



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 210 OF 2007 (130/2007 UR)

ANASTASIUS H. KAMAU.....APPLICANT

VERSUS

KAREN INSURANCE BROKERS LIMITED.....RESPONDENT

(An application for extension of time to file and serve Notice of Appeal out of time in accordance with Rule 4 of the Court of Appeal Rules from the Orders of the

High Court of Kenya at Nairobi (Ang'awa, J) dated 3rd May 2007

in

NAIROBI ELC. CIVIL CASE NO. 60 OF 2007)

RULING

Anastasius H. Kamau, (applicant) urged the court to certify as urgent the Notice of Motion application dated 5th July 2007. The application was placed before a single Judge, (Bosire, JA), who declined to do so, and the applicant then obtained a hearing date for the application from the registry.

In his application under **Rule 4** of the Court of Appeal Rules, he prayed:

- 2. That the Honourable Court do enlarge time to file the annexed Notice of Appeal from the Ruling of Honourable Justice Mary Ang'awa in HCCC ELC. NO. 60 OF 2007.**
- 3. That the annexed Notice of Appeal be deemed as duly filed upon grant of this application.**
- 4. That the costs of this application be in the cause.**

The application was supported by his own affidavit dated 5th July 2007 and upon the following grounds:

- THAT the ruling I wish to apply against was delivered on 3rd May 2007.**
- THAT on the same date we applied for certified copies of the proceedings and ruling to enable us to appeal and our letter was duly filed and served upon the respondent's advocates on 3rd May 2007 but inadvertently failed to file Notice of Appeal.**

3. **THAT** shortly thereafter the applicant applied for review of the said orders on 11th June 2007 and on 12th June 2007 the application for review was dismissed by the court.

4. **THAT** after the review application was heard and dismissed the applicant instructed the current advocates to file an appeal.

The replying affidavit was sworn by Richard Kiruja Murithi, a director of Karen Insurance Brokers Ltd (*respondent*). Subsequently and with the leave of the court, a further affidavit was filed by the applicant's counsel, basically giving the history of the dispute.

Mr. Kabaru, learned counsel for the applicant sought the court's leave to extend the time for filing the Notice of Appeal, under **Rule 4** of the Court of Appeal Rules, as he intended to appeal against orders of injunction granted by Ang'awa, J ex parte on 3.5.2007, to stop the eviction of the respondent/tenant. That the applicant filed an application for review of those orders, but the same was dismissed, and in the meantime on 3.9.2007, he filed a reference in the Tribunal, seeking termination of tenancy for non-payment of rent. The reference was due to be heard on 19th May 2008, otherwise the main suit is still pending for hearing in the superior court. The applicant's counsel submitted that the applicant will be prejudiced if he is not allowed to file a Notice of Appeal out of time. That he applied for proceedings by a letter dated 3.5.2007, which he served on counsel for the respondent.

Miss Chepkwony for the respondent opposed the application for enlargement of time to file a Notice of Appeal out of time because of the delay which has not been explained. She submitted that the ruling of Ang'awa, J was delivered on 3.5.2007, and this application, dated 5.7.2007, was filed on 14th August, 2007. That the applicant should have filed the Notice of Appeal in the superior court within 14 days, but they did not, and instead elected to go for a review of Ang'awa J's order vide an application for review filed on 31.5.2007. This was dismissed, as already stated, on 12.6.2007, and the present application was lodged in this Court's registry on 14th August, 2007.

Miss Chepkwony submitted that the delay of almost 3 months has not been explained by the applicant/landlord who has already filed a reference, in the Tribunal on the issue of notice of termination of tenancy. She submitted further that the applicant has not come to court with "**clean hands**" as he transferred the property whilst the suit was pending in the High Court. That he annexed a copy of the new title deed to her affidavit. It shows an endorsement of transfer and at page 10 of the annexures is a copy of the register whereby the applicant transferred the property to one Metcourt Hostels Ltd on 30.4.2007.

Mr. Kabaru conceded that he did not explain the delay in filing a Notice of Appeal in the superior court from 3.5.2007, to 14.8.2007, but submitted further that the respondent will not be prejudiced, so the Court should allow him to file a Notice of Appeal out of time. He submitted further that in any event, the property had already been transferred when the injunction order was issued, and apparently, the respondent was not aware.

The further affidavit does show that Metcourt Hostels Ltd was joined in the suit which is still pending in the superior court, and all parties consented to have an injunction order issued against Metcourt Hostels as well, to stop both the applicant and Metcourt from evicting the respondent. Initially the injunction order was issued for 90 days, upto 15th November, 2007, but subsequently this was extended pending the finalization of the Reference filed by the applicant at the Business Rent Tribunal, being **Ref. No. 732 of 2007**.

From the material placed before me, it appears that the dispute herein relates to tenancy and non payment of rent by the respondent. A copy of the Reference to the Tribunal is an annexure. It shows that the applicant filed a Reference against the respondent on the grounds that,

"The tenant has persistently failed to pay rent arrears of seven (7) months totaling Kshs.210,000/= and has not honoured other terms and conditions of the lease".

It would appear that the applicant filed the Reference, after an injunction order had been issued against him, restraining him from evicting the respondent and further, after his application for review was dismissed. His affidavit in support of his certificate of urgency to have this application certified urgent said in part:

- 2) **“That I was served with the application for injunction on 26th April 2007 requiring me to attend court on 2nd May 2007”,**
- 3) **“That on 2nd May 2007, I instructed M/s Kabaru & Co. advocates to attend the High Court and represent me”,**
- 4) **“That on the said date my said advocates filed a memorandum of appearance and appeared before the said Justice Ang’awa and applied orally for a short adjournment to enable them to file grounds of opposition and a replying affidavit”.**
- 5) **“That the said Judge refused to adjourn the matter and heard it on the same day without giving me an opportunity to file any reply or be heard”,**
- 6) **“That the ruling gave adverse orders against me, injuncting me from dealing with my property without having given me an opportunity to be heard”.**

There are many authorities in this Court where it has dealt with applications under **Rule 4** of the Court of Appeal Rules, for example, in **PATEL vs WAWERU AND 2 OTHERS [2003] KLR 361 at Pp 362-3**, this court had the following to say in respect of **Rule 4** of the Rules:

“This is a matter in which the learned 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 inordinate delay. How does a single Judge exercise his discretion? In LEO SILA MUTISO vs 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 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 succeed if the application is granted and fourthly the degree of prejudice to the respondent if the application is not granted”.

In this application, the delay is said to be of about 3 months which counsel for the respondent submitted, is **“unexplained”**. Counsel for the applicant concedes to the delay which he does not specifically address. To this extent, I must say that the Rules of the Court must be complied with, as was said in **RATMAN vs CAMARASAMY [1964] 3 ALL ER 933**, by Lord Guest at page 935,

“The Rules of the Court must prima facie, be obeyed and in order to justify the court extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation”.

The foregoing sets out the manner in which this Court is to consider applications brought under **Rule 4** of the Rules.

In this application the applicant failed to file a Notice of Appeal in the superior court within 14 days, and the applicant avers in his affidavit in support of the application as follows:-

“That on the same day the Ruling was delivered, my advocates applied for and served certified copies of the proceedings and ruling, but inadvertently omitted to file and serve a Notice of

Appeal”.

The applicant therefore gives “*inadvertence*”, as the reason for not filing the Notice of Appeal on time, but over and above that, the materials placed before the Court show his vigorous attempts to discharge the injunction order granted against him, when his counsel was refused an adjournment and the application proceeded for hearing in his absence in the superior court. He applied for a review of that order, which application was dismissed, and finally filed a Reference to the Tribunal.

I have considered the history of this matter, and the nature of the dispute between the parties, which has now become even more complicated by the fact that the suit premises, which is the subject of the dispute, was transferred before the injunction order was issued, though the respondent who occupies it, was not aware of this fact. This is what the respondent’s counsel refers to as the applicant not coming to Court with, “*clean hands*”.

Given these circumstances, and the further fact that the respondent’s occupation of the suit premises is “*secured*” by the injunction order issued by Ang’awa, J, in which case the respondent is not likely to suffer any prejudice, I feel inclined to exercise my discretion in favour of the applicant, and grant an order to enlarge the time to file a Notice of Appeal from the Ruling of Ang’awa, J in **HCCC ELC 60 OF 2007**. Though the application referred to the “*annexed*” Notice of Appeal, there was none in the proceedings. I therefore enlarge the time by a period of (7) days from the date hereof. Costs of this application which I assess at Kshs.5,000/= to be paid to the respondent by the applicant within a period of 30 days from today.

Dated and delivered at Nairobi this 20th day of June 2008.

J. ALUOCH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR