REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 268 of 2003

1. PETER G.N. NG'ANG'A

2. KEZIAH W. NG'ANG'A……..
APPLICANTS

AND

HALL EQUATORIAL LIMITED ……..
RESPONDENT

(Application for extension of time to file and serve record of appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Rimita, J) dated 19th March, 2003

in

H.C.C.C No. 5480 of 1991)

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R U L I N G

The applicants in this application, **Peter G.N. Ng'ang'a** and **Kezia Wanjiku Ng'ang'a**, filed an application dated 23rd October, 2002 in the High Court Civil Suit No. 5400 of 1991 against **Hall Equatorial Ltd**. That application sought several reliefs including prayers that execution of warrants of arrest issued on 31st January 2001 against Peter G. N. Ng'ang'a be set aside, that notice to show course issued by the Deputy Registrar and by the superior court consequential thereof be set aside, varied or reviewed on terms just; that Ksh.300,000/= paid to the decree holder be restituted to the applicants and that the costs of that application and all the process pursuant to the notice to show course issued on 12th May 2004 be born by the judgment creditor. That application was heard by the superior court (Rimita J (as he then was)) and was in a ruling dated and delivered on 19th March 2003 dismissed. The applicants felt aggrieved by that ruling and intend to appeal against it. They filed notice of appeal on 28th March 2003 and applied for copies of proceedings and decision vide their advocates' letter dated 27th March 2003 which was received at the High Court Registry on 28th March 2003. That in effect meant that the record of appeal should have been lodged latest by 27th May 2003. It was not and hence the application before me dated 29th September 2003 which was filed on 3rd October 2003 seeking for orders as follows:

"**1. The time for lodging and serving the record of appeal against the superior court's decision dated 19th March 2003 be extended.**

2. The Honourable Court be pleased to make such further or other orders as the justice of the matter may require.

3. Costs of and incidental to this application abide the result of the intended appeal."

The application is supported by an affidavit annexed to it sworn by the learned counsel for the applicants, Mr. Fredrick N. Wamalwa, and two other affidavits namely a supplementary affidavit sworn on 27th September 2004 and filed on the same date and a further affidavit sworn on 1st October 2004. Both affidavits were also sworn by the same learned counsel, Fredrick N. Wamalwa. The respondent opposed the application and filed an affidavit sworn by Mr. K.A. Fraser, advocate for the respondent on 3rd November 2003.

This application is brought pursuant to **rule 4** of the Court of Appeal Rules (**the Rules**). In deciding an application under that rule, the court exercises discretionary jurisdiction. That discretion, like all other judicial discretions, must be exercised judiciously and upon reason or reasons. The principles guiding the same exercise of discretion are now well settled. In the case of **Major Joseph Mweteri Igweta vs. Muhura M'Ethare & Attorney General – Civil Application No. Nai. 8 of 2000 (unreported)** this Court stated, *inter alia*, 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."**

I may add here that the list of the matters to be considered by the court as a guide in the exercise of its discretion when considering an application under **rule 4** of the Court's Rules are not limited to the above. To do so would deprive the court of its discretion as the court in considering the application may find other factors not mentioned above but of equal importance. The list therefore is not exhausted but I would say it is limited to factors that are reasonable in the circumstances of the particular case. I therefore agree with Waki J.A, in his comments in the case of **Kagai Kimomori Watakia vs. Ngatie Kareko – Civil Application No. Nai. 77 of 2005** where he stated:

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

Again, as to the length of the delay, the court is not limited to a particular period i.e. there is no limit as to what period would constitute an inordinate delay and that aspect must abide the circumstances of the case. In my view, however, when considering the delay period, the element of the time taken in preparing the application under consideration must be treated in favour of the applicants and cannot be treated as delay period, but again that period must be reasonable in the circumstances of the volume of work involved in assembling the documents and compiling the record for the application. All will really depend on the circumstances of the particular case before the court.

It is with the above in mind that I now proceed to consider this application before me.

The ruling the applicants intend to appeal against, was delivered on 19th March 2003. The applicants

wrote to the deputy registrar seeking certified copies of the proceedings and ruling on 27th March 2003 and filed a notice of appeal on 28th March 2003. Meanwhile, the respondent's advocates extracted the order of the court and in a letter dated 26th March 2003 forwarded the same order to the advocates for the applicants. Although in their affidavit in support of the application, the applicants do not clearly spell out this fact, in their further affidavit they admit the same except that the applicants' counsel on receipt of the draft suspected ill motive on the side of the respondent and so instead of making any suggestions to it and returning it as should have happened, the applicants' advocates after allegedly correcting it, typed it out and sent it to the respondent's advocates as if it was a fresh extract. This was done vide their letter of 14th April 2003. There is no explanation as to why that apparently short exercise of merely correcting the draft extract of the ruling should have taken over fifteen days to accomplish. Be that as it may, the respondent's advocates were not amused. On 17th April 2003 they wrote to the applicants' advocates asking them to return the draft order amended or not amended. The applicants' advocates did not return the order and a reminder was sent to them on 25th April 2003. On 29th April, 2003, the applicants' advocates returned the draft order to the respondent's advocates. There was no agreement on the way the order was extracted and after haggling over that issue for sometime, both parties sought the help of the court in settling the terms of the order. The court obliged and on 25th June 2003, the draft order was placed before Rimita J. for settling the terms. The terms of the order were settled on that day, 25th June 2003. The learned counsel for the applicants states in his further affidavit as follows concerning what happened after the court approved the terms of the order:

"**10. That following disagreement the order was approved by Mr. Justice Rimita on 25th June 2003.**

11. That honestly I required respondent's advocates' approval my firm requested the respondents' advocates who declined to approved (sic) the draft order approved by Mr. Justice Rimita on 25th June 2004.

Shown to me annexed hereto are copies of relevant documents marked FNW 1."

Before me Mr. Wamalwa in his submission clarified the remarks at paragraph 11 reproduced hereinabove by saying that what he meant was that he honestly believed that even after Rimita, J had approved the draft order it was still necessary for the respondent's advocates to approve it yet again and so he sent the draft order as approved by the Judge to the respondent's advocates. I may say that he added before me that he had realised that that was a misapprehension of the legal position and he apologized for the same. However, the respondent's advocates in their affidavit in reply denied the allegation that the applicants' advocates had sent to them draft order as approved by Rimita J. for further approval. Their stand in their affidavit is as follows:

"**11. The terms of the order were settled by Justice Rimita on 25th June 2003.**

12. It is my understanding of the procedure that it was then for the applicant's advocate to return the order to the court for signature and that there was no need for any further approval.

13. My firm has not received any order for approval after 25th June 2003.

In short, the applicants are alleging in explanation of the delay that after 25th June 2003 when Rimita J. approved the draft, they inadvertently returned it to the respondent's counsel and hence further delay. The respondent on the other hand denies that the draft was ever returned to them for further approval after Rimita J. approved it on 25th June 2003 and so its stand, if I understand its counsel, is that there was no reason for the delay after Rimita J. approved the draft, as thereafter all that the appellants' counsel needed to do quickly was to prepare draft as approved and forward it to the deputy registrar of the superior court for signature as the Judge had approved it. I need to consider who is telling the truth on this aspect for if it is true that the applicant sent the approved draft back to the respondent's advocates again then even though it may have been done in ignorance of the law by their counsel, they would not be punished for the same and that delay is to be treated as explained but if that allegation is not true, then no explanation

existed for that delay for in my view, the explanation required for any delay must be a genuine explanation even if based on ignorance of the law. The learned counsel for the respondent, in disputing that allegation referred me to the annextures to further affidavit of the applicants and particularly to annextures alluded to at paragraph 11, I have reproduced hereinabove and contended that those documents annexed to confirm that the applicants' counsel returned the order already approved by Rimita J. to the respondent's counsel do not prove the same. I have, on my own, perused them. They are first, a letter dated 27th March 2003 to the deputy registrar seeking copies of proceedings; second, a letter dated 5th May 2003 to the deputy registrar enclosing copies of the order to the deputy registrar seeking that the draft order be placed before the Judge for settling the terms. The third annexture is a letter dated 30th May 2003 from the advocates for the respondent also seeking that the draft order be placed before the Judge for settling its terms. The next document is the draft order. Then there is a letter dated 11th July 2003 addressed to the deputy registrar seeking certified copies of proceedings and decision. There is another letter dated 26th May 2003 also from the applicants' advocates again seeking that the matter be placed before Rimita J. for settling the terms of his ruling. The other annextures are a letter dated 29th April 2003, another copy of the order, a letter dated 25th April 2003 to the applicants' advocates by the respondent's advocates. The next letter is dated 4th September 2003 and it is from the respondent's advocates to the applicants' advocates. Its contents are important. It states:

"**We refer to your letter to the Deputy Registrar of the 2nd September, 2003. Please clarify what order you are referring to and when it was submitted to us for approval."**

There was apparently no reply to that letter. The other documents are a draft order, a letter dated 14th April 2003 and another letter dated 17th April 2003. None of the annextures demonstrate what the applicants' counsel swore in his further affidavit that he sent the draft approved by Rimita J. to the respondent's advocates again for approval. At the bar, when Mr. Wamalwa was asked by me to clarify this aspect as all his enclosures were accompanied by a letter, and there was nothing to show that he sent the approved draft to the respondent's advocates, he admitted that there was no letter showing he had done so. He further stated that he could not have sent it without an accompanying letter. He felt that perhaps copies of such letters were not annexed to his further affidavit or to any of his affidavits.

I have considered that part of the delay i.e. delay after Justice Rimita approved the draft and I have no hesitation whatsoever in finding that after Justice Rimita approved the draft on 25th June 2003, the appellant and their counsel did nothing on the same till 8th August 2003 when an order was filed in court. That order bears the court stamp 08 Aug 2003. The story given in the further affidavit that the approved draft was again forwarded to the respondent's counsel cannot, in my view, be true and it is a story calculated to buy more time for the applicants in an attempted explanation of the delay between 25th June 2003 and 8th August 2003, a period of over 1½ months. Once sent to court on 8th August 2003, that order apparently delayed in court and some other amendments were allegedly made to it which were not appropriate. The applicant approached the court and these improper amendments were removed. Eventually, the order was approved and at paragraph 7 of his supporting affidavit, the learned counsel for the applicants states:

"**7. That a copy of the certified copy of the superior court order was ultimately certified on 3rd September 2003, and collected by my firm from the superior court's Registry soon thereafter."**

And in the same affidavit in support of the notice of motion, the learned counsel stated at paragraph 3 as follows:

"**That copies of proceedings and of the said decision were received by the applicant's counsel within 60 days prescribed for appeal therefrom."**

The position as on 3rd September 2003 was therefore that the applicants' advocate had the required copies of the proceedings and the certified order. He had filed notice of appeal on 28th March 2003 within the

fourteen days provided under the Rules. He needed to file the record as I have stated above by 27th May 2003. He could not do so rightly because he had not obtained certified copy of the order extracted from the ruling of 19th March 2003. He himself did not move to extract the order quickly but he was lucky the respondent's counsel did that work for him. He suspected the respondent's motive and that ended in disagreement over the proper order. That disagreement was resolved on 25th June 2003 when Rimita J. approved the draft order. Although there were delays, some of which I have mentioned hereinabove, I would be prepared to ignore them as they were, to an extent, minor. I would agree that the delay upto 25th June 2003 was understandable as the parties were still engaged in the unnecessary but usual misunderstandings resulting from mistrust that often occurs between "*learned friends*". However, what about the delay after 25th June 2003? I have stated that I do not accept explanation for the delay between 25th June 2003 to 8th August 2003 as that explanation is not genuine. I have stated why, to me it is not a genuine explanation. I do accept the explanation of the delay between 8th August 2003 and 3rd September 2003 when the order was awaiting certification by the court. However, thereafter between 3rd September 2003 and 3rd October 2003 when this application was filed, is there any explanation for that delay of about one month? Ms Kirimi in her submission before me in opposing the application raises this delay. I have perused all the three affidavits filed by the applicants. None of them states what happened between 3rd September 2003 when the order was certified and 3rd October 2003 when this application was filed. I have gone out of my way and considered the record before me. I cannot say it would have taken even a week to prepare. As I have stated, as on 3rd September or immediately thereafter the applicants' counsel had the copies of proceedings and the decision which had been supplied (according to him) before 27th May 2003 or within 60 days required for appeal purposes. He had the certified order and had filed a notice of appeal. What then caused the delay? I have no explanation for that delay. I had no genuine explanation for the delay between 25th June 2003 and 8th August 2003.

I have also considered whether the intended appeal would *prima facie* not be a frivolous one. I find it difficult to come to any informed conclusion on that aspect as the applicants, though had proceedings and the decision long before filing this application never considered it fit to file any draft memorandum of appeal. Further they did not file copies of the actual application that was before the superior court and which was dismissed giving rise to the intended appeal. As if that is not enough, the applicants have not made any attempts to indicate in their affidavits what nature of the grievances they entertain against the ruling of the court. In short, that aspect of whether the appeal to be preferred or the intended appeal is not frivolous cannot be decided in favour of the applicants. This is their application and they have the burden of demonstrating to the court that the intended appeal would not be frivolous. They have not done so.

Would the respondent be prejudiced? The matter that was before the superior court, going by the ruling of that court, apparently concerned application to stop execution in respect of a decision which had been delivered sometime before 23rd October 2002 (for that is the date of their application). It means therefore that this matter is dealing with a situation whereby a party which had obtained judgment way back before 23rd October 2002 is being asked to wait for the proceeds of the same judgment. The respondent in his counsel's affidavit at paragraph 18 states that there was an application that was filed for stay of execution which was fixed for hearing on 9th December 2003. I was told from the bar by the respondent's learned counsel that that application was dismissed. Again that would mean that the respondent is being kept out of the fruits of its successes. Obviously, the applicants have their constitutional right of appeal, but it would appear to me that the question of prejudice as far as the facts of this application are concerned favour the respondent.

I have considered the other aspects that would make me exercise my discretion in favour of the applicants. Unfortunately, I cannot see any favourable aspect other than that they filed notice of appeal in time. I cannot exercise my discretion in a vacuum as no genuine explanation was given for the delay between 25th June 2003 and 8th August 2003 and no explanation at all for the delay between 3rd September 2003 and 3rd October 2003. Further, no attempt was made to persuade me that the intended appeal is not frivolous and I do, on my part, feel that the respondent would, to an extent, be prejudiced under the circumstances of this application.

In the result, the application fails. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 7th day of February, 2007.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR