



MOUNT BUILDERS & MECHANICAL ENGINEERS LTD..... APPLICANT

AND

KARUNA HOLDINGS LIMITED RESPONDENT

(Application for extension of time to file and serve record of appeal out of time in an intended appeal from a judgment of the High Court of Kenya limani Commercial Courts (Waweru, J) dated 2nd July 2004 in H.C.C.C NO. 964 of 2001)

RULING OF THE COURT

This is a reference to full Court under Rule 54(1) (b) of the Rules of this Court from the decision of a single Judge dated 21st July 2006 dismissing an application for extension of time to file and serve a record of appeal out of time.

The applicant intends to appeal against the judgment of the superior court (Waweru J.) dated 2nd July 2004 dismissing the applicant's suit with no order as to costs. In the suit, the plaintiff had claimed a total of Sh.3,629,506/05 from the respondent on the basis that the respondent was in breach of a building contract by failure to give proper instructions to the applicant to continue with the building contract resulting in the termination of the contract by the applicant. At the hearing of the suit, the applicant's witness produced the building contract as an exhibit. Although the respondent did not attend the hearing of the suit, the superior court nevertheless found that no proper evidence had been tendered that the applicant's right to determine the contract duly accrued or that it duly determined the contract as provided in the building contract.

The application for extension of time was based on the grounds:-

“A) THAT the proceedings were collected on 20th December, 2004.

B) THAT on 10th January, 2005, an application was made for copies of the exhibits and on 5th May, 2005, the Court gave an Order for the collection of exhibits.

C) THAT on the 9th August, 2005, the plaintiff's Advocate's Agent, Alphonse Mutinda whilst perusing the Court file saw the said Order of 5th May, 2005, and collected the exhibits and thereafter on 10th August, 2005, applied for a Certificate of Delay which to-date has not been received.

D) THAT the said Advocate's Agent misplaced the exhibits and the same were traced on 16th January, 2006.

E) THAT the delay, if any, herein is due to the failure to obtain the aforesaid Certificate of Delay.”

The single Judge found that the appeal should have been filed by 5th September 2004 which is within 60 days from 7th July, 2004 when the notice of appeal was lodged and that the application for extension of time was filed on 7th February 2006 – a year and 5 months later. The learned Judge also considered the reasons advanced for the substantial delay and rejected them.

The exercise of a discretion by a single Judge under **rule 4** of the Rules regarding the extension of time can only be interfered with by the full court if the single Judge did not exercise the discretion judicially, *inter alia*, by taking into account irrelevant matters or failing to take into account relevant matters, or misapprehension of some point of law or fact or on the ground that the decision on the available evidence is plainly wrong. A reference not being an appeal, the full Court cannot substitute its view for that of the single Judge.

In this case, the application for extension of time under consideration was, as we stated earlier, was filed on 7th February 2006, about 1^{1/2} years after the date of judgment and about one year after the proceedings and judgment were collected on 20th December, 2006. In computing the period of delay, the learned single Judge considered that the applicant had filed an earlier application for extension of time on 2nd March 2005 being *Civil Application No. Nai. 44 of 2005* – which was withdrawn on 15th June 2005 but declined to exclude the period after that application was filed.

The reasons given for the delay were failure to collect the exhibits from the court in time and failure by the Deputy Registrar to issue a certificate of delay. The learned single Judge took into account the fact that the applicant’s advocates only applied for release of the only exhibit (building contract) four months after the expiry of the time for lodging of the appeal and the further inaction by the applicant’s advocates which showed that the applicant’s advocates were not actively pursuing the release of the exhibit from the court. Indeed, despite the order of the court dated 5th May 2006 that exhibits be released, the applicant’s advocates did not collect the exhibits from the court until 9th August 2005 – nearly a year after the time had expired for filing the record of appeal.

The certificate of delay is in practice prepared by the concerned advocate and sent to the Deputy Registrar to verify and sign. The applicant’s advocates do not say that they prepared the certificate of delay which the Deputy Registrar failed to sign. We cannot speculate on the reasons why the certificate of delay has not been issued but as the learned single Judge correctly observed, the absence of the certificate of delay is not a bar to exercise of discretion by the Court to extend time if thought fit.

On analysis, we are satisfied that the learned single Judge exercised his discretion judicially. Incidentally, the merits of the intended appeal is a relevant factor in the exercise of the discretion to extend time (see *Wasike vs. Swala* [1984] KLR 591). The applicant’s advocate did not say anything about the merits of the intended appeal before the learned single Judge.

In the result, the reference is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of May, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR