IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 63 OF 2008

PULLIN HARAKCHAND SHAH ….....…… APPLICANT

AND

SOUTHERN CREDIT BANKING CORPORATION LTD.…....…RESPONDENT

(Application for extension of time to lodge notice and record of appeal out of time in an intended appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts (Ringera, J) dated 14th March 2002

in

H.C.C.C No. 759 of 1998)

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R U L I N G

On 14th March 2002, Ringera J. (as he then was) delivered a ruling in Nairobi Milimani H.C.C.C No. 759 of 2002 in favour of the respondent, Southern Credit Banking Corporation Ltd. The applicant, Pullin Harakchand Shah, felt aggrieved by that ruling. He lodged a notice of appeal against that ruling on 20th March 2002 and on 2nd July 2002, he lodged Civil Appeal Number 166 of 2002. These were filed through his former advocate, Bhasker Sheth. He then changed his advocates and on 14th March 2007, when that appeal came up for hearing, his present firm of advocates and in particular, Mr. Onsando Osiemo, who was conducting the case on his behalf at that particular time, applied and was allowed to withdraw that appeal. The applicant then lodged Civil Application No. Nai. 62 of 2007 for enlargement of time to lodge a fresh notice of appeal and record of appeal out of time. Before that application could be heard, Mr. Osiemo, who was handling the matter for the applicant on behalf of the applicant's advocates' firm left the country, leaving Mr. Mak'Ogonya T.T. Tiego to handle the matter for the applicant. That was on 15th June 2007. Mr. Tiego fell sick in May 2007, four weeks before he assumed the conduct of the appeal for the applicant. On 16th July 2007, that application for enlargement of time was heard by O'Kubasu, J.A who allowed it and the applicant was granted leave to file fresh notice of appeal within seven (7) days from 16th July 2007 and to lodge and serve record of appeal within fourteen days from the date the notice of appeal was filed. The applicant then lodged fresh notice of appeal on 20th July 2007 and that notice of appeal is still on the record as it has not been struck out nor ordered withdrawn. Mr. Tiego cites two decisions of single judges of this Court in his attempt to convince me that in law, that notice of appeal has been withdrawn pursuant to the provisions of rule 82 of this Court's

Rules. I will revisit that issue later as there may very well be other decisions to the contrary on that issue.

Back to the genesis of the notice of motion. The applicant, after lodging a notice of appeal on 20th July 2007 says through his counsel, Mr. Tiego, that his advocate took sometime to trace the relevant superior court file and when it eventually resurfaced, he found, on perusal, that several relevant and important documents and exhibits produced at the hearing in the superior court were removed from the file and he was not therefore able to trace them in time to be able to beat the deadline ordered by O'Kubasu J.A. They had to contact the respondent's advocates for help. They wrote to the respondent's advocates on 1st August 2007 and got a response on 13th August 2007. Unfortunately, by that time the applicant's advocate's health had started deteriorating and he had to be admitted to Aga Khan University Hospital for treatment. His condition took sometime to improve and as if the whole world had conspired against the applicant, his advocate's brother was also a victim of the trigger happy police in Kisumu who were allegedly putting down the post election violence. His brother was shot dead on 30th December 2007 and passed on on 31st December 2007. Further, the applicant's advocate's father also developed cancer of the stomach and had to be airlifted to Nairobi and later to Italy for medical attention. The applicant's counsel, Mr. Tiego, says all these together with his health conditions made it difficult for him to file a second application for enlargement of time to file notice of appeal and record of appeal as the time given by O'Kubasu J.A could not be complied with because the documents and exhibits that had to be part of the record of appeal could not be traced in the court file and were traced through the respondent's advocates after the time given by the court had expired. The applicant has now filed this notice of motion before me dated 14th April 2008 in which he is seeking two orders as follows:

"1. That time be extended within which the applicant can lodge and serve his notice of appeal and record of appeal against the order/ruling of the High Court of Kenya at Nairobi by Hon. Mr. Justice Ringera dated the 14th day of March 2002.

2. That the costs of the application be in the intended appeal."

The reasons in support of the application and the affidavit in support of it are on the main, as I have stated above, that the period granted by O'Kubasu J.A, in his ruling of 16th July 2007 could not be complied with first, because the relevant and primary documents and exhibits that were required to be incorporated in the record of appeal were removed from the court file and could not be traced. They were traced only with the help of the respondent's advocates and by that time, the period allowed had expired. Secondly, that even before the orders of O'Kubasu, J.A were given, the applicant's advocate, Mr. Tiego, who had taken over the conduct of the case from Mr. Osiemo, fell sick and had to attend for medication and tests for over a period and even before he recovered, his family underwent serious catastrophies which required his attention as a member of the family. All these resulted into delay in filing the application as ordered by O'Kubasu J.A. The application was not opposed as the respondent's advocate, though served with the notice of motion and though the hearing date for the application had been taken by consent of both parties, did not file a replying affidavit and did not attend court on 10th June 2008 when this matter came up for hearing. Mr. Tiego, however, mainly highlighted the contents of his affidavit in his submission before me and urged me to give yet another chance. In his submission, he contended that pursuant to rule 82 of this Court's Rules, the notice of appeal filed on 20th July 2007 is deemed as withdrawn and is no longer on record and hence his client's application for enlargement of time to file a notice of appeal as well as record of appeal.

I have considered the application. It is brought pursuant to **rule 4** of the Court's Rules. The law as regards such an application is now well settled. The court in considering such an application exercises unfettered discretion but as with all such judicial discretion, the court has to exercise it upon reason and not capriciously and or on the courts whims. In order to ensure that the court exercises such discretion upon reason, or judiciously, there are principle guidelines that the court uses which have been over a period developed to help the courts. These guidelines are not in any way limited as if they were, then the doctrine of the use of the court's discretionary powers would cease to exist. These guidelines are spelt out in several cases. One well known such case is that of Major Joseph Mweteri Igwate v. Muhura M'Ethare & Attorney General – Civil Application No. Nai. 8 of 2000 (unreported) where Lakha J.A (as

he then was) summarised the law as follows:

"The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance to them."

As Waki J.A. rightly stated in the case of Kagai Kimomori Watakia vs. Ngatia Kareko – Civil Application No. Nai. 77 of **2005** –

"The discretion under rule 4 is unfettered and there is no limit to the number of factors that the court will consider."

I do agree with him.

It is with the above in mind that I now proceed to consider this notice of motion before me. However, first, I need to comment on Mr. Tiego's contention that the notice of appeal filed on 20th July 2007 was no longer on record by virtue of the provisions of rule 82 of this Court's Rules. It is correct that in the case of K and K Amman Ltd vs. Mount Kenya Game Ranch & others (2003) IEA 105 where a notice of appeal was filed but the record of appeal was not lodged within the appointed time, the learned single judge held that the notice of appeal must have been deemed to have been withdrawn pursuant to rule 82(a) of the Court's Rules and he allowed time for filing a notice of appeal to be extended. That was a single judge's ruling on the matter. In Delphis Bank Ltd. v. Recco Builders Ltd and another (2005) 2 KLR 346, Deverell J.A (as he then was) was also of the same view and felt a court order was not necessary to declare a notice of appeal withdrawn as according to him, rule 82(a) was clear on the point and such a notice of appeal was automatically deemed withdrawn. The learned Judge also dealt with the matter as a single judge of this Court. Sight must not be lost of the fact that in law, a single judge of this Court sits as an agent of the full Court. That is the reason why his decisions are subject to full bench's decision should a party desire a full bench to go over it. In the case of Ocean Freight Shipping Company Limited vs. Oakdale Commodities Limited – Civil Application No. Nai. 198 of 1995, a full bench of this Court was faced with a decision of Shah J.A as a single judge on the same issue. It stated as follows:

"The applicant made its motion asking that it be allowed to file its notice of appeal out of time. The motion, as is the practice of the Court, was heard by a single judge (Shah, J.A). The learned single judge took the view that since the applicant had already filed a notice of appeal which was still on record, to extend the time to file a notice of appeal would be in effect to allow the applicant to file two notices of appeal. The learned Judge thought rightly, in our view, that what the applicant ought to have asked him to do was to extend time by such a period as would validate the notice of appeal lodged on the 21st August 1992. The applicant did not do so and the learned single Judge thought that:

"So effectively I am asked to disregard the notice of appeal filed on 21st August, 1992, and allow the filing of another notice of appeal out of time and then validate ex posto facto, the appeal already filed without there being an extension of time to validate the notice of appeal filed on 21st August, 1992. I cannot do so. The applicant is taking too many shot cuts.""

The full bench agreed with those sentiments. In 1999, Omolo J.A, in the case of **Dolphin Palms Limited vs. Al-Nasibh** Trading Co. Ltd. and two others – Civil Application No. 112 of 1999 was more specific on the issue. He stated as follows:

"Mrs. Gudka, for the applicant, sought to persuade me that I have jurisdiction to allow the applicant to file a notice of appeal out of time. Of course I have jurisdiction to extend time within which a notice of

appeal is to be filed. But as Mr. Khatib, for the first respondent, correctly pointed out, there is in fact a valid notice of appeal which was lodged on time against the decision in so far as that decision affects the first respondent. As at now, there is really no notice of appeal at all as regards the third respondent and prayer one in the notice of motion is not that I should enlarge time within which the applicant can file and serve a notice of appeal against the decision as it affects the third respondent. The prayer is that I should extend time to enable the applicant to file a notice of appeal. There is in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single judge: that is a province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single judge of this Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 52(b), an application to strike out a notice of appeal can only be heard and determined by the Court not by a single judge.

By deeming a notice of appeal to have been withdrawn, the single judge may well be usurping the powers reserved for the Court."

I do agree with the full Court and Omolo J.A. The notice of appeal filed on 20th July 2007 is validly on record and to order another one to be filed out of time would mean two notices of appeal in support of one appeal. Further, it is not mine as a single judge to declare the notice of appeal filed on 20th July 2007 as withdrawn. That is, as Omolo J.A rightly stated in the Dolphin case (supra), the work of a full bench and not a single judge. The best I can do, and I do, since that notice was properly filed, is to extend time such that it is validated for purposes of the record of appeal which was not filed within the time required after it was filed.

As to the record of appeal, the reason given, which I have cited above, for the delay between 30th July 2007 being the last day the applicant should have filed the record of appeal as per O'Kubasu J.A's order and 15th April 2008 when this application was filed are, in my view, acceptable reasons. All are mortal, and falling sick is part of us, whether we are advocates or ordinary beings. The applicant's advocate was sick and documents have been availed in support of the same. The respondent has not challenged the allegation and the supporting documents. Before he fell sick, the same advocate says he could not trace the necessary documents and exhibits in the superior court's file and had to enlist the assistance of the respondent's counsel. That too has not been disputed. I am satisfied that the delay period although lengthy, was explained to my satisfaction. As to the merits of the appeal, I have perused the annexed draft memorandum of appeal and I cannot say the intended appeal is frivolous. Lastly, as there was no replying affidavit and neither the respondent nor its counsel appeared before me at the hearing of the application, I cannot be in a position to appreciate whether or not the respondent stands to suffer any prejudice.

In view of all the above, I do grant the application and order the applicant to file and serve his record of appeal within fifteen (15) days of the date hereof. As I have stated, the period for filing the notice of appeal is extended to such period that the notice of appeal filed on 20th July 2007 is validated. Costs of this application shall be in the intended appeal.

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

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR