



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal (Appli) 184 of 2006

NICHU INVESTMENTS LIMITED APPLICANT/APELLANT

AND

PAN AFRICAN CREDIT AND FINANCE LIMITED

(IN LIQUIDATION) RESPONDENT

(Application for extension of time to file Notice of Appeal and Record of Appeal out of time against an Appeal from the judgment and Decree of the High Court of Kenya at Nairobi, Milimani Commercial Courts (Azangalala, J) dated the 30th day July, 2004

In

H.C.C.C. No. 2671 of 1995)

RULING

The motion dated 25th August, 2008 and lodged in the Court on 28th August, 2008 is brought under **Rule 4** of the Court’s Rules and while the discretion of a single Judge of the Court is unfettered under that rule, the Court itself has, over the years developed certain perimeters within which that discretion is to be exercised. Those perimeters are well known. Let me cite a few authorities setting out those perimeters. In **LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI**, Civil Application No. NAI. 255 OF 1999 (unreported) the Court declared:-

“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.”

Again in **MWANGI VS. KENYA AIRWAYS LTD. [2003] KLR 486**, the Court asserted as follows:-

“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. -----.”

The Court then cited the passage from the case of **LEO SILA MUTISO**, supra, which I have set out above and continued as follows:-

“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 any way.”

These are the guidelines I must apply in considering the motion before me which is one for the enlargement of time:-

- (i) to file a notice of appeal out of time; and
- (ii) to file the record of appeal out of time.

There is no basis for prayer one seeking the filing of a notice of appeal out of time. The judgment sought to be challenged on appeal was delivered on 30th July, 2004. A notice of appeal was in fact lodged in the superior court on 2nd August, 2004. That was within three or so days after the delivery of the judgment. **Rule 74 (2)** of the Rules allows fourteen days within which a notice of appeal is to be lodged. The notice lodged on 2nd August 2004 is still in existence and in fact it is included at page 275 of the record of appeal which was lodged in this Court on 25th August, 2006. If I allow the applicant, Nichu Investments Ltd., to file another notice, it would mean there would be two notices of appeal by the same party from a single decision. That is not permissible and I reject the prayer respecting the enlargement of time to lodge a notice of appeal.

That leaves the prayer for extension of time within which to lodge the record of appeal. As I have already pointed out, Civil Appeal No. 184 of 2006 was in fact lodged in the Court on 25th August, 2006; the motion for extension of time was brought within that appeal and the motion really seeks the validation of that appeal which was, admittedly, filed out of time.

The certificate of delay attached to the motion shows that the applicant was supplied with copies of proceedings on 16th May, 2006; the appeal, therefore, should have been lodged in Court by the 15th July, 2006 as the latest date. Of course the applicant insisted on being supplied with “*certified copies of proceedings and judgment*” which are really not necessary for lodging appeals and could have collected the documents sometime after 18th April, 2006 when a letter was sent to them informing them that copies of the proceedings and judgment were available for collection. So that in considering the length of the delay, I must take it that the appeal could have been lodged after 18th April, 2006. The delay which the applicant had to explain must run from that period, i.e. 18th April, 2006 to the 25th August, 2006 when the record of appeal was lodged. That is a period of some three months.

The applicant explains that delay, basically on the ill-health of its previous advocate, the late Mr. A.L.R. Shah. It is sworn that he fell ill around May, 2006 and travelled to England around that time to be with his family there and to seek medical attention. Mr. Isindu for the applicant told me that Mr. Shah actually did succumb to his ailment on 28th August, 2006 while in India. Meanwhile he had locked the relevant documents relating to the appeal in his drawer and that Mr. Isindu only got those documents after 10th August, 2006 – see the letter from the late Mr. Shah to Mr. Isindu dated 10th August, 2006; that letter forms part of the motion before me. It appears Mr. Shah died some eighteen days after writing that letter.

Mr. Njeru, learned counsel for the respondent, Pan African Credit and Finance Ltd (In liquidation), vigorously and vehemently opposed the motion and contended that the applicant is seeking to take advantage of the unfortunate death of Mr. Shah and even doubted the signatures appearing on some documents purporting to be those of the late Shah. Mr. Njeru pointed out to me that the case started way back in 1995 and that the value of the security property may now be less than the amount the respondent is claiming from the applicant, i.e. the prejudice to the respondent is real and therefore, I ought not to extend the time in the manner I am asked to do.

In these matters, the burden is really on the party seeking the extension to satisfy the Court that there are good grounds for enlarging time. What the applicant relies on is, basically, the ill-health of the late Shah which terminated in his demise. On the material before me, I am satisfied that from around May, 2006, the late Shah was in ill-health and that he sought medical treatment abroad. It may have been not wise of him to have locked the file in his drawer but it is to be noted that as soon as Mr. Isindu obtained the file in August, 2006, the record of appeal was lodged that same month. I am unable to blame the delay from 1995 when the suit was filed to the 30th July, 2004 when judgment was delivered on the applicant. Even if during the whole of that period it was the applicant who kept on asking for adjournments, it was the duty of the judges who were being asked for adjournment to assess whether or not the application(s) for the adjournment were justified. If the applications were granted by the various judges, then of course they must have been justified and the applicant cannot be blamed for delaying the matter. I repeat that the applicant's counsel was not wholly blameless; there was no need for them to insist on certified copies of proceedings and judgment. It was unwise for him to lock up the file in his drawer when going abroad to seek medical attention. I take all these factors into account. But I must weigh those factors against the undisputed fact that Mr. Shah was unwell and actually died just after the record of appeal was lodged. I do not think it would be right for me to determine the authenticity of the signatures purporting to be those of Mr. Shah. In any case, I do not understand why anyone would want to forge the signatures on the documents. I also take into account the fact that the record of appeal has in fact been lodged. If I refuse the extension sought, that record might well fall by the way-side. In the circumstances prevailing, I think it would be too hard on the applicant to have the record struck out. I accordingly allow that part of the motion seeking the extension of time to lodge the record of appeal out of time and I extend the time to include the 25th August, 2006 when the record was lodged. I have rejected the prayer for extension of time to lodge the notice of appeal.

On costs, I think the applicant must pay to the respondent the costs of the motion and I so order. Those shall be may orders on the matter.

Dated and delivered at Nairobi this 17th day of July 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.