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

Civil Appli 277 of 2005 (UR. 171/2005)

THE CHAIRMAN BOARD OF GOVERNORS

HIGHWAY SECONDARY SCHOOL.....APPLICANT

AND

WILLIAM MMOSI MOI …….....……..……RESPONDENT

(Being an application for extension of time to file notice of appeal against the ruling/decision/judgment of the High Court of Kenya

irobi (Hayanga, J.) dated 26th September, 2001

in

H.C.C.C. NO. 1737 OF 2001)

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RULING OF THE COURT

On the 19th December, 2005, a single Judge of this honourable Court declined to extend time as sought by the Board of Directors, Highway Secondary School, *("the Board"*) who are the applicants, for filing a notice of appeal and record of appeal. The Board now comes before us on a reference under *rule 54(1) (b)* of the rules of this Court *("the rules"*) seeking to "vary, discharge or reverse" the said decision.

As we have stated on numerous occasions, a reference is not an appeal although it is in the nature of one. The single Judge in exercising his discretion under ***rule 4*** of the rules does so on behalf of the full Court and the discretion would not therefore be easily upset except on sound principles which again this Court has set out before. In substance these 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. A breach of any or any number of those principles would entitle the full court to interfere with the exercise of discretion and the Board in this matter must satisfy us that we ought to interfere.

On the material available in the record before us, the Board was, in October 2001 sued by its employee, ***William Mmosi Moi*** (*"the respondent"*) who was working as a groundsman in the school. He had been

dismissed from his employment one year earlier on allegation that he had stolen some 8 Kg. of fish (meat) from the school kitchen. He was summoned before the Board and he denied the alleged offence. In fact, it emerged from evidence elicited from the school's watchman that the respondent had not committed the offence as the stolen meat was found elsewhere on the day in issue. Notwithstanding such evidence, the Board still cited the theft incident as the reason for dismissing the respondent, hence the suit in which he pleaded wrongful dismissal and defamation.

Service of summons to enter appearance was apparently effected on the Principal of the school whereupon interlocutory judgment was recorded by the deputy registrar on 14th February, 2002 in default of appearance or defence. The superior court (Rimita J.) however was not satisfied with the service and therefore made an order on 10th April, 2002 that summons be served again upon the Principal of the school or the Chairman of the Board of Governors. It would appear that the matter came up on 23rd January, 2003 before Hayanga J. for formal proof and the learned Judge was satisfied that the order of Rimita J. had been complied with but still there was no appearance or defence filed on behalf of the Board. He proceeded to hear the respondent (the plaintiff in the suit) and awarded him Shs.667,200/= for wrongful dismissal from employment and a further Shs.200,000/= for defamation. That judgment was dated 21st February, 2003 and was delivered on 21st March, 2003. Notice of it was served on the Board on 3rd April, 2003.

The reaction of the Board was to instruct the Attorney General who filed an application on 14th April, 2003 seeking to set aside the judgment and leave to file defence to the action. The main ground relied on in the application was that the Board was never served with summons to enter appearance and therefore the judgment was irregular. It was also argued that there was a good defence. Hayanga J. however found as a fact that the summons to enter appearance was indeed served on the Principal to the school, one ***Daniel Karaba***, who was also the Board's Secretary. That there was no appearance or defence could only therefore have been negligent or reckless on the part of the Board. As for the defence, the learned Judge was of the view that it contained mere denials and he was therefore unable to exercise his discretion in favour of the Board. He dismissed the application on 26th September, 2003.

A notice of appeal was then filed on 8th October 2003 to challenge that decision but for the next two years until the application before the single Judge was filed on 14th October, 2005, no appeal was filed. The appeal would of course have been due within sixty days of the date when the notice of appeal was lodged ***(Rule 81(1)***) which in this case would be 7th December, 2003. As computed by the learned single Judge, the period of delay was thus 1 year and 10 months.

The explanation given for that delay was in the affidavit of the Chairman of the Board, ***Paul Ndegwa Thige*** who stated: -

"*4. THAT the delay in lodging an appeal herein is unfortunate but my lawyer on record Mr. Khamati, informs me that it has been caused by reasons beyond his control. The proceedings requested for in October, 2003 were only availed to him in June, 2005 (note they are certified on 26/04/05) yet they are not complete as they do not contain the ruling of 26/09/2005(sic) of which a copy was collected from the court file on 30/09/05 when I was under arrest for failing to pay the decretal sum ordered by the High Court.*

5. THAT Mr. Khamati informs me that he has now requested for the formal order of 26/09/2003 which is vital for completion of the record of appeal.

6. THAT there have been several applications in the High Court to stay execution hence further reason for delay in obtaining the record of proceedings judgment and ruling.

7. THAT the school has not been indolent in this matter and when it realized that the State Law Office was not handling the matter with expedition it sought leave to engage a private lawyer and I annex hereon the following records marked "B": -

1. *The Application to set aside Judgment.*

2. *The authority to engage a private lawyer.*

3. *A copy of the application for stay of execution.*

4. *A copy of an application for review."*

The advocate referred to in that affidavit did not file any affidavit in the motion to explain the reasons which were beyond his control.

In line with established authorities, the learned single Judge examined the period of delay and the explanation made for it and found that it was unacceptable. He also considered the merits of the intended appeal in view of the evidence and concession by the Board's Advocate that the summons to enter appearance had been served on the Principal of the school; and finally, he considered the prejudice likely to be suffered by the respondent. In the end he stated: -

"**Having taken all of the above into account in the exercise of my discretion, which I am conscious must be exercised judiciously and not capriciously, I have come to the conclusion that the application for extension before me should not be granted. The extension sought is for a substantial period and, though the copies of the proceedings and certified copy of the Hayanga J. Ruling is still not available, the lack of evidence of persistent chasing up by the advocates for the Board of the registry to produce the copies of the complete record is an undoubted weakness in the Board's application."**

Learned counsel for the Board, Mr. Mwendwa now submits before us that the failure to follow up the copies of proceedings, as observed by the learned single Judge, was a mistake of counsel which ought not to have been visited on the Board. It was erroneous in any event, he submitted, to find that the period of 1 year 10 months amounted to inordinate delay. As for the explanation given, Mr. Mwendwa submitted that it ought to have been appreciated because the school was an institution, not an individual, whose decision-making process was bound to take long. It had also been disclosed that the Board was pursuing other applications before the superior court, thus causing further delay. Finally, he relied on the merits of the case and submitted that the factor of merit alone would outweigh the delay even if it was not fully explained. For her part, the respondent's learned counsel Ms. Gulenywa found no reason for us to interfere with the discretion exercised by the single Judge. The court registry, she submitted, had not delayed the supply of proceedings since the copies were only applied for in January, 2005 and were ready for collection in April, 2005. Nothing was done to collect them for filing of the appeal if the Board was interested in doing so. Instead the Board waited until October, 2005 to file the application determined before the single Judge. In the meantime the Board had chosen to instruct its advocates to pursue other issues before the superior court and in particular an application for review which was dismissed for failure to attend court. There was no certificate of delay applied for or obtained and the order intended to be appealed against was not even extracted for certification. In her submission, there was pure inaction on the part of the Board and its advocates. For a matter that has been around for a period of six years, it would, in her view, be prejudicial to prolong the respondent's agony waiting any longer for satisfaction of the lawful decree made in his favour some four years ago.

We have carefully considered the matter and we think, with respect, that there is no firm basis laid for our interference with the exercise of discretion by the learned single Judge of this Court. It is true, as submitted by Mr. Mwendwa in relation to delay, that there are decisions of this Court which have held delays of longer than the 1 year and 10 months as complained of in this matter, not to have been inordinate and the court has extended time in such cases. Nevertheless, as we have stated on many occasions before, each case must depend upon its own facts and circumstances. The advocates appearing for the Board in this matter appear, as found by the single Judge, to have been guilty of inaction, which is not excusable as opposed to having made excusable mistakes of counsel. A clear distinction has been made in that regard by this Court and we need only refer to **Nelson Wahome Kiringi v Nyawira Ndiuini Civil Appl. NAI. 188/96 (ur)** and **Adam Shaiya v John Marangi Kariuki Civil Appl. NAI. 49/95(ur).**

The factor of delay and the reasons given for it was duly considered by the learned single Judge and it is not open to us to substitute our discretion for his, even if we were so minded, particularly where the findings are well supported by facts on record. In any event it was not merely the advocate in this matter who would be blameable even if that was the case. The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular the Board gave instructions that an application be filed for review of the ruling of Hayanga J made on 26th September, 2003. It is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances, we think, the options available to the Board were exhausted when the application for review was determined by the superior court and we doubt that the intended appeal would be valid even if it was filed.

An aggrieved party under ***Order XLIV*** of the Civil Procedure Rules can only apply for the review of a decree or order either where "*no appeal has been preferred"* or where "*no appeal is allowed"*. An appeal is allowed on orders made under ***Order 9A r 2*** Civil Procedure Rules, as in this case, and indeed the Board filed a notice of appeal under ***rule 74*** of the rules to challenge the orders. A notice of appeal is however only a formal notification of an intention to appeal and it cannot be said that the aggrieved party had "*preferred*" an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent, having filed a notice of appeal which had not been withdrawn had a right to apply for review was answered in the affirmative by this Court in **Yani Haryanto v E. D & F. MAN (SUGAR) Ltd**. **Civil appeal No. 122/92 (ur)**. In that case the application for review under ***order 44*** of the Civil Procedure Rules was filed two years after the filing of the notice of appeal. After examining the relevant provisions of the law, the court stated:-

"**The Court of Appeal for Eastern Africa in the case of Motel Schwetser v Thomas Cunningham & Another (1955) 22 EACA 252, held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 of the East African Court of appeal Rules, 1954. Rule 81 of the Court of Appeal Rules, in addition, requires the inclusion of a memorandum of appeal. This statement of the law regarding the status of a notice of appeal was subsequently approved by the Court of appeal for Eastern Africa in the case of Ujaga Singh v Runda Coffee Estates Ltd [1966] E.A 263. So, quite clearly, the Judge had jurisdiction to entertain the application for review……."**

So that, the Board was at liberty to pursue the option of review of the orders made on 26th September, 2003 despite the filing of a notice of appeal to challenge the same orders. We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court. The record here shows that the Board filed an application for review dated 24th February, 2004, on 4th March, 2004. That application was determined by the superior court on 7th December, 2004 when it was dismissed for whatever reason. No further action appears to have been taken by the Board after that dismissal. In our view that was the end of the matter and the notice of appeal was rendered purposeless. Both options in our judgment cannot be pursued concurrently or one after the other.

For those reasons the reference before us is for rejection and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 4th day of May. 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

…….

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR