



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 105 of 2007

KENYA PORTS AUTHORITY APPLICANT

AND

GITURO KAHUGI RESPONDENT

(An application for extension of time to file and serve notice of appeal, letter for copies of proceedings and judgment and memorandum of appeal in an appeal from judgment and decree of the High Court of Kenya

Mombasa (Khaminwa, J.) dated 15th September, 2006 in

MOMBASA H.C.C.C. NO. 717 OF 1995)

R U L I N G

In the notice of motion dated 10th May, 2007, M/S. Kenya Ports Authority (KPA) applies under *rule 4* of the Court of Appeal rules (“*the rules*”) for an order that “*the time for filing and service of a notice of appeal, letter for copies of proceedings and judgment in the superior court, and memorandum of appeal and record of appeal against the judgment of Lady Justice Joyce Khaminwa be extended for such period as this Court may deem fit*”.

As far as I can gather from the affidavits and annexures on record, the dispute that was determined by the superior court on 15th September, 2006 was between KPA and its employee, who is the respondent here. The respondent went before that court in October 1995 and filed suit claiming damages and other remedies following premature termination of his employment. KPA did not deny that the respondent was its employee or that he was retired from employment, but contended that the retirement was in compliance with the rules, regulations and procedures governing the respondent’s employment.

The superior court, Khaminwa J, heard evidence on the dispute upto 20th May, 2005 and reserved judgment for delivery on 1st July, 2005. It was not delivered on that day and an order was made that it would be delivered on notice to the parties. Eventually it was delivered on 15th September, 2006 but KPA says, through its advocates, that they were not served with any notice of delivery of the judgment. They only found out on 6th November, 2006 that the respondent had been awarded in excess of Shs.2.3 million. KPA was aggrieved by the judgment but the time limited for appeal had expired for no fault of

theirs. They instructed new advocates, **M/S. Kaplan & Stratton**. Those advocates had to comply with the law before taking any action in the matter and so, they applied to the superior court on 16th November, 2006 for an order that they replace the previous advocates on record. That application, though certified urgent, was not heard until 3rd March, 2007 when the order was granted. On perusal of the court file, the advocates found that a decree had been extracted for an amount in excess of Shs.6.1 million and it was due for execution by April, 2007. They also formed the view that KPA had a good appeal since the judgment went against previous judgments made in other disputes between it and employees whose services had been terminated in similar circumstances; notably **Kenya Ports Authority v. Edward Otieno C.A. No. 120/97 (ur)**. Copies of the proceedings and judgment had been applied for by the previous advocates on 27th November, 2006 with a copy to the respondent. A further letter was addressed to the court by the new advocates on 14th March, 2007. By the time the application before me was filed on 19th May, 2007, the copies had not been supplied.

In their calculation, the cumulative delay occasioned before the application was filed is six months but Mr. Muthui, learned counsel who appeared for KPA, pleads that it was fully explained and was in any event not inordinate. It was the superior court, in Mr. Muthui's submission, which in the first place flouted the rules and failed to serve notice of judgment on the applicant, otherwise the applicant would have challenged the judgment timeously. The ensuing decree was for an enormous amount of money which a public institution like KPA will be required to pay if no opportunity to appeal is granted.

For his part, the respondent who appeared through learned counsel Mr. Wanjohi, did not dispute the fact that the superior court's judgment was delivered without notice to KPA. He rather contended that this application ought to have been filed soon after the applicant learned about the existence of the judgment in November, 2006 and in default, they should strictly explain the delay each day thereafter. He further submitted that it would be prejudicial to allow the application at this late stage since the respondent is an old man at 63 years and is no longer enjoying regular income. He ought to be allowed to enjoy the fruits of his judgment which he started seeking some 11 years ago.

I have considered the rival submissions from both counsel and have perused the affidavits on record. Whether or not I should exercise my discretion in an application under **rule 4** is of course entirely open to me so long as I do justice between the parties. I cannot however proceed capriciously and must have regard to guidelines which this Court has set for itself over time. The length of delay, the reasons for the delay, the merits of the intended appeal, and matters of prejudice all of which the parties raised before me, are relevant considerations. They are not the only considerations however and I would be at liberty to consider other factors so long as they are relevant – See **Fakir Mohamed v Joseph Mugambi & 2 others Civil Appl. NAI. 332/04 (ur)** which was a reference made to the full court.

There is no dispute that there was a cumulative delay of about six months before the application before me was filed. The explanation for the delay however has its genesis in the delivery of judgment which appears for some reason, which is not apparent in the record, to have been made without any information to the applicant. Neither the respondent nor his counsel say in the replying affidavit or submissions that they were not present when the judgment was delivered or why they kept it away from the applicant until the discovery by some chance two months later that it was delivered. Good faith would have required that the respondent informs the absent party about the *ex parte* delivery of judgment. From that breach of **Order 20 rule 1** of the Civil Procedure Rules by the superior court itself, the litigation timetable was thrown off-balance. It is also evident that the applicant changed its advocates and I am satisfied that the legal requirements of **Order 3 r 9A** of the Civil Procedure rules had to be complied with. That it took the court more than three months to dispose of the application cannot be blamed on the applicant. I am of the view that the remaining days that were taken before this application was filed were necessary for preparation of it and is not inordinate in the circumstances. At all events, the respondent became aware in November, 2006 when the applicant's erstwhile advocates applied for copies of the proceedings and judgment and served the copy on the respondent's advocate that they intended to prefer an appeal. The respondent does not say those copies were supplied any time sooner or at all thus causing unnecessary delay in instituting the intended appeal. I have perused the judgment of the superior court and the draft memorandum of appeal and I cannot say the intended appeal is a frivolous one. On the contrary there are

weighty issues of law, apparently issues which have arisen in previous decisions, which must be considered at the highest level in order to give clear guidance on contractual rights and obligations between the applicant and its employees.

Finally, I am in no doubt that the respondent is anxious to enjoy the fruits of his judgment without any further delay and is justified in submitting that further delay in the matter will cause him prejudice. The justice of the matter nevertheless demands that an opportunity be given to the applicant to test the validity of this judgment in the highest court. I believe the fruits will be sweeter for the respondent when they are handed down from that level. It is also my view that costs would be a fair atonement for the prejudice that may have been suffered in the meantime. For those reasons I am inclined to grant the application and I make the following orders: -

- a) *That time be and is hereby extended to file and serve a notice of appeal against the judgment of the Hon. Lady Justice Joyce Khaminwa made on 15th September, 2006.*
- b) *The notice of appeal shall be filed and served on or before 5 p.m. on 21st June, 2007.*
- c) *That time be and is hereby extended for filing the record of appeal against the judgment of the Hon. Lady Justice Joyce Khaminwa made on 15th September, 2006.*
- d) *The record of appeal shall be filed and served on or before 5 p.m. on 21st August, 2007.*
- e) *The costs of this application assessed at Shs.20,000/= shall be borne by the applicant and shall be paid to the respondent on or before 21st June, 2007. In default of payment execution shall issue.*

Those shall be my orders.

Dated and delivered at Nairobi this 8th day of June, 2007.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR