REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

Civil APPEAL 340 of 2004

RAMESH SHAH ………………………………….. APPLICANT

AND

KENBOX INDUSTRIES LIMITED ………….. RESPONDENT

(An application for leave to file and serve a notice of appeal and record of appeal out of time in an intended appeal from the judgment of the High Court of Kenya

Nairobi (Ransley, J.) dated 10th June, 2003

in

NAIROBI H.C.C.C. NO. 1107 OF 1990)

****

RULING OF THE COURT

The respondents herein *M/S. Kenbox Industries Ltd* (Kenbox) were aggrieved by the decision by a single Judge of this honourable Court made on 12th September, 2005 allowing the applicant, *Ramesh Shah* (Shah) to file a notice of appeal and record of appeal long after the period allowed for such documents to be filed had expired. They now come before us on a reference under *rule 54(1)(b)* of the rules of this Court ("the rules") pleading that we "vary, discharge or reverse" that decision. The reference is, of course, not an appeal and we may only interfere with the exercise of the wide discretion bestowed on a single judge under *rule 4* of the rules on the basis of sound principles. These in substance are that the single Judge took into account an irrelevant factor which he ought not to have taken into account or that he failed to take into account a relevant factor which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to the issues at hand; or that the decision on the available evidence and law is plainly wrong. The onus of demonstrating the breach of any or all such principles is on Kenbox.

The dispute between the parties has been raging for the last 18 years. The genesis of it was some agreement made between them in March 1989 wherein Shah agreed to supply, and Kenbox agreed to purchase, a large number of jukeboxes and flipchart machines and spareparts for both items on specified terms. Shortly thereafter Kenbox alleged breach of the contract and filed HCC 1107/90, claiming amongst other things a sum of money in excess of Shs.27 million in special damages. Shah denied the breach and made his own counterclaim in excess of Shs.45 million. After several skirmishes over the

years, the suit was finally set down for hearing on 26th May, 2003 but neither Shah nor his advocates showed up. Ransley J. before whom the suit was listed proceeded to hear evidence from Kenbox and gave judgment in their favour for the special damages they had pleaded in excess of Shs.27 million. Shah's counterclaim was dismissed. That was on 10th June, 2003.

Shah says he learned about that judgment on 5th July, 2003 and thereafter instructed his advocates to file a notice of appeal against the judgment. No notice of appeal was filed however, but instead, an application to set aside the *exparte* judgment was filed on 16th July, 2003. The application was heard on merits and in a reasoned ruling delivered on 27th March, 2004, Ransley J dismissed it. There was no challenge to the ruling.

About nine months after the dismissal of the application, Shah filed a notice of appeal, not against the ruling of 27th March, 2004, but against the judgment of 10th June, 2003. A letter bespeaking copies of the proceedings was not written until 29th August, 2004 and the application for extension of time to file the notice of appeal and record of appeal was not filed until 20th December, 2004.

The learned single Judge, in line with authority, examined the period of delay and the reasons for it and found it unacceptable. He stated: -

"**The length of the delay between the delivery of the 2003 Ransley ruling (sic) and filing of the Notice of Appeal on 10th December, 2004 and the current application on 16th (sic) December, 2004 is approximately 18 months.**

In my view, exercising my discretion, judiciously upon such evidence as is properly before me, the reasons given for this very lengthy delay are totally inadequate."

He further went ahead to consider whether the intended appeal was "*frivolous or in other words lacking in a reasonable probability of success*". The only material placed before him were the grounds pleaded on the face of the application before him about which he found: -

"**This ill expressed and ungrammatical pleading, supported by what little I have ruled above to be admissible in the Shah Affidavit and the Nyaberi Affidavit, is, in my view, insufficient to satisfy me that there is an arguable appeal against the ruling of Ransley J. delivered on 10th June, 2003."**

The learned single Judge however seems to have been subsequently persuaded by submissions of counsel for Shah which he analysed at some length before concluding as follows: -

"**It is not for me to decide or say what the result will be if the matter goes on appeal: my task is merely to consider whether an appeal is arguable. Given that the reasoning of the superior court in coming to its decision does seem to me to be faulted I have come to the conclusion that the intended appeal is arguable.**

I have taken into consideration whether there is any special prejudice to one side or the other which cannot be compensated in orders for costs and am of the view that there are not.

I have weighed up all the above factors and have in the exercise of my discretion come to the conclusion that the application should be allowed despite the unsatisfactory reasons for the lengthy delay."

Time was then extended for seven and fourteen days to file the notice of appeal and the record of appeal, respectively

Mr. Sarvia, learned counsel who addressed us on behalf of Kenbox, was in no doubt that the learned single Judge had made an error of law and principle in granting leave after making a categorical finding

that the reasons given for the lengthy period of 18 months were totally inadequate. In his view it was not open to the learned Judge, after making such a finding, to grant extension for the sole reason that the appeal was arguable. For that proposition, he cited various authorities including **Waweru & Another v Kirori [2003] KLR 448**, **Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 others [2003] KLR 733**, **Wasike v Swala [1984] KLR 591**, **Standard Ltd v Gekonga & others [2005] I EA 376** and **Mutiso v Mwangi [1999] 2 EA 231**. Mr. Sarvia further submitted that the learned Judge erred in principle in finding that the intended appeal was unarguable and in the same breath finding that it was arguable on the basis of submissions of counsel. Such finding, in his view, was on matters which ought not to have been considered. The finding that there was no prejudice to any of the parties was also not borne out by the facts, he submitted. The fact that the case had taken 18 years to conclude and the numerous delays occasioned in the course of hearing were weighty enough to occasion irreparable prejudice to Kenbox.

For his part, Mr. Wagara, learned counsel for Shah, submitted that there was no reason to interfere with the ruling of the learned single Judge who exercised unfettered discretion under ***rule 4***. The Judge considered the reasons for the delay and found them unsatisfactory but that, in Mr. Wagara's submission, did not amount to no reasons at all, which would have militated against Shah's application. In addition, the learned Judge found the intended appeal was arguable and that alone, in his view, could form the basis of the Judge's discretion, not to mention lack of prejudice. In support of this argument, Mr. Wagara cited various cases but notably **Murai v Wainaina (No4) [1982] KLR 38, Githere v Kamungu [1984] KLR 387**, **Michuki & Another v Kentazuga Hardware Ltd; C.A NAI. 16/98 (ur)**.

We have anxiously considered the reference made before us particularly in view of the caution we must always administer that the single Judge in exercising his discretion under ***rule 4*** does so on behalf of the full court and therefore his decision ought not to be easily dislodged. As stated earlier, the full court may only interfere when the applicant demonstrably shows that the principles stated above were not observed. We have also considered the submissions of both counsel and the authorities cited before us, although we need not analyse them here. It is clear to us, and both counsel readily appreciated as much, that the only ground upon which the application under ***rule 4*** was granted was because the intended appeal was arguable. The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under ***rule 4***. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay.

The factor that the chances of the intended appeal succeeding was for possible consideration in an application under ***rule 4*** was recognized by the full court in **Mutiso v Mwangi** (supra). Indeed the list of factors open for consideration is not exhaustive so long as they are relevant. Further explanation was however made in subsequent cases, notably **Mwangi v Kenya Airways Ltd [2003] KLR 486**, where the court stated:

"**It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a "*possible*" consideration, not that it must be considered. This is understandable because the "*the chances of an appeal succeeding*" is normally dealt with by this Court under the rubric of "*an arguable appeal*" or "*an appeal which is not frivolous*" and the full court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of *Bhaichan Ghagwanji Shah v D Jamnadas & Co. Ltd [1959] EA 838* where Sir Owen Corrie, Ag. JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:**

"**……. It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons**

for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application."

The court then observed that the Shah case (ante) was decided under ***rule 9*** of the former rules which required that "*sufficient cause*" be shown before extension of time could be obtained. It then concluded: -

"**It must not be forgotten that even the recent case of Mutiso did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration."**

The authorities cited before us are consistent that the delay in taking the necessary steps to mount an appeal should not be inordinate and that there should be reasons given for any delay. The period and the reasons given therefor were indeed the two factors first considered by the learned single Judge and were found wanting. In effect they could not form the basis of exercise of his discretion in favour of the applicant. On a reference, the full court would have no basis to interfere with such finding. We think the two factors must take primacy of consideration if the time table laid in the rules for conduct of court business will have any meaning. As stated earlier, it would be a rare case where the arguability of the intended appeal would outweigh all other considerations, and it would at best, in our judgment, be considered in borderline cases. One rare case which was cited before us was **Wasike v Swal**a (supra) where the court stated:

"**A recent decision of this full court in a reference from a single judge also made it clear that it would, in the circumstances of that case, reverse the decision of the single judge of this court because the intended appeal related to land and because, although the applicant could not technically explain satisfactorily the delay or take advantage of the proviso to rule 81(1), nevertheless the respondent had sufficient notice that the applicant was resolutely intending to prosecute his appeal. *John Kuria v Kelen Wahito*, Nairobi Civil application Nai 19 of 1983 April 10, 1984. Here again, the subject matter is land and Mucha Swala or his advocate have known all along that Cleophas Wasike is determined to institute his appeal."**

Those circumstances do not obtain in the case before us.

Whether therefore we should call it an error of principle or a misapprehension of a point of law or a plainly wrong approach, we agree with Mr. Sarvia that we ought to interfere with the exercise of the discretion of the learned single Judge. In the result, we allow the reference, set aside the orders of the single Judge made on 12th September, 2005 and substitute therefor an order dismissing the notice of motion dated 20th December, 2004. The costs of this reference and of the motion shall be borne by the applicant, Ramesh Shah.

Dated and delivered at Nairobi this 27th day of April 2007.

R.S.C. OMOLO

………………..

JUDGE OF APPEAL

S.E.O. BOSIRE

…………..…………..

JUDGE OF APPEAL

P.N. WAKI

……………..………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR