



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal (Appli) 169 of 2008

NATIONAL BANK OF KENYA LTD.....1ST APPELLANT

GRAHAM J.G. SILCOCK.....2ND APPELLANT

NAVALJ N.G. SOOD.....3RD APPELLANT

AND

KISUMU PAPER MILLS LIMITED.....RESPONDENT

(Application for extension of time to file and serve record of appeal out of time from a

Ruling and Order of the High Court of Kenya at Kisumu (Tanui, J) dated 18th January, 2006

in

H.C.C.C. NO. 413 OF 2001)

RULING

This is a motion under *rule 4* of this Court's Rules for an order extending the time within which to lodge and serve the record of appeal. There are also two other players, the first one being that the record of appeal herein be deemed to have been lodged and served within the extended period. Second, that time be extended within which to bespeak copies of proceedings.

In an earlier application dated 24th July, 2006, *KISUMU PAPER MILLS LTD*, the applicant herein, had moved this Court under *rule 4*, aforesaid, for an order extending the time within which to file and serve a notice of appeal, in an intended appeal and also for an order that the time for lodging and serving a record of appeal in an intended appeal against the ruling of the superior court dated 18th January, 2006, be extended. That application was heard by *Waki, J.A.* and in a well reasoned and detailed ruling delivered on 1st December, 2006, he granted the first prayer but not the second. The reason he gave for declining to grant an order in the second prayer was that it was abandoned at the hearing of the application, and was therefore not available for determination. In the affidavit in support of the application before me, however, *Mr. David Otieno*, counsel on record for the applicant, is silent on this aspect and suggests that he was under the mistaken impression that the issue was dealt with by *Waki, J.A.*, and time for filing a record of appeal was extended. Learned counsel complicated matters further, when in his submissions

before me he stated that he abandoned the second prayer on the advice of *Waki J.A.* I might not be able to know the correct position as the learned Judge will obviously not be called upon to comment on this aspect of the matter or at all. Perhaps *Mr. Otieno* must have had this in mind when he made that statement from the bar, because if it were otherwise, there was nothing to preclude him from deponing to that effect in his affidavit in support of this application. It is quite clear to me that learned counsel was less than candid in that score and I cannot but deprecate that behaviour.

Turning to the application before me, the background facts are straightforward. The applicant commenced a suit by plaint on 8th November, 2001, against *NATIONAL BANK OF KENYA LTD* (1st respondent), *GRAHAM J.G. SILCOCK* (2nd respondent) and *NAVAL J.N.G. SOOD* (3rd respondent), praying for declaratory and injunctive reliefs against them relating to a charge and debenture over immovable property known as *KISUMU/KORANDO/4189* registered in the name of the applicant. Summons to enter appearance and the plaint were served upon all the respondents, and they thereafter filed defences. Pleadings closed and the suit was then set down for a hearing.

On the day the suit came for a hearing certain issues were framed for the opinion of the court. Counsel for the parties thereafter addressed the court on those issues and a ruling was reserved to be delivered on 13th June, 2005. However, the ruling was not delivered, and when eventually it was delivered, it is contended that the applicant was not notified of the delivery date, and did not become aware of it until some time in April, 2006, by which time the time for lodging a notice of appeal had long expired. Consequently, it was argued, neither a notice of appeal could be filed nor could a request for copies of proceedings for appeal purposes be made. The ruling was delivered on 18th January, 2006.

The power of the Court under *rule 4*, above, is discretionary. The discretion is judicial and that being the case, it must be exercised on the basis of evidence and sound legal principles. (*MBOGO And Another v. Shah 1968 EA 93*). The discretion is unfettered. The principles to guide the Court in the exercise of that jurisdiction are well settled and were summarized in the often cited case of *LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI Civil Application No. Nai 255/1997*.

I do not consider it necessary to rehash those principles here. Suffice it to state that in an application of this nature the main issue is delay. An applicant is obligated to explain the delay in taking the essential step in the proceedings before other factors may be considered.

The delay in this matter is long. As I stated earlier the decision against which an appeal has been filed was given on 18th January, 2006. The applicant's counsel has deponed that neither himself nor the applicant had notice that the decision would be pronounced on that day. He became aware of it about three months thereafter. *Waki J.A.*, in his ruling which I referred to earlier dealt with the issue of delay in filing a notice of appeal. He was satisfied that the delay was caused by the time taken by the applicant to obtain leave to appeal. It is in evidence that the applicant applied to the superior court for leave to appeal believing that such leave was necessary before a notice of appeal could be filed. In view of the provisions of *rule 74(4)* of the Court of Rules such leave was not necessary. In view of *Waki, J.A's* ruling I do not consider it necessary to revisit the issue of delay. A court of competent jurisdiction was satisfied that the delay in filing a notice of appeal was satisfactorily explained.

As regard the delay in filing the record of appeal, such record could not be filed before a notice of appeal was filed. The applicant was granted an extension of time within which to file the notice of appeal but it was not granted my order regarding the filing of a record of appeal out of time. It is not clear, as I stated earlier, why the applicant abandoned the prayer for an extension of time within which to file and serve the record of appeal. As at the date of *Waki J.A's* ruling, the applicant knew or ought to have realized that it would not file and serve a valid record of appeal before being granted an order for doing so outside the time stipulated for doing so. The applicant's counsel deponed that the applicant had been granted such an extension. I do not however find any proper basis on record for so believing. The ruling speaks for itself. Its contents do not permit any confusion as to what the court had ordered. Besides, learned counsel is the one who told *Waki J.A* that he had abandoned the second prayer. That being so, the conclusion I come to is that learned counsel was indolent in taking the necessary steps to obtain an

order for an extension of time within which to file the record of appeal.

This application was prompted by the respondent's application for an order striking out the notice of appeal the subject matter of Waki J.A.'s order. The application lodged in court on 8th September, 2008 is still pending. Had that application not been filed, the applicant herein would probably have not brought this application. I agree with Mr. A.B. Shah for all the respondents that counsel for the applicant was indolent.

There was clearly long delay in bringing this application. That notwithstanding the circumstances of this matter are such that I am inclined to exercise my unfettered discretion to grant the extension of time prayed for. The interests of justice demand I so exercise my judicial discretion. However, in view of the circumstances outlined above this is a case in which the applicant should be penalized in costs. I will deal with the issue later in this ruling.

The applicant also prayed for an order extending the time within which to file the letter bespeaking copies of proceedings and ruling of the superior court dated 18th January 2006. Such a letter is only necessary where an appellant or intending appellant had filed a notice of appeal timeously but was not able to file a record of appeal on time because of delay in receiving copies of proceedings and judgment or ruling against which an appeal is intended. The letter becomes helpful if the request for proceedings is timeous. The proviso to rule 81 of this Court's Rules, stipulates that such request has to be made within 30 days of the decision against which an appeal is intended. The applicant seems to say that it did not have an opportunity of complying with that provision. That may well be so. It is because of that reason that it has applied for an extension of time to validate what otherwise would be an appeal filed out of time. The proviso to rule 81 is meant to help in discounting from computation the time taken in the preparation of the copies of proceedings and judgment or ruling for purposes of an appeal. The applicant's complaint is not that there was delay in obtaining copies of proceedings and ruling, but that it could not file its appeal in time because it was unaware of the decision dated 18 January, 2006 until after the expiry of the time limited for filing an appeal. In the circumstances, the prayer for an extension of time within which to file the letter bespeaking copies of proceedings is misconceived and has no basis in law.

In the foregoing circumstances, I allow the application to the extent that the time within which to file a record of appeal is extended for such period to include 8th August 2008, when the record of appeal in this matter was filed and also the date the record of appeal was served on the respondents or their advocate or advocates.

As regards costs, I order that the applicant shall bear the respondents' costs of the motion dated 25th September, 2008 to be agreed failing agreement to be taxed.

Dated and delivered at Kisumu this 16th day of January 2009.

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR