)*** had expired. Without compliance with that proviso and ***sub-rule (2)***, the court registry cannot issue a certificate of delay, and even if it did, the entire period of delay would still need to be explained, the certificate notwithstanding. I accept as a fact that there was indeed a letter bespeaking the copies and dated 8th March, 2007 which was copied to the respondents. There is a copy of it on record indicating that it was served on some of the respondents on the same day and on 9th March, 2007. ***Rule 81 (2)*** does not however require that the letter be "served" on the respondents but only that a copy of it be "sent" to the respondents. On the face of it, there were copies of the letter sent to the respondents and if that was the only issue for consideration I would not hold it against the applicants. But the letter was not delivered to the addressee at all and I am asked to find that it was an inadvertent omission by the advocate's court clerk who has not himself confirmed it was so. The explanation is that he cannot be found since he left that office and is probably dead. The information of his death is not verified in any affidavit and I cannot blame the respondents' advocates for suggesting that there was no truth in the assertion. But that will not bring the clerk back to life if he is dead as there is equally no affidavit to show that he is alive. In the circumstances I will give the benefit of doubt to the applicants and find that the failure to file the letter with the court may well have been a mix up in the advocate's office and it would be unjust to visit it on their clients. I am also prepared to accept the explanation that the copies were supplied by the court on 9th October, 2007 and excuse that delay. I have some difficulty, however, in understanding why it took two months from receipt of the copies to the filing of this application.

It cannot be said, as submitted by the respondents that there was no explanation at all for that period and therefore no basis for exercising any discretion. I think there was an attempt to make an explanation, but I find it unsatisfactory. The explanation is contained in two paragraphs reproduced above and, with respect, it reeks of evasiveness and lack of candour. I would have readily rejected the application on that basis if I did not hold the view that the two other relevant factors argued before me were fairly weighty on their own.

I allude to the merits of the case and the issue of prejudice. It is not in the province of a single judge of this Court to decide with finality whether an appeal or intended appeal will or will not succeed only the full court can do so. Yet, one of the factors in the guiding principles is to consider, possibly, the chances of the appeal succeeding if the application is granted. It may not be in all cases that the principle will be invoked, but I think for myself, that it is useful for a single judge to examine the merits or otherwise of an intended appeal if only to satisfy himself that it is not vexatious, frivolous, or an abuse of the court process. It may also be that the matter raises a novel point or an issue where the law requires clarifying, and generally whether a ground of appeal merits serious judicial consideration. Nevertheless in making such considerations the single judge does not make a decision on the intended appeal but only expresses a *prima facie* view.

I have considered the *O/S*, the ruling of the superior court and the grounds of appeal intended to be put forward, and I cannot say with conviction that they are frivolous. The ruling appears to be based largely on previous decisions of the same court which do not appear to have been tested on appeal and therefore the reconsideration of those decisions by the full court may enhance jurisprudential development.

As for prejudice which the respondents say they will suffer by incurring further costs, I will only observe that the applicants have not been declared paupers by any order of the court and they are not litigating as such. The fact that their lawyer is offering free legal services as he states does not render them incapable of bearing the costs of the litigation and if there was any genuine fear on that score, there are provisions open to the respondents to seek security for costs.

On both counts, I am inclined to allow this application and make the following orders:

1) Leave is hereby granted to the applicants to file and serve the record of appeal.

2) The record of appeal shall be filed and served on all the respondents through their advocates on record within 14 days of this ruling.

3) The applicants shall bear the costs of the application to be agreed or taxed and paid within 14 days of such agreement or taxation.

4) In default of compliance with any of the orders No. 2 and 3 above the application shall stand dismissed with costs without any need for a further court order.

Dated and delivered at Nairobi this 5th day of November, 2010.

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original**.**

DEPUTY REGISTRAR