



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civ Appli 213 of 2006

MUHORONI SUGAR COMPANY LTD (IN RECEIVERSHIP)..... APPLICANT

AND

KASAMANI & COMPANY ADVOCATES RESPONDENT

(An application for extension of time to serve Notice of Appeal and to validate service thereof in an appeal from the ruling and decree of the High Court of Kenya at Kisumu (Tanui J) dated 8th February, 2006

in

H.C.C.C. NO. 14 OF 2005 (O.S.)

R U L I N G

This is an application under **Rule 4** of the Court of Appeal Rules for orders that:

- 1. Time for service of the Notice of Appeal lodged on 22nd February, 2006 by the applicant from the ruling and orders of the superior court given on 8th February, 2006 be extended.***
- 2. The applicant's Notice of Appeal served on 3rd March, 2006 be deemed to have been properly served.***

The application is supported by the affidavit of Tobias Ouma Okumu, a clerk working with M/s. Otieno, Ragot & Company Advocates and the affidavit of David Otieno, Advocate for the applicant.

The applicant was placed in receivership by Kenya Sugar Board, the debenture holder in the year 2001.

On 15th April, 2005 the respondent filed an originating summons under **Section 45 (1) (b)** of the Advocates Act and **Order LII Rules 3 and 10** of the *Civil Procedure Rules* for orders that:

- 1. THAT the Defendant's Receivership does not absolve it from paying its debts.***
- 2. THAT a declaration that the Defendant is indebted to the Plaintiff in the sum of Kshs.2,234,972/= as at 20th December, 2000.***

3. THAT an order that the Defendant do pay to the Plaintiff the admitted sum of Kshs.2,160,892.45 in legal charges, in default execution to issue”.

The originating summons was heard inter partes but in the absence of the debenture holder and allowed by the superior court (Tanui J) on 8th February, 2006. On 22nd February, 2006, the applicant filed a Notice of Appeal and proceeded to file *Civil appeal No. 17 of 2006* on 24th April, 2006.

On the same date, i.e. 24th April, 2006, the applicant filed *Civil Application No. Nai. 118 of 2006* seeking the same orders as sought in the present application. When that application came for hearing on 20th June, 2006, Mr. Otieno, advocate, currently the counsel on record for the applicant, sought an adjournment to enable him to move to the superior court to seek leave to appeal against the decision of Tanui J. dated 8th February, 2006. The application for adjournment was however rejected by a single Judge of this Court. The applicant's advocates thereupon withdrew the application for the extension of time.

Meanwhile, on 10th May, 2006, the respondent filed *Civil Application No. NAI. 16 of 2006* for an order that the appeal be struck out as it is incompetent for two reasons, firstly, that it was filed out of time and, secondly, that leave to appeal against the decree was not obtained.

The present application was filed on 28th July, 2006.

The applicant's advocates stated from the bar that the superior court granted an order of stay of execution of the decree pending appeal on condition that the decretal amount be deposited in a bank account and that the money has been duly deposited in an interest bearing account in the joint names of the advocates for the parties.

According to Tobias Ouma Okumu, after lodging the Notice of Appeal at High Court Registry at Kisumu on 22nd February, 2006 for stamping and fees assessment, the registry did not release the Notice of Appeal until 3rd March, 2006. He states that he received and served the Notice of Appeal on the same day.

Mr. David Otieno has explained the delay in filing the present application in his long supporting affidavit. He states, among other things, that, the respondent sent the decree to Receiver/Managers of the applicant on 21st February, 2006; that the respondent thereafter called one Kipngetch K. Bett, a Receiver Manager, and informed him that the respondent wanted the matter to be settled amicably, that the Receiver Manager, thereafter gave Mr. David Otieno instructions to engage in negotiations with the respondent; that the negotiations proceeded culminating in a meeting of 23rd March, 2006; that the negotiations ultimately broke down on about 27th March, 2006. He explains further that the application for extension of time was not filed immediately in order to give the negotiations a chance and that when the negotiations failed, he was instructed to file both the application for extension of time and the appeal itself.

Mr. Otieno, states in the affidavit that after he was served with the replying affidavit stating that leave of the superior court to appeal was required and after he was served with the application to strike out the appeal, he was of the view that leave to appeal was necessary and this led to the withdrawal of the application for extension of time on 20th June, 2006.

Lastly, Mr. David Otieno stated that it is after he discovered the case of *MULI VS. KITUKU* [2004], EA 178 on 21st July, that he came to know that no decree requires leave to appeal and subsequently, filed the present applicant.

The respondent opposes the application and has filed a replying affidavit.

The factors which guide the court in exercising its unfettered discretion to extend time under **Rule 4** of

the Court of Appeal Rules are well known.

In this case, the applicant has already filed the appeal. The respondent has also filed an application to strike out the appeal. In the circumstances, I refrain from the consideration of the prima facie merits or otherwise of the pending appeal or the pending application.

The applicant is only seeking extension of time for the service of the Notice of Appeal on the ground that the Notice of Appeal was served two (2) days out of time. The applicant is merely asking the court to validate the service of the notice of Appeal. So far, there is no application to strike out the Notice of appeal and the pending application to strike out the appeal is not based on the late service of the notice of appeal. The delay of two days has been reasonably explained and I am satisfied that the delay is excusable.

The first application for the extension of time of service of the Notice of appeal was filed on 24th April, 2004. The delay from 3rd March, 2006 to 24th April, 2006 has been explained. Negotiations were actively being pursued and no action was taken in order to give negotiations a chance. That is a reasonable explanation.

The period from 24th April, 2006 when the first application was filed and 20th June, 2006 when the application was withdrawn has to be discounted. That is the time taken to complete the legal process.

There was a lull of one month from 20th June, 2006 to 21st July, 2006 when the applicant's counsel discovered the case of *Muli vs. Kituku* (supra). The present application was filed a week later.

The delay of one month from 20th June to 21st July, 2006 is not inordinate. It is during that time when the applicants entertained uncertainty about the state of the law and the competence of the appeal already filed. After the applicant's counsel was certain about the state of the law he filed the present application promptly.

In all the circumstances of this case, the delay is not inordinate and is excusable.

The respondent will not suffer undue prejudice if the service of the Notice of Appeal is validated. The requirement that the Notice of Appeal should be served within 7 days of the filing is intended to promptly inform the other party of the imminent appeal. The respondent came to know of the imminent appeal on 3rd March, 2006 when the Notice of Appeal was served. The respondent has been aware of the existence of the appeal since early May, 2006.

Moreover, the validation of the service of the Notice of Appeal will not prejudice the pending application for the striking out of the appeal as the late service is not a ground of that application.

This is the kind of cases, where costs would be adequate compensation to the respondent.

In the result, I allow the application and grant the orders in the application. I give the costs of this application to the respondent.

Dated and delivered at Kisumu this 9th day of February, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR