REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

Civil Appli 64 of 2008

HARRIS HORN JUNIOR ……………………………..…….1ST APPLICANT

HARRIS HORN SENIOR ……….……………………….2ND APPLICANT

AND

VIJAY MORJARIA …………………………….....………..RESPONDENT

(An application for extension of time within which the applicants may file and serve notice of appeal and record of appeal in an intended appeal from the judgment and decree of the High Court of Kenya at Nakuru (Mr. Justice Muga Apondi) dated 16th June, 2006

in

H.C.C.C. NO. 285 OF 2004)

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R U L I N G

In a judgment dated and delivered by the superior court (Muga Apondi, J.) on 16th June, 2006, the applicants herein Harris Horn Junior, and Harris Horn Senior, the first and second applicants respectively were ordered to pay to the respondent Vijay Morjaria Ksh.22,500,000/= together with interest at court rates from 1st February, 2003 upto date of full payment. They were also to pay costs of the suit. The applicants felt aggrieved with that judgment and intended to appeal. They filed notice of appeal through their advocate timeously on 29th June 2006. Thereafter, they did nothing in pursuit of the appeal. There is some evidence from the record that on 6th July 2006, the applicants, through their advocate, made an application in the superior court for review of the judgment under ***Order 16 rules 4, 44*** and ***50*** of the Civil Procedure Code. In order to do so, the applicants purported to withdraw the notice of appeal filed on 29th June 2006. Unfortunately, that attempt to withdraw the notice of appeal never materialized as the alleged withdrawal was not endorsed by the Court as is required by the Rules of this Court. The application for review came up for hearing before Koome J. In a ruling dated and delivered on 29th June 2007, the learned Judge of the superior court dismissed that application. The applicants did nothing thereafter until 27th March 2008 when they moved to this Court by way of this notice of motion before me dated 20th March 2008 and filed on 27th March 2008. They are seeking by this notice of motion orders as follows:-

"*1. That this Honourable Court be pleased to extend time within which the applicants may file and serve notice of appeal in an intended appeal from the judgment and decree of the High Court of Kenya at Nakuru (Hon. Mr. Justice Muga Apondi) delivered and given at Nakuru on the 16th day of June 2006 in Nakuru HCCC No. 285 of 2004.*

2. That after extension of time as prayed in prayer one (1) above this Honourable Court be pleased to extend time within which the applicants may file and serve record of appeal.

3.That this Honourable Court be pleased to give further orders and directions as it may deem fit and just.

4. That costs of this application be provided for."

The reasons for the application are in a brief summary that the applicants have an arguable appeal; that they lodged notice of appeal on 29th June 2006, but the applicants' former advocates decided to withdraw that notice of appeal in preference of an application for review, the which application was in turn dismissed by the superior court; that the applicants are victims of their advocates mistakes and that the respondent will suffer no prejudice if this application is allowed. There was a further affidavit in support of the application sworn by the first applicant which states on the main that they were represented by the law firm of Karanja Mbugua & Company, advocates in the superior court; that after the respondent's case was closed, and the defence case was slated for hearing their advocates neglected to notify them of the date set for hearing and proceeded to close the defence case without their evidence being taken; that notwithstanding that, their advocates did not inform them of the date set for submissions and when that date matured, their counsel never made any submissions on their behalf. Consequently they allege in the affidavit that they were condemned unheard; that they were unsatisfied and intended to appeal and did file notice of appeal but another advocate advised them to apply for review of the judgment of Apondi J. They accepted that advice, and to that effect they wrote a letter to withdraw the notice of appeal so as to clear the way for their application for review, but that application for review was dismissed for reasons inter alia, that their attempt to withdraw the notice of appeal did not succeed as the application to withdraw notice of appeal was not endorsed by the Court and thus by the time the application for review came up for hearing, the notice of appeal was still alive and validly in place. The applicants stated further, that they were not late in coming to the Court for the orders sought "*since ruling on review was only delivered (sic) on 29th June 2007" and their advocate "communicated to them about (sic) on or about the August 2007."*

The respondent opposed the application maintaining in his replying affidavit that as the applicants had not filed draft memorandum of appeal, there was no material which would demonstrate that the intended appeal is arguable. In his view the intended appeal has no merit and is frivolous, as the applicants were at all times represented by advocate Karanja Mbugua, who presented to the Court at the trial that the applicants would not testify and he would not make any submissions. That was not a mistake by an advocate and further the applicants, on their own volition preferred to proceed with the review application and abandoned their intention to appeal midstream; that in any case the applicants have lodged the appeal against the dismissal of the application for review and that being so, the applicants are abusing the Court process as they are engaging the respondent in double vexation. Lastly the respondent states in that affidavit that the delay is hopelessly inordinate and should not be entertained by Court.

Mr. Kimani, the learned counsel for the applicants and Mr. Githui, the learned counsel for the respondent addressed me each at length and referred me to several authorities which I have perused and appreciated.

I have anxiously considered the notice of motion, the grounds for it, the affidavit in support of it, the affidavit in reply, the record, the judgment delivered by Muga Apondi J. in HCCC No. 285 of 2004 at Nakuru, the decision on the application for review delivered by Koome J. on 29th June 2007, the entire record, the submissions by both learned counsel, the authorities to which they referred me and the law. First, I do not think, even if I were minded, I would grant the first prayer which seeks orders to extend time within which the applicant may file and serve notice of appeal from the subject judgment. This is

because, the judgment was delivered on 16th June 2006 and the applicants, as I have stated above, timeously filed notice of appeal against that judgment on 29th June 2006. That notice is still validly in the file as an attempt by the applicants to withdraw it never succeeded. Both parties concur on this. That in effect means that there is already a notice of appeal filed in respect of the judgment delivered by Muga Apondi J. on 16th June 2006 in HCCC No. 285 of 2004. If I were to extend time to file another notice of appeal, there would be two notices of appeal seeking to support one appeal. That would be improper in law. On the other hand, I cannot extend time to validate the notice already filed as in any event it was filed in time and further I have no application to do that before me. Lastly, I cannot deem it to have been withdrawn under ***rule 82*** of this Court's Rules because I am sitting as a single Judge and as such I have no jurisdiction to mark it withdrawn. In the case of ***Paul Kanyi and Another vs. George Mbugua Njoroge & Another*** – Civil Application No. NAI. 288 of 2001, Kwach JA, (as he then was) dealing with a similar situation stated, inter alia:-

"***I must reject that submission as misconceived because this Court has stated in a number of decisions that a notice of appeal cannot be deemed to have been withdrawn under rule 82 of the Rules, except with the order of the Court.***

The position in this case therefore is that the notice of appeal filed on 26th July, 2001 is still alive and well as long as it is still extant, there is no room for making an order for filing a second notice of appeal. For this reason, this application must fail and it is hereby dismissed with costs."

See also the decision of Omolo, JA in the case of ***Dolphin Palms vs. Al Nasibh Trading Company Ltd and two others*** – Civil Application No.112 of 1999.

That leaves me with the second prayer. Although that prayer is predicated upon my first extending time to file notice of appeal as prayed for in the first prayer, the which prayer I have declined to grant, nonetheless, I would need to consider whether, the notice of appeal on record, having been filed timeously and having not been marked as withdrawn, I can on the facts of this application extend time to file record of appeal. This notice of motion is premised on ***rule 4*** of the Court of Appeal Rules. The law as regards the principles that guide the Court in deciding such an application is now well settled and is documented in several decisions of this Court. One such decision is the well known case of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi,*** Civil Application No. NAI. 251 of 1997 (unreported) where a full court made it clear that the court, in considering an application brought under that rule, exercises unfettered discretionary jurisdiction. However, whilst that discretion is unfettered, the same must be exercised, like all discretion, judicially and not arbitrarily or capriciously nor should it be exercised on the basis of sentiment or sympathy. In order that the exercise of such discretion may be exercised judicially, that case sets out certain guidelines which the Court is bound to look into, to enable it reach a fair conclusion. The Court went on and stated:-

"***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."***

As the discretion is unfettered, it goes without saying that the list spelt out in the above decision cannot be exhaustive by any standards. There may still be other factors that may militate in favour of granting the application though not covered in the above list. All must depend on the facts, circumstances, and peculiarity of a particular case. However, generally the above have been accepted as proper guidelines to the Court when considering an application brought under ***rule 4*** of this Court's Rules. In this ruling, I will be guided by those principles.

The judgment, the applicants intend to appeal against was delivered as I have stated above, on 16th June 2006. The notice of appeal was filed by the applicant on 29th June 2006. The record of appeal should have been filed within sixty days after the date the notice of appeal was filed. It was not so filed.

The applicants say, in their affidavit that they were advised to apply for review of that Judgment and that in order to do so successfully, they had to withdraw that notice of appeal. The respondent agrees that applicants filed application for review and made an unsuccessful attempt to withdraw the notice of appeal. Under those circumstances, I am prepared to accept that the delay period after sixty days from the date the notice of appeal was filed to the date the ruling on application for review was delivered by Koome J. which was on 29th June 2007 is explained by allegation, that the applicants laboured under confusion and thought review application was preferable in such circumstances. Thereafter, having known from the ruling of Koome J. that they were not on a good wicket, they reverted to their original intention to appeal against the judgment of Muga Apondi J. against which they had filed the notice of appeal which they failed to have marked as withdrawn. That in effect meant that they had to take appropriate action immediately after 29th June 2007, the date Koome J. dismissed their application for review. They did not do anything until 27th March 2008 close to nine months late. What explanation do they give for this delay? At paragraph 21 of their supporting affidavit sworn by Harris Horn Junior on 20th March 2008 and filed on 27th March 2008, the first applicant, they state:-

"***21. That I also honestly believe that we are not late in coming to this Honourable Court for the orders sought, since the ruling on review was only delivered on 29th June 2007 and our advocate communicated to us about (sic) on or about the August 2007."***

That is the only explanation for that delay of nine months and as can be seen from that deponment, the applicants do not in my mind sound serious. They claim in that statement that they believe they are not late in coming to the Court when they at the same time know that that affidavit is being sworn some nine months late, and they are not even certain of when their advocate communicated the dismissal of their review application to them. Secondly one would have expected them to know on what date in August they got information even if it was not by a letter.

Nevertheless, I will give them the benefit of doubt and take it that they got communication from their advocate that they had lost the application for review on 31st August 2007. I will therefore count the lateness period from that date 31st August 2007. What explanation do they offer now that they had known that they had lost the application for review and no more confusion now prevailed? I will count the delay period that needed explanation from 31st October 2007 for that is the date sixty (60) days from 31st August 2007. Mr. Kimani says they have no explanation for the delay covered by that period from 31st October to 27th March 2008 when this application was filed. It is a period of over 140 days to be on the safe side. There is no attempt to explain that delay as Mr. Kimani simply said his clients had no explanation for that delay.

Mr. Kimani's main argument was that the applicants' intended appeal had merits as the applicants were not heard in their defence before the superior court. He did not file any draft memorandum of appeal to support that contention and Mr. Githui in his response made heavy weather for that omission; I may say rightly too, though in my view, it is not necessary for an applicant to file memorandum of appeal to demonstrate the second principle that the intended appeal has merits. While it is the easiest and by far the best way of showing that the intended appeal has merits, all that the Court needs is some indication as to what matters the applicant intends to raise in his intended appeal. This can be brought out in the body of the application in the grounds of the application and even by annexing the proceedings and decision if the same are available. In my mind, what the Court needs is some material from which it can make an informed decision as to the prima facie merits of the intended appeal without deciding the same intended appeal or appearing to decide it. Having said the above, I have perused the proceedings before Muga Apondi, J. and the submissions by the then learned counsel for the applicants and the judgment of the same learned Judge which is the subject of the intended appeal. I have also perused proceedings before Koome J. and the ruling delivered by the learned Judge. In my view, and without going into the merits of the intended appeal, I cannot on the material before me conclusively say the intended appeal has merits. For fear of prejudicing the appeal should it come to that, I will leave it at that.

I was not addressed on the question of prejudice to the respondent should the application be allowed and I will not canvas my own theory on that aspect.

In dismissing this application as I must do, I am aware, the amount of money that was awarded was fairly large but in my mind that was the same reason why the applicants should have acted fast, if they knew they did not owe anything or that much to the respondent to take early action for redress. As matters stand, they have only themselves and their successive advocates to blame for whatever may have befallen them. I have nothing before me to persuade me to exercise my discretion in favour of the applicants even after giving them the benefit of doubt in so many aspects of the matter.

In the result, the notice of motion dated 20th March 2008 and filed on 27th March 2008 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 13th day of March, 2009.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR