



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPLI 75 OF 2008 (UR 41/2008)

ABDI NURU OMAR

ALI MOHAMED HAJI T/A DELTA HAULAGE SERVICES LTD..APPLICANTS

AND

MOHAMED ADEN ABDI RESPONDENT

(Application for extension of time to file a notice and record of appeal from the judgment of the

High Court of Kenya at Kisumu (Warsame J) dated 10th February, 2006

in

H.C.C.C. NO. 304 OF 1999)

R U L I N G

This is an application by way of Notice of Motion expressed as having been brought:

“Pursuant to Rules 4, 41 (as amended by Rule 2 of the Court of Appeal (Amendment) Rules 1998) 42 and 43 of the Court of Appeal Rules)”.

The foregoing simply means that this is an application under **Rule 4** of the Court of Appeal Rules which provides:

“4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court for the doing of any act authorized or required by those Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

In this application, the applicants seek the following reliefs:

“1. THAT this Honourable Court be pleased to grant to the Applicant leave to file a Notice of Appeal and a Memorandum and Record of Appeal against the judgment delivered by the Honourable Mr. Justice Warsame on the 10th February 2006 in the Kisumu High Court Civil Suit Number 304 of 1999 out of time,

2. THAT the costs of the application be in the cause”.

The application is supported by a detailed affidavit sworn by Ali Mohammed Haji. In that affidavit running into twenty paragraphs, the deponent explains the background to this matter which in essence is the factual position which cannot be seriously disputed.

The application which came up for hearing before me on the 25th June, 2008, Mr. Allan Maleche who appeared for the applicants sought to rely on the long affidavit of Ali Mohammed Haji and went on to give a general background to the application. He explained that when the earlier appeal was struck out by this Court on 30th November, 2007 the applicants and their legal advisors were exploring an out of court settlement when an offer of Shs.500,000/= was made. The respondent's advocate wrote back saying that they would revert to the applicants' offer but in a letter dated 14th April, 2008 rejected the offer. It was after that rejection that this application for extension of time was filed on 28th April, 2008.

On the issue of chances of the intended appeal succeeding Mr. Maleche referred to the ruling of this Court delivered on 19th October, 2006 in which the issue of jurisdiction was considered as an arguable point.

As regards prejudice to the respondent Mr. Maleche pointed out that the respondent would not suffer any prejudice as he had already withdrawn the amount that was deposited in the joint account. For these reasons, Mr. Maleche asked me to allow this application.

Mr. Geoffrey Yogo who appeared for the respondent opposed the application by relying on his own affidavit sworn on the 18th June, 2008. He pointed out that there was no explanation for the period from 30th November, 2007 when the ruling striking out the earlier appeal was delivered and 11th December, 2007 when the respondent wrote a letter.

As regards chances of the appeal succeeding, Mr. Yogo was of the view that taking into account the ruling of this Court he would say nothing on that issue.

It was Mr. Yogo's contention that since this matter started by way of a suit filed in 1999 this litigation ought to be brought to an end by rejecting this application.

I have considered the submissions by counsel appearing and the two authorities cited by Mr. Maleche together with the affidavits placed on record. It is now settled that an application under **Rule 4** of this Court's Rules, a single Judge of the Court is called upon to exercise his unfettered discretion but like any other judicial discretion, that discretion must be exercised upon reasons. The matters to be considered, whether to grant an extension of time are first the length of delay, the reason for the delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In **PATEL V WAWERU AND 2 OTHERS** [2003] KLR 361 at pages 362 – 3 this Court had the following to say in respect of **Rule 4** of the Court's Rules:

“This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. NAI. 251 of 1997 this Court Stated:

‘It is now 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 whether to grant an extension of time are first the length of the delay. Secondly, the reasons 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’ ”.

I must be guided by the foregoing principles. What are the facts leading to this application? It is not in dispute that the applicants' earlier appeal to this Court was struck out on the 30th November, 2007. In

its ruling striking out the appeal, this Court stated:

“As for the appeal itself, Miss Nungu having conceded that the documents omitted are primary documents which cannot be brought in by filing a supplementary record, the appeal, ipso facto; is incompetent and can only be struck out. We therefore order the appeal to be and is hereby struck out with no order as to its costs”.

In view of the foregoing, if the applicants (the appellants in the struck out appeal) wanted to file an appeal they had to start the appeal process afresh by seeking extension of time in which to file a notice of appeal and lodge the record of appeal. Hence, this application before me – see ***KUWINDA RURINJA & COMPANY LIMITED V KWINDA HOLDINGS LIMITED & OTHERS*** – Civil Application No. Nai. 243 of 1998 (unreported).

In the present application, it has been shown that when the earlier appeal was struck out on 30th November, 2007 the applicants decided to pursue an out of court settlement. There is evidence of correspondence exchanged by advocates for the parties in a bid to reach an out of court settlement. The applicants’ offer of Shs.500,000/= was however rejected by the respondent’s advocates vide their letter of 14th April, 2008 in which it was stated, *inter alia*:

“We have spoken to our client through his advocates and their instructions to us is that, they would not wish to negotiate this matter below the sums awarded by court”.

With that response, the applicant’s efforts for out of court settlement were frustrated. Hence they had to start the appeal process afresh. It is to be observed that the letter rejecting the applicants’ proposal was dated 14th April, 2007 and within two weeks, this application was filed. The delay from 30th November, 2007 to 11th December, 2007 has been, in my view, adequately explained since the applicants had genuinely believed that the dispute would be amicably settled without further court proceedings.

On the issue of the intended appeal having chances of success, I can only rely on what this Court said in its ruling pursuant to the applicants’ application under ***Rule 5 (2) (b)*** of this Court’s Rules in which the applicants sought an order staying execution of the judgment of the superior court pending appeal to this Court in respect of this same dispute. In that ruling delivered on 19th October, 2006 this Court stated, *inter alia*:

“We have come to the conclusion that whether the learned trial Judge was right or wrong in coming to the above decision on the jurisdiction issue is an arguable issue before this Court.

We also consider that there is an arguable issue arising from the manner in which the special damages were dealt with in the superior court. The applicant submits that the special damages were not properly pleaded and the evidence led in support of them was produced irregularly”.

In view of the foregoing, it cannot be disputed that the applicants’ intended appeal will raise arguable issues. That fact was conceded by Mr. Yogo in his submissions. Hence the intended appeal has chances of succeeding. But let me add a rider here that an arguable appeal does not mean that the appeal shall definitely succeed – see ***PATEL V E. A. CARGO HANDLING SERVICES LTD*** [1974] E.A. 75.

As regards prejudice to the respondent, it has already come to light that the respondent has already withdrawn the Shs.500,000/= which had been deposited in the joint names of the advocates for the parties. Just to set the record straight, it must be remembered that it was by its ruling of 19th October, 2006 that Shs.500,000/= was deposited by the applicants. That money remained secure in the said joint account until 30th November, 2007 when this Court struck out the earlier appeal. With that order of 30th November, 2007 there was no appeal pending and the order of stay, of course was swept away when the appeal was struck out. It was during that time that the respondent decided to withdraw the Shs.500,000/= since there was no order of stay any more.

In view of the foregoing, I accept Mr. Maleche's submission that the respondent would suffer no prejudice if the application was granted as the respondent has already enjoyed part of the decretal sum.

I think I have said enough on this application to show that this is a proper case in which I should exercise my discretion in favour of the applicants.

For the foregoing reasons, I grant the prayers sought and order that the applicants are to file a notice of appeal within seven (7) days from the date hereof and lodge the record of appeal within thirty (30) days from the time the notice of appeal is filed. I further order that the costs of this application which I assess at Shs.10,000/= be awarded to the respondent which amount should be paid within 30 days in default execution to issue.

Dated and delivered at Kisumu 27th day of June, 2008.

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR