



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

Civ Appli 250 of 2005

QUASAR LIMITED APPLICANT

AND

KOBIL PETROLEUM LIMITED RESPONDENT

(Application for leave to serve notice of appeal and record of appeal out of time from the ruling and order of the High Court of Kenya at Milimani, Nairobi (Kasango J.) dated 27th April, 2005

in

H.C.C.C. NO. 412 OF 2003)

RULING OF THE COURT

This is a Reference to full Court under **Rule 54 (1)** of the Court of Appeal Rules (Rules) from the decision of a single Judge of this Court (Waki JA) dated 20th December, 2005 allowing the respondent’s application for extension of time for serving a Notice of Appeal.

The applicant, **Quasar Limited** intends to appeal against the ruling and order of Kasango J in Nairobi *Milimani Commercial Court H.C.C.C. No. 412 of 2003 **Kobil Petroleum Limited vs. Quasar Limited*** dated 27th April, 2005 consolidating that suit with *Kisii H.C.C.C. No. 99 of 2003 **Quasar Limited vs. Kobil Petroleum Limited*** and transferring the Kisii suit to High Court, Nairobi.

The application for extension of time was supported by the affidavit of David Otieno, learned counsel for the applicant who deposed, inter alia, that he practices in Kisumu; and that on 9th May, 2005 he prepared the Notice of Appeal and a letter to the Deputy Registrar requesting for the proceedings and forwarded them to M/s. Kimanga & Company Advocates of Nairobi with instructions to file them and effect service of the Notice of Appeal on M/s. Esmail & Esmail, Advocates and that on 13th July, 2005 he received a letter from M/s. Kimanga & Company, Advocates informing him that his clerk had filed the documents but had inadvertently not served the respondents advocates in time as instructed. He annexed a letter dated 11th July, 2005 from M/s. Kimanga & Company Advocates addressed to him which states in the relevant part:

“Kindly note that on receipt of the documents, I dispatched, my clerk with instructions to file the same and effect service on M/s. Esmail & Esmail Advocates. Thereafter I traveled up country to attend to

some domestic matters and I returned on 13th June, 2005. I have enquired from my clerk about the said documents so that I forward the same with my bill as agreed but on receiving the said documents I have realized that the same had not been served on the respondents advocates as you had instructed ...”.

At the hearing of the application before the single Judge Mr. Otieno, submitted that the mistake was that of their agent and that the delay was not inordinate. Mr. Esmail, learned counsel for the respondent, on the other hand, contended, inter alia, that as there was no affidavit from the advocate who was told by the clerk about the omission; the evidence was double hearsay and unacceptable; that there was an unexplained delay of 4 weeks from 13th June, 2005 to 11th July, 2005, when M/s. Kimanga & Company Advocates wrote to the applicant’s advocates, and a further delay of 51 days from 13th July, 2005 when the applicant’s advocates received the letter from M/s. Kimanga & Company Advocates and 2nd September, 2005 when they filed the application.

The single Judge considered the application and allowed it with costs to the applicant herein.

The case of **SAMKEN LIMITED VS. MERCEDES SANCHEZ RAU TUSSEL & ANOTHER**, Civil Application No. Nai. 21 of 1999 (unreported) lays down the principles applicable when a full court is dealing with a Reference from a single Judge in exercise of his discretion to extend time. The single Judge exercises the power to extend time on behalf of the full court and the reference not being an appeal the full court will be very slow to interfere with the exercise of such discretion. The full court will only interfere with the exercise of discretion if the single Judge has not exercised the discretion judicially.

Mr. Esmail submitted before us that there was no material other than hearsay evidence, to explain the delay of about 4 months up to 13th July, 2005 nor any evidence to explain the delay of 51 days from 13th July, 2005 to 2nd September, 2005 when the application for an extension of time was filed.

It is clear from the ruling of the learned single Judge that he fully appreciated the principles upon which the court exercises its discretion under rule 4 of the Rules to extend time, particularly that (and in his own words) “*where there is a long delay and total inaction even by a counsel coupled with lack of some explanation, there would be no basis for granting any indulgence*”.

The learned single Judge did not agree with Mr. Esmail that there was no material to explain the delay before 13th July, 2005. He considered the supporting affidavit of Mr. David Otieno and the annexures thereto, including Mr. David Otieno’s letter dated 9th May, 2005 to M/s. Kimanga & Company Advocates and the reply thereto by M/s. Kimanga & Company Advocates by the letter dated 11th July, 2005 as sufficient material and stated in part:

“It would have been prudent to obtain affidavits from Nairobi lawyers to put the argument beyond doubt that their clerk overlooked the service of the notice of appeal. But there is no suggestion that the letter from those lawyers, which is exhibited with the affidavit of counsel for the applicant, is not genuine ...”.

The learned single Judge also considered the delay of 51 days thus:

“There is a period of 51 days between the time the letter was written on 13.07.05 and 02.09.05 when the application was filed. Mr. Otieno explains that was the time taken to draw up, prepare and file this application. For Mr. Esmail it was a period of deliberate and total inaction ...”.

The application comprises of 274 pages. The learned single Judge considered Mr. Esmail’s submissions and concluded that Mr. Esmail’s perception was a harsh assessment of the applicant’s conduct.

The single Judge considered the overall delay in conjunction with the fact that the Deputy Registrar had not supplied the applicant with copies of proceedings to facilitate the filing of the appeal before the

application was filed and held:

“All in all, I am not persuaded that there was deliberate or total inaction by the applicants advocates in this matter or that the period of delay is inordinate”.

On analysis, we are satisfied that the learned single Judge not only properly directed himself but also took into consideration all the relevant matters in exercising his discretion.

It seems to us that the respondent is indirectly asking us to reconsider the material which was before the learned Judge and come to a different finding. We have no power to do that. The reference not being an appeal we cannot substitute our own decision for that of the learned single Judge.

In the result, the reference has no merit. It is dismissed with costs to the applicant.

Dated and delivered at Nairobi this 9th day of March, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR