



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 77 of 2008

BELINDA CASH.....APPLICANT

AND

COAST BUS COMPANY

MOHAMED NAWAZ MIRARESPONDENTS

(An application to extend time for serving the Notice of Appeal from the order of the High Court of Kenya at Nairobi. (Osiero, J) dated 26th February, 2008

in

H.C.C.C. No. 112 of 1998)

RULING

This application dated 30th April, 2008 is expressed to be made under **rule 4** of the Court of Appeal Rules and seeks the order of this Court for extension of time for service of the Notice of Appeal by 39 days covering the period from 15th March 2008 to 22nd April 2008. The grounds on which it is based are set out on the face thereof. They are:-

(a) On 26th April, 2008 (sic) the application filed an application seeking leave to execute against Mohamed Nawar Mizra the second respondent.

(b) The application was argued interpartes on 8th October 2007 14th November 2007 and 28th November 2007.

(c) On 26th February 2008 Mr. Justice Osiero delivered his ruling dismissing the application with costs to the second respondent.

(d) The Notice of Appeal was filed in the High Court on 7th March 2008 which was within time.

(e) *The Notice of Appeal should have been served on or before 14th March 2008 but the copies for service were mislaid in the applicant's advocate's office.*

(f) *The Notice of Appeal was served on 22nd April, 2008.*

(g) *The request for copies of proceedings and the ruling of the court were delivered to the first respondent and O.A. Sherman & Company the advocates for the second respondent on the 13th March 2008 so that they were aware of the intention to appeal within the time for service of the Notice of Appeal*

The supporting affidavit to the application was deposed to by Mr. Kenneth Alison Frazer, a partner in the firm of Hamilton Harrison & Mathews, the advocates for the applicant herein. His averments therein are:-

1. ...

2. *On the 8th October 2004 judgment was entered for the applicant against the first respondent for Australian dollars 301,015/38 and Kshs.3,690,972/= with interest at 12% per annum from 9th October 2004 and costs being damages for personal injuries suffered in a motor accident on 27th April 1995. A copy of the plaint is at pages 1 to 6 of the exhibit, a copy of defence is at pages 7 to 8 and copy of final decree is at page 9 to 10 of the exhibit thereto.*

3. *On the 26th September 2005 the court granted the applicant leave to execute the decree before the taxation of the applicant's Bill of Costs.*

4. *On the 26th April 2006 the applicant filed an application seeking leave to execute against the second respondent Mohamed Nawaz Mizra, the only surviving partner of the first respondent. A copy of the application is at page 11 to 64 of the exhibit hereto.*

5. *The second respondent filed his replying affidavit to the application on 14th June, 2006. A copy of the replying affidavit is at pages 65 to 75 of the exhibit hereto.*

6. *On 26th February 2008 Mr. Justice Osiemo dismissed the application with costs to the second respondent. A copy of the ruling is at pages 76 to 81 of the exhibit hereto.*

7. *On 7th March 2008 my firm filed in the High Court a Notice of Appeal. A copy of the Notice of Appeal is at page 82 of the exhibit hereto.*

8. *By letter dated 12th March 2008 filed in the High court Registry on 13th March 2008, my firm requested for copies of proceedings and the ruling for purposes of an appeal. A copy of the letter is at page 83 of the exhibit hereto.*

9. *Copies of the letter dated 12th March 2008 were sent by G4S Security (K) Limited on 12th March 2008 and under certificate of posting to the first respondent and to O.A. Sherman & Company, the advocate for the second respondent on 13th March 2008. A copy of the certificate of posting is at page 84 of the exhibit hereto and the G4S Security (K) Limited consignment notes 068490 and 069739 signed on behalf of the first respondent and O.A. Sherman & Company acknowledging receipt on 13th March 2008 are at pages 85 and 86 of the exhibit hereto.*

10. *The service of the Notice of Appeal was overlooked in my firm as the copies for service appear to have been mislaid between my firm's court clerks and my office. I noticed this omission on 16th April 2006. I was unable to trace the copies of the Notice of Appeal for service. I immediately requested my firm's court clerk to collect the Notice of Appeal signed by the Deputy Registrar of the High Court so that we could serve the copies of the Notice of Appeal. My court clerk brought the signed copies of the Notice*

of Appeal on 17th April 2008 and I immediately dispatched the copies of the Notice of Appeal to Kishore Nanji Advocate of Mombasa for service.

11. The Notice of Appeal was served on 22nd April 2008 a copy of which is at pages 87 to 90 of the exhibit. This was received by me on 28th April 2008.

12. I request extension of time of 39 days for service of the Notice of Appeal for the period between 15th March 2008 and 22nd April 2008 which was occasioned by the copies of the Notice of Appeal for service being mislaid in my firm. The respondents were aware of the intention to appeal from the delivery on 13th March 2008 of the request for proceedings.

13. I now produce the exhibit marked "KAF 1"

There was no replying affidavit from the respondent and when the application was fixed for hearing on 28th April 2009, although the second respondent was served with a hearing notice, neither himself nor his counsel appeared hence the application proceeded on an ex parte basis. Mr. Kingara learned counsel for the applicant submitted on the application and reiterated the reason for the delay vis a vis mislaying of the Notice of Appeal in the firm's court clerks office. Thus the application for extension of time is based on a bona fide mistake of the applicant's firm of advocate which amounts to sufficient cause as is not contravened, see *Murai v. Wainaina* (NO. 4)[1982] KLR 37. This aside, the amendment to rule 4 of the Court of Appeal Rules by Legal Notice No. 14 of 1984 gives this Court a much wider discretion in extending time as it can do so where "it thinks just". Considering that the case was concluded by the superior court where the applicant was awarded substantial sum of damages for serious injuries sustained in a road accident, it is my view that in the circumstances of this case the applicant should be granted more time to enable her to pursue her appeal. Since the notice had already been served but late, I allow this application and extend the period of service to run from 14th March 2008 to 22nd April 2008. There will be no order for costs.

Delivered and dated at Nairobi this 8th day of May, 2009

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR