



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

CIVIL APPLICATION 200 OF 2008 (UR 127/2008)

WARUHIU K'OWADE & NG'ANG'A ADVOCATES (A FIRM) APPLICANT

AND

MUTUNE INVESTMENTS LIMITED

RESPONDENT

(Application for extension of time to lodge and serve a Notice of Appeal and Record of Appeal out of time from the judgment of the High Court of Kenya at Milimani Commercial Courts (Azangalala, J) dated 25th May, 2008

In

H.C.C.C. No. 552 of 2004)

RULING

By a judgment dated and signed by Azangalala, J on 25th April, 2008 but delivered on his behalf by Lesiit, J on 16th May, 2008, the former Judge ordered M/s Waruhiu, K'Owade and Ng'ang'a Advocates, the applicants herein, to honour their professional undertaking by paying to M/s Mutune Investments Ltd., the respondents herein, the sum of K.shs.2 million within sixty days of the Judge's order. The applicants are a firm of advocates practising law in Nairobi. By their letter dated 15th January, 2002, another firm of advocates, M/s Sichangi & Company Advocates who were acting and are still acting for the respondents, had told the applicants:-

“We refer to the above matter and enclose herewith cheques for K.shs.2 million released to you on your undertaking to release to us the Title documents for the above property and Discharge of charge by Trust Bank Limited (DPF).”

It appears that the terms on which the cheques were sent were not honoured by the applicants and they did not and still have not refunded to the advocates for the respondents the sum of Ksh.2 million. The respondents then moved the superior court under **Order 52 & rule 7 (1) (a)** of the Civil Procedure Rules to compel the applicants to honour the undertaking. The applicants retorted, basically, that they had made

no such undertaking, and that in any case, one Isaac Gichuthu who was the director and principal shareholder of the respondent owed them (the applicants) over Ksh.2million in respect of previous professional services and the applicants had a lien over the Ksh.2 million, the subject of the alleged undertaking. In this motion which is brought before me under **Rule 4** of the Court of Appeal Rules, I am not too terribly concerned with these conflicting positions unless I am compelled to consider the issue of the success of the intended appeal if I extended the time as requested in the motion.

It is clear from the record that the judgment of the superior court was delivered on notice. The Deputy Registrar of the High Court at Milimani sent out a written notice dated 2nd May, 2008 to both firms of advocates. The applicants, through their learned counsel Mr. Thangei, agreed before me that the Deputy Registrar used the correct address given by the applicants for the purpose of communicating with them. The advocates for the respondents received their notice and were present in court when Lesiit, J delivered the judgment. But Mr. Thangei swears in his affidavit in support of the motion that they did not receive the notice, and hence their absence from the court at the time the judgment was delivered. Mr. Achach, learned counsel for the respondents, retorted that since they received the notice, the applicants must also have received theirs. Mr. Achach added that the cause list for the day the judgment was delivered contained the case before Lesiit, J and that was another notice to the applicants. I do not know if the cause list at Milimani Commercial courts is sent to all the advocates practising in that court. Mr. Achach did not swear so or tell me so during the hearing of the motion. So I do not know how an advocate would know about the appearance of a particular matter on the cause list unless that advocate has read the cause list. As to the receipt by the applicants of the notice of delivery of the judgment though the correct address was used by the Deputy Registrar, the only evidence with regard to whether or not it was actually received is that of Mr. Thangei. Mr. Achach can only presume that it was received.

Look at what happened after Mr. Thangei came to know about the judgment on 9th July, 2008. On 11th July, 2008, two days later they drew up a notice of appeal, which they filed on 14th July, 2008. The applicants have not disclosed in their motion if they have written to the superior court asking for proceedings and judgment and whether they have actually received them. I take note of the fact that though the advocates for the respondents were present in court at the time judgment was delivered and must have noted the absence of the applicants, they did not inform the applicants about the judgment until the service of taxation notice upon the applicants on 9th July, 2008. This motion was filed on 28th July, 2008, some nine days after they came to know of the judgment. In these circumstances, I am prepared to hold, as I hereby do, that the applicants did not in fact receive the notice for the delivery of the judgment and that they only came to know about the judgment on 9th July, 2008 when they were served with the notice for taxation. They immediately filed a notice of appeal and followed it up with the present motion about one week later. As Mr. Thangei correctly pointed out before me, they stood to gain nothing by not acting if they were aware of the judgment before 9th July, 2008. I am concerned about their failure to state if they have applied for proceedings and judgment in accordance with **rule 81** of the Court's rules, but that matter was not raised as an issue before me and I am not inclined to use it as a basis for not exercising my discretion in their favour. Weighing one thing against the other, I am satisfied this is a proper case in which I ought to exercise my discretion in favour of the applicants. I do so by allowing the notice of motion lodged in the Court on 28th July, 2008 and I order that:-

“(i) the notice of appeal lodged in Court on 14th July, 2008 is deemed to have been lodged and served within the prescribed period.

(ii) the record of appeal shall be filed within twenty- one days of the date hereof and shall then be served within a further seven days from the date on which it is lodged.

(iii) the applicant shall pay the costs of this motion in any event.

Those shall be my orders in the motion.

Dated and delivered at Nairobi this 3rd 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.