



IN THE COURT OF APPEAL OF KENYA PEAL AT NYERI

Civil Appeal 235 of 2002

**EDWARD NJAGI NKARIAMA (suing as Legal Representative of the Estate
of FREDRICK MUTEGI alias MANAGER (DECEASED).....APPELLANT**

AND

BLUE SHIELD INSURANCE COMPANY LTD. RESPONDENT

(An appeal from the Order and Ruling of the High Court of Kenya At Merru (Kasanga, J)

dated 1st August, 2002 In H.C. Misc. Civil Application No. 77 of 2002)

JUDGMENT OF THE COURT

On 22nd may, 2002, the respondent in this appeal Blue Shield Insurance Co. Ltd., through its advocates, filed a Notice of Motion in the High Court of Kenya at Meru against the appellant Edward Njage Nkariama, the Legal Representative of the estate of Fredrick Mutegi Njage alias Manager. As the same Notice of Motion is important for this judgment, we reproduce it here below:-

“NOTICE OF MOTION UNDER SECTIONS 79 (G) 3 AND 3A AND ORDER XLI RULE 4 OF THE CIVIL PROCEUDRE RULES.

TAKE NOTICE that this court will be moved on the 30th day May, (sic) 2002 at 9.00 O’Clock or soon thereafter as the counsel for the applicant for the orders (sic):-

- 1. That this application be certified urgent and be heard ex-parte initially.***
- 2. That this Honourable Court be pleased to grant leave to appeal against the judgment of the Senior Principal Magistrate dated 22nd January, 2002 in CMCC No. 462 of 2000.***
- 3. That this Honourable Court be pleased to order stay of execution of the decree in CMCC 462 of 2000 until the intended appeal is heard and determined or until further orders.***
- 4. That costs be in the intended appeal.***

WHIICH APLICATION is supported by the affidavit of Martin Mugambi Mithega and the following grounds.

- 1. That the respondent has taken out warrant of execution and they have proclaimed applicant’s properties.***

2. *That there is no inordinate delay and no prejudice shall be suffered by the respondent.*

3. *That the applicant shall abide by any condition this Honourable Court may see fit and just to impose.*

4. *That the application has merit.”*

That application was supported by affidavit of Martin Mugambi Mithega to which we shall refer later in this judgment. The appellant opposed that application on grounds that the application was frivolous, vexatious and abuse of the process of the court; that the application was incompetent and bad in law, and that the notice of motion was *res judicata*. No replying affidavit was filed by the appellant.

The application was heard by the superior court (Kasanga Mulwa, J) who after full hearing allowed it and ordered the respondent to file his appeal within 14 days of the date of the ruling which was 11th August, 2002. We understand that the appeal has since been filed in the High Court, Meru. The appellant was aggrieved by that decision and hence this appeal which is premised on six grounds. Before us, Mr. Riungu, the learned counsel for the appellant submitted that the main and only ground of appeal is that the learned Judge gave orders which were not sought in the application as the motion sought leave to appeal but the learned Judge gave order for leave to appeal out of time which was not sought in the application that was before him. He contended that during the hearing of the Notice of Motion before the superior court, the learned counsel for the respondent stated that the application was for leave to appeal out of time and admitted that in the application the words “out of time” were omitted, but as the respondent did not amend the Notice of Motion, the court had no jurisdiction to grant an order not sought even though the court might have been aware of the same mistake. Mr. Kariuki Manasses, the learned counsel for the respondent, on the other hand opposed the appeal and urged us to note that the Notice of Motion before the learned Judge of the superior court was brought under section 79 G which is clearly a provision for setting out time for filing appeals from subordinate courts and which provides for admission of appeals from the subordinate courts out of time. As the application was brought under that section, it was an application for leave to file an appeal out of time and the learned Judge rightly dealt with it as such notwithstanding the omission of the words “out of time” in the Notice of Motion. In his view, the learned judge exercised his discretion properly on the matter that was before him and we should not interfere with the exercise of the discretion unless we are satisfied it was not exercised properly. He referred us to several authorities to buttress his argument.

We have considered the rival submissions, the record, and the law. It is certain the learned judge in deciding the application that was before him brought under **section 79 G** of the Civil Procedure Act and under **Order XL1 Rule 4** of the Civil Procedure Rules, was exercising discretionary powers. That being the case, we can only interfere with his exercise of such discretionary powers under certain well defined principles. These principles are succinctly spelt out in the case of **Mrao Ltd. v. First American Bank of Kenya Ltd. & 2 others [2003] KLR 125**, where this Court held inter alia as follows:-

“2. The Court of Appeal may only interfere with the exercise of a court’s judicial discretion if satisfied:

(a) The Judge misdirected himself on law; or

(b) That he misapprehended the facts; or

(c) That he took account of considerations of which he should not have taken account; or

(d) That he failed to take account of consideration of which he should have taken account;; or

(e) That his decision, albeit a discretionary one, was plainly wrong.”

In the appeal before us, the appellant, if we understand Mr. Riungu, states, and it is his first and main ground of appeal, that the second prayer in the application, though brought under section 79G of the

Civil Procedure Code, was at variance with the provisions of that section as it was seeking that leave to appeal be granted by the court and not leave to appeal out of time. That being the case, the appellant's position is that the learned Judge of the superior court in granting the respondent leave to appeal out of time considered a matter that was not asked for and so exercised his discretion improperly. With respect, we do not agree. The relevant prayer that was before the superior court was clearly premised upon section 79G of the Civil Procedure Code. That section states as follows:-

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

This provision can only be dealing with the time of lodging an appeal in the High Court from subordinate court and leave to appeal out of time. It does not deal with leave to appeal, its being invoked in the notice of Motion that was before the superior court was an indication that the application was for leave to appeal out of time and not that for leave to appeal which is provided for elsewhere in the same Code whenever leave to appeal is necessary. Further, the reasons appended to the Notice of Motion which we have reproduced hereinabove are clearly reasons that are in support of application for leave to appeal out of time and not for leave to appeal. Lastly, we have looked at the affidavit in support of the application by Martin Mugambi Mithega. Paragraphs 5, 6, 7, 9 & 10 are all on matters that would go to support application for leave to appeal out of time.

We have perused and considered the ruling of the learned Judge. He was fully alive to this issue and in his ruling he addressed himself thus:-

I have considered the Notice of Motion, the affidavit in support, the grounds of application as well as the submissions by counsel.

It is evidence from the affidavit in support of the application that the applicant is seeking leave to appeal out of time more so in light of paragraph 5, 6 and 7. The face of the application contains a prayer for leave to appeal but leaves out the words “out of time”. It is my view that such omission is not fatal. The motion is to be considered together with affidavits and as such a mistake by whoever drafted cannot be visited on the applicant.

As is clear above, we have also, in our own analyzed afresh what was before the superior court, as is required of us, this being a first appeal - (See **Selle and another v. Associated Motor Boat Company Ltd. and Others, (1968) EA 123**, we cannot fault the learned Judge of the superior Court in his findings on this issue. Substantive justice demanded the action he took. As this is the only issue taken by the appellant before us, this appeal cannot succeed. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 18th day of May, 2007.

R.S.C. OMOLO

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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.