REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civ Appli 52 of 2006

REUBEN M. MULI T/A KONZA MERCHANTS……..……APPLICANT

AND

KESHRA VISHRA T/A ALPESH ENTERPRISES…..……RESPONDENT

(Application for leave to file and serve Notice of appeal and record of appeal out of time against the ruling and order of the High Court of Kenya at Mombasa (Lady Commissioner of Assize Mrs. Khaminwa) dated 5th May, 2003

in

H.C.C.C. NO. 232 OF 2001)

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RULING

What is before me is an application made under **Rule 4** of the rules of this Court ("the rules")seeking two prayers which are couched as follows;

"**1 That the applicant be granted leave by this Honourable Court to file and serve his Notice of appeal out of time and the Notice of Appeal filed on 26/5/2003 and served on the same day upon the respondent's advocate be deemed as filed and served if leave is grant(sic).**

2 That the period in which to appeal be extended for a further period of 60 days if leave to appeal out of time is granted."

Although the application is dated 15th December 2005, it was not filed until 30th December 2005. It was scheduled for hearing on 26th July, 2006 in Mombasa but the applicant's counsel sought an adjournment on the ground that he intended to file a supplementary affidavit to introduce the ruling of the superior court which was intended to be challenged but had been left out when the application was filed. The adjournment was granted by Omolo J.A and leave was also granted for filing that affidavit within 14 days of the order. The applicant was penalized in costs. When the matter came before me on 15th January, 2007 however, no supplementary affidavit had been filed and the ruling referred to was not on record. Learned counsel for the applicant, Mr Masika, nonetheless opted to proceed with the application explaining that he had entrusted the filing of the supplementary affidavit to an advocate in Mombasa who

never took any action. He did not find that out until the eve of the hearing date. That would mean that the hearing of the application was unnecessarily delayed for some 6 months or so.

Be that as it may, Mr Masika swears in his affidavit in support of the application that he ordinarily practices as an advocate in Machakos but had conduct of the case which was filed in Mombasa Law Courts. In the suit, the respondent here, who is the plaintiff in the superior court, sought some principal sum of Kshs. 1,148,537 on account of unpaid balance for goods sold and delivered to the applicant here, who is the defendant in that court. The applicant denied the claim but the respondent took out a motion under **Order 35** of the **Civil Procedure Rules** for summary judgment. The application was heard on 28th August, 2002 before Khaminwa, J and the ruling was reserved for delivery on 11th October, 2002. On that date Mr Masika requested another advocate in Mombasa to hold his brief but the ruling was not delivered. Instead, both parties were informed that it would be delivered on notice. Without service of any notice on the applicant or his counsel however, the ruling was delivered on 5th May, 2003 in the presence of the respondent's counsel. It is the respondent's counsel who wrote to M/s Manthi Masika & Co Advocates on 9th May, 2003 informing them about delivery of the ruling and demanding payment of some Kshs. 1.4 million in principal, interest and costs at the pain of execution of the ensuing decree. That letter, Mr Masika swears, was not received until 20th May 2003 in Machakos. On the same day, his firm wrote to the registrar initimating the intention by the applicant to appeal and seeking copies of the proceedings and the ruling. The letter, which was filed in the Mombasa Court registry on 26th May, 2003 was also copied to the respondent's advocates pursuant to **rule 81(2)** of the rules. On the same day the Notice of Appeal, the subject matter of this application, was filed and served. Ordinarily the notice of appeal ought to have been filed on or before 19th May, 2003-14 days from the date of the ruling. It was therefore filed out of time.

The Registrar appears to have taken some time preparing and delivering the copies applied for. In his certificate of delay issued on 8th December, 2005 he certified that the period required for that purpose was between **26th May 2003** and **24th November 2005**. Between those two dates, time did not run against the applicant as he had complied with the proviso to **rule 81.** As this Court has held severally before, the time taken in obtaining a certificate of delay is not excluded under that proviso. – See, for example, **Richard Muchai Macharia** t/a Richard Muchai Auctioneers vs Njoroge Kibatia t/a Kibatia & Co advocates, **Civil Appeal No. 273/04 (UR).** It did not matter therefore that the certificate of delay was issued on 8th December, 2003. Thus, the period between receipt of the copies applied for, i.e 24th November, 2005, and the filing of the application before me, i.e. 30th December, 2005, which is **36 days,** falls for explanation. I do not consider the period between 19th May, 2003, when the notice of appeal ought to have been filed and the 26th May, 2003 when it was actually filed, of any consequence since it was the court itself which failed to comply with an essential requirement of the law that notice be served on the parties or their advocates before a decision in their dispute is given- see **Order 20 rule 1** Civil Procedure Rules. In all probability, the notice of appeal would have been timeously filed if the applicant's advocates were aware of the ruling delivered on 5th May, 2003.

I am aware that I am considering an application under **rule 4** of the Court's rules, a lot about which this Court has said in the past. In **Fahir Mohammed V Joseph Mugambi & 2 Others civil Application NAI 332/04 (ur)** which was a reference to the full Court from my earlier ruling, I summed up the principles as follows:-

"**The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: see Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'ethare & Attorney**

General, Civil Application No. Nai. 8 of 2000 (ur) and Murai vs Wainaina (No 4) [1982] KLR 38".

On authority therefore, there is no limit to the number of factors available for consideration so long as they are relevant nor is there any requirement that all such factors be considered in any particular application. The facts and circumstances of each application will dictate the exercise of the Court's discretion. It cannot of course be gainsaid that the discretion is not exercisable whimsically or capriciously, but upon reason, or as is usually put, judicially. There must therefore be some material on record on which the Court can exercise its discretion. What is the material placed before me to explain the 36 days which I have found above was the period of delay?

The affidavit sworn by Francis Manthi Masika in support of the application says absolutely nothing about that period. It concentrates instead on the period before receipt of the copies of proceedings and the ruling which, for reasons stated above, I found excusable. Indeed, Mr Masika conceded at the hearing of the application that there was nothing in the affidavit covering the period in issue. It follows therefore that there is no basis for making any finding that the delay was excusable. On the contrary, in the absence of any explanation, I find it inordinate. As this Court stated in **First American Bank of Kenya Ltd & Anor vs Grandways Venture Ltd, Civil Application No. NAI 173/99 (UR).**

"**We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the Court that despite their default the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants have not discharged."**

I would say the same about the applicant in this matter.

I was also asked by Mr Masika to consider and find that the applicant has an intended appeal which has overwhelming chances of success despite the omission of the ruling of the superior court from the record. In his view the proceedings on record which contain the submissions of both counsel are sufficient to enable me to form a firm view on the matter.

Whether or not an appeal has any chances of succeeding is of course one of the factors for possible consideration. As was stated by this Court in **African Airline International Ltd v. Eastern Southern Africa Trade & Development Bank (PTA Bank) [2003] KLR 140,**

"**No doubt in some cases it may be material to have regard to the merits of the appeal; because it may be wrong; and indeed an unkindness to the appellant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal"**

The purpose is not for the single Judge to make any peremptory findings on the merits of the intended appeal. That is in the province of the full court. The only material placed before me for consideration of that factor is the draft memorandum of appeal, and averments made in the supporting affidavit on that memorandum, that there were triable issues. On the opposing side, there are averments in the affidavit in reply that the judgment was regular as there were no triable issues. The submissions of both counsel before the superior court do not take the case further in the absence of the ruling of the court which resolved the issues raised in those submissions. I cannot in the circumstances make a finding one way or the other whether the intended appeal is or is not meritorious. And once again, the applicant has himself to blame for it. There was no difficulty in introducing the ruling of the superior court and indeed leave to do so was given at the instance of the applicant's counsel who for six months apparently did nothing about it.

The views expressed above are sufficient to dispose of the application since I am not inclined towards granting the prayers sought. There are however two matters which both counsel took considerable time over in their affidavits and submissions but which I think were irrelevant and inconsequential.

One was the contention by learned counsel for the respondent, Mr Alwenya, that the application before me was for " *leave to appeal,"* in which case there was non-compliance with the provisions of **Rule 43(3)**

(a) of the rules which requires in mandatory tone that a copy of the decision against which leave to appeal is sought shall accompany the application. The rule however is a continuation of the provisions of **rule 39** which provides for applications for leave to appeal. That is not the case here. The orders sought may not be couched in clear language as they talk about "leave" and not "extension". But clearly, the prayers in the application are for "*leave to appeal out of time*", not simply " *leave to appeal*" and they carry the connotation intended in **rule 4** under which the application is expressly made. There is no merit in the objections raised in that regard.

The other is the misconception by both counsel that it was necessary to seek leave to appeal against the decision of the superior court under **section 75** of the **Civil Procedure Act** as read with **Order XLII rule 1(2)** and **3** of the rules thereunder. Mr Masika in his affidavit in support swore:

" **(II) That I was supposed to apply for leave to appeal as it is required by Order X (sic) of the Civil Procedure Rules and by the time I learned of the ruling on 20/5/2003 fourteen days (14) in which to seek for leave in the superior court had expired and I had to make an application for leave to appeal and this application was filed on 15/7/2003 and leave was granted on 19/8/2003 and I do annexe(sic) a copy of the Court ruling marked "FMM IX"**

Fortunately for him, all that unnecessary process, took place when the registrar was till compiling the proceedings and ruling and so, the time taken seeking leave does not feature in the computation of time. At the hearing of this application, Mr Masika appeared to concede that it was a wasted effort because in his view, **Order 42 rule 3** would not require the applicant to seek leave. For his part, Mr Alwenya still persisted in the averments made in his replying affidavit and submitted that it was necessary to seek leave to appeal because the right of appeal in applications made under **Order 35** of the Civil Procedure Rules was only reserved for applications made under **rules 5, 7** and **10** as stated under **rule 42 (1) (v).** In his view, the applicant was granted leave to appeal by the superior court and did nothing about it. He was therefore precluded from seeking the same orders before this Court.

With respect, as stated earlier, both counsel have in my view misconstrued the relevant provisions of the law. The application before the superior court was made under **rule 1(1) (a)** of **Order 35** which provides for entry of final judgment were the requirements of that rule obtain. Such determination as there was in the application thus resulted into a "**decree"** and not an "**order"**. **Section 75** and **order 42** relate only to "**Appeals from orders"**. They are not relevant for consideration in this matter. The relevant provision on appeals from original decrees is **section 66** of the Act. There is no argument that decrees are appealable as of right and, consequently, the applicant's initial action of filing a notice of appeal, albeit late, was procedural. Indeed, the respondent cannot be heard to argue that the determination of the dispute under **order 35** merely resulted into an "**order**". There is material on record, and it is confirmed by both counsel, that the respondent proceeded to execute the ensuing "**decree**" after attempts by the applicant to obtain a stay of execution and other orders for setting aside failed in the superior court. Completion of the execution process, I am told, is only held up by objections made by a third party.

The true nature of a "decree" and "order" has been considered before and I need only refer to this Court's decision in **Ahn v. Openda [1982] KLR 87** where Potter J.A. stated:

"**During the hearing, the question arose as to whether Section 75 (1)(h) of the Act and Order XLII had any application to this appeal. I think it became clear finally that those provisions did not. An order is defined by section 2 of the Act as " the formal expression of any decision of a court which is not a decree……..." The combined effect of rules 1 and 3 of order XLII is that appeals lie as of right under that Order only in the case of decisions under the orders specified which are " "orders" as defined in section 2 of the Act and not "decrees" as so defined."**

Kneller Ag. J.A in the same case was of the same view:

"**The result of the proceedings in the superior court conclusively determined the rights of the appellant, the respondent and her husband to at least some matters in controversy in the suit……..**

So a formal expression of this adjudication is a "decree" under section 2 of the Civil Procedure Act. It was not, therefore, an "order" and Order XLII rules 1 and 3 of the Civil Procedure Rules were irrelevant. This decree of the High court is what the appeal was from so there was an appeal as of right. Section 66 (ibid)."

And so it was in this matter. The summary judgment entered in favour of the respondent under **order 35 rule (1) (1) (a)** of the Civil Procedure Rules determined the rights of the parties conclusively subject only to appeal. Judgment was entered and a decree ensued for execution.

The upshot is that the application dated the 15th December, 2005 and filed in court on 30th December 2005 is for dismissal and it is so ordered. Costs of the application shall be borne by the applicant.

Dated and delivered at Mombasa this 19th day of January, 2007.

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR