



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPLI 166 OF 2008 (KSM 9/08)

SMALL ENTERPRISES FINANCE COMPANY LTD.....APPLICANT

AND

THOMAS ADONGO ONUKO T/A

KISUMU EXPERT TAILORING HOUSE.....RESPONDENT

(Application for extension of time to lodge a notice of appeal out of time for in an intended appeal from a judgment & decree of the High Court of Kenya at Kisumu

in

H.C.C.C. NO. 110 OF 1996)

RULING

Before me is an application by way of Notice of Motion expressed as having been brought pursuant to

“The Court of Appeal Rules including Rule 4, Section 3 of the Appellate Jurisdiction Act and all other enabling provisions of the law”.

In the this application, the applicant **SMALL ENTERPRISES FINANCE COMPANY LTD**, seeks orders that:-

“1. This honourable Court be pleased to extend time limited by the Court of Appeal Rules for lodgment of a Notice of Appeal for an intended appeal from a judgment of the high Court of Kenya at Kisumu (the Hon. Justice B. K. Tanui) given on the 4th day of June, 2004 in Kisumu HC.C.C. NO. 110 OF 1996 and the time be so extended to the 225th June, 2008 and the notice of appeal lodged on that be deemed lodged within the time so extended.

2. This Honourable court be pleased to prescribe the time within which to lodge the memorandum and record of appeal for the intended appeal from the judgment of the High Court of Kenya at Kisumu (the Hon. Mr. Justice B.K. Tanui) given on the 4th day of June, 2004 in Kisumu H.C.C.C. NO. 110 OF 1996.

This application which is supported by the affidavit of *Isaac Edwin Nicholas Okero* the applicant’s

advocate is brought on the following grounds:-

- (i) Civil Appeal No. 301 of 2004 filed by the applicant was struck out after the record was found to be missing an exhibit produced at the trial.**
- (ii) A notice of appeal has been served and filed indicating the applicant's desire to pursue its right of appeal.**
- (iii) This application has been brought promptly and without delay.**
- (iv) The granting of this application shall in the circumstances be in the interests of justice."**

This is the application that came up for hearing before me on 3rd December, 2008 when *Ms. S. Osman* appeared for the applicant while *Mr. J.A. Mwamu* appeared for the respondent.

In her submissions *Ms. Osman* stated that Civil Appeal No. 301 of 2004 was struck out on the ground that some exhibits were missing from the record of appeal. She pointed out that the earlier appeal was struck out on 19th June, 2008 and immediately thereafter this application was filed. In fact, a fresh Notice of Appeal was filed on 25th June, 2008. She further submitted that the respondent would suffer no prejudice since he had been paid Shs.400,000/- being part of the decretal amount. Finally, *Ms. Osman* submitted that the appellant (applicant herein) has been sufficiently punished by the striking out of its earlier appeal.

Mr. Mwamu, on his part opposed the appeal. While he conceded that the applicant promptly filed this application after its earlier appeal had been struck out nonetheless he was of the view that a delay of six days was inordinate. He contended that his client would be seriously prejudiced if this application was granted.

The background to this application appears fairly straightforward. The applicant's earlier appeal (Civil Appeal No. 301 of 2004) was struck out by this Court on 19th June, 2008 on the ground that exhibit 13 which was produced in the High Court had been omitted from the record of appeal. That appeal having been struck out the applicant had to commence the appeal process afresh. It is for that reason that the applicant filed this application. It is to be observed that while the earlier appeal was struck out on 19th June, 2008 this application was filed in this Court on 26th June, 2008 within one week. That is the period that this Court has to consider. In ***MONGIRA & ANOTHER V. MAKORI & ANOTHER (2005) 2 KLR 103 at pp 106-107*** this Court stated:-

"It has been stated time and again that in an application under rule 4 of the Rules, a single judge of this Court is called upon to exercise his discretion which discretion although unfettered must be exercised judicially. On numerous occasions this Court has had time to comment and elaborate on the issue of judicial discretion and the nature of that discretion exercised by a single judge under rule 4 of the Rules. In MWANGI V KENYA AIRWAYS LTD [2003] KLR 486 at p 487 - 488 this Court stated:-

"Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI, (CIVIL APPLICATION NO. NAI. 255 OF 1997) (unreported), the Court expressed itself thus:-

"It is now well 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 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 succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear

from the use of the words “in general”. Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”

Bearing in mind the foregoing and taking into account the facts of this application I am of the view that the applicant came back to court promptly after its earlier appeal was struck out. This application was filed within one week. Hence, I am persuaded that I should exercise my discretion in favour of this applicant. Accordingly this application is allowed and the applicant is to file the notice of appeal within seven days from the date hereof. However since the applicant had already filed a notice of appeal the same shall be deemed as having been lodged within the time so extended. It is further ordered that the applicant is to lodge and serve the record of appeal within 21 days from the date hereof.

The costs of this application shall abide the outcome of the intended appeal.

DATED and DELIVERED at KISUMU this 5th day of December, 2008.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR