



IN THE COURT OF APPEAL

AT NAIROBI

CIV APPLI NO. 236 OF 2007 (UR. 147/2007)

BENSON W. K. MUIGAIAPPLICANT

AND

CO-OPERATIVE MERCHANT BANK OF KENYA LTD RESPONDENT

(An application for extension of time to file and serve a notice of appeal and to lodge record of appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Milimani (Mr. Justice Anyara Emukule) dated 19th May, 2005

in

H.C.C.C. NO. 781 OF 2001)

RULING

This is an application by notice of motion dated 20th September 2007 and lodged on 21st September 2007 by **Benson W. K. Muigai (Benson)** seeking orders:-

- 1. That this Honorable Court be pleased to extend time to file a Notice of Appeal and to lodge the Record of Appeal out of time.***
- 2. That the costs and incidentals to the application (sic) abide to result of the said appeal (sic).***

There was an affidavit in support of the application sworn by Benson on 20th September 2007 as follows:-

- 1. That I am the appellant/applicant herein and thus competent to swear this affidavit.***
- 2. That, by a charge dated 9th April 1996, I charged my property known as L.R. No. 4953/96 situated in Thika Town to the respondent for Kshs. 4,000,000/-.***
- 3. That I repaid the loan for a year then fell into arrears whereupon, the respondent sold the property in 1997 for Kshs. 4.5 million.***
- 4. That after the sale, the respondent did not give an account statement to indicate that there was any balance outstanding. After 3 years its advocates sent me a demand letter for Kshs. 6,271,561.20. The respondents then filed HCCC No. 781 of 2001 claiming sum of Kshs. 8,616,786.45 “BWKM 1”***

5. ***That, I am informed by my advocate on record, which information I verily believe to be true, that the respondents filed an application dated 16th February 2004 seeking to strike out the defence. Annexure “BWKM 2”.***
6. ***That, I am informed by my advocate on record, which information I verily believe to be true, that the application was heard on 7th April 2005 and that by a ruling delivered on 19th May 2005, the defence was struck out and the judgment entered as prayed in the plaint. Annexure “BWKM 3”.***
7. ***That I did not know of the foregoing until 20th May 2005, when I received a letter from my advocates dated 20th May 2005 informing me of the ruling. “BWKM 4”.***
8. ***That, after receiving this letter, I could not give instructions as I fell seriously ill being hypertensive and diabetic and my health has since then deteriorated. In the circumstances, the delay was not intentional. “BWKM 5”.***
9. ***That I am informed by my advocates on record which information I verily believe to be true that the learned Judge misdirected himself in failing to find that the defence raised triable issues inter alia, the failure by the respondents to give an account before and after the sale of the charged property, the terms and conditions of the loan facility, whether the plaintiff should charge interest after July 1997 and whether the doctrine of estoppel applies.***
10. ***That the respondent is now claiming Kshs. 20,463,866.45 which amount is quite substantial and I stand to suffer irreparably if the orders sought are not granted. Annexure “BWKM6”***
11. ***That, I believe that the intended appeal has high chances of success.***
12. ***That, I believe that no prejudice will be occasioned to the respondent if the orders sought are granted.***
13. ***That, it is fair and just to grant the orders sought.***
14. ***That, all the facts deponed to herein are true to the best of my knowledge and belief.”***

The ***length of delay*** sought to be excused is from 14 days after the date of delivery of Emukule J. ruling striking out Benson’s defence on 19th May 2005 to the date of the current application being 20th September 2007 which is approximately two years and three and a half months. Benson deponed that he did not know of the striking out of the defence until 29th May 2005 when he received his advocate’s letter dated 20th May 2005 informing him of the ruling which letter simply stated that ***“Your defence in this matter has been struck off and judgment entered against you as prayed. Please get in touch with us urgently for further instructions.”***

It was after receiving that letter that Benson claims to have fallen seriously ill being hypertensive and diabetic. ***Dr. Kiama Wangai*** issued a certificate addressed to whom it may concern dated ***11th September 2007*** in which he certified that :-

“the above named patient has been followed in this clinic suffering from hypertension and diabetes. These two problems have been from 1995. They are exacerbated (sic) by stress psychological mostly emanating from his business. He has had to be on bed rest and medication for long to control the condition. He is stable, not for long and the symptoms reappear. He is currently relatively stable.

He is on strict rest from routine business work. And instructed to adhere to medication.

I hope you find the information helpful.

Yours sincerely,

Dr. Kiama Wangai”

I have come to the conclusion that this doctor’s certificate goes some considerable way towards explaining why Benson failed to act promptly on two occasions: the first being when he allowed the loan repayments to fall into arrears leading to the sale of the charged property and the second being when he learnt that the learned Judge had struck out his defence rendering it necessary to give prompt instructions to his advocate as to whether or not to apply for an extension of time to mount an appeal against the Emukule J. ruling striking out his defence.

The length of delay sought to be excused is certainly substantial but this is not one of those cases where it can be said that there is no chance of an appeal succeeding so that granting an extension would be to act in vane.

I have taken into consideration the submissions of both counsels for the applicant and counsel for the respondent on the likelihood of prejudice that will or will not be suffered if the extension is granted. Mr. Orege learned counsel for the applicant

submitted that there would be no prejudice to the respondent which is a large commercial bank to which the delay will not cause prejudice to such a Bank.

Mr. Kariuki, in his brief reply on behalf of the respondent Bank, submitted that to deny the Bank the fruits of a judgment given in 2005 would grossly prejudice the Bank.

My discretion in deciding applications of this nature is unfettered but must be exercised judicially and having taken into account all of the above I have reached the conclusion that the extension sought should be granted.

I therefore hereby order that the time for lodging a notice of appeal against the ruling of Emukule J. dated and delivered on 19th May 2005 be extended to expire fourteen days from the delivery of this ruling and must be served on the respondent within seven days of the lodging of the notice in accordance with **rule 76** of the Court of Appeal Rules.

The costs of this application shall be in the intended Appeal.

Dated and delivered at Nairobi this 15th day of February, 2008.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR