



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

**Civil Appli. Nai 118/2007 (UR 78/2007)**

**RELIANCE BANK LIMITED (IN LIQUIDATION) ..... APPLICANT**

**AND**

**GRANDWAYS VENTURES LTD. & 2 OTHERS .....1<sup>ST</sup> RESPONDENT**

**SOUTHERN CREDIT BANK CORPORATION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to within which to file and serve Notice and Record of Appeal from the Judgment and Order of High Court of Kenya at Kisumu (Tanui, J) dated and delivered by Mwera, J on 10<sup>th</sup> August, 2006*

**In**

**H.C.C.C. No. 272 of 2001)**

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**RULING**

The Applicant before me is Reliance Bank Ltd. (In Liquidation). It asks me, through its learned counsel, Mr. Mwagonah Emmanuel Mwangambo, to extend for it under Rule 4 of the Court of Appeal Rules, the time within which to lodge its notice of appeal and record of appeal. Rule 4 is, as everybody who has anything to do with the Court’s Rules knows, is one of the most over-worked rules in the rule book. That Rule is in these terms:-

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of an act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

So the Court, which in the circumstances of the Rules means a single member of the Court, has complete discretion to extend or refuse to extend the time but of course taking into account the justice of the particular case under consideration. A single member of the Court can extend time before an act is done or after it has been done. For instance, Rule 74 (2) provides that a notice of appeal:-

“shall ..... be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

A party who has failed to file a notice of appeal within the stated fourteen (14) days can choose to come to the Court and ask for extension first before filing the notice of appeal or can file one and then come for extension after doing so. That is all allowed under Rule 4.

Mr. Justice Tanui, now retired, heard and determined the case filed against the Applicant and Southern Credit Banking Corporation Ltd. (the 2<sup>nd</sup> Respondent herein) by Grandways Ventures Ltd (the 1<sup>st</sup> Respondent herein). In the superior court the Applicant was represented by the firm of Okoth & Kiplagat Advocates, the 1<sup>st</sup> Respondent by the firm of Wasuna & Company Advocates and the 2<sup>nd</sup> Respondent by the firm of Muriu Mungai and Company Advocates. Before me, Mr. Mwagambo argued the Applicant's application on behalf of Okoth & Kiplagat Advocates, while Mr. Wasuna argued the 1<sup>st</sup> Respondent's case on behalf of the 1<sup>st</sup> Respondent. Nobody appeared on behalf of the Advocates for the 2<sup>nd</sup> Respondent.

After completing hearing the case, Tanui, J. retired but he wrote his judgment and sent it to Kisumu High Court where Mwera, J delivered it on 10<sup>th</sup> August, 2006. Tanui, J. was perfectly entitled to do what he did, i.e. write the judgment and have it delivered by Mwera, J pursuant to section 62 (2) of the Constitution. The problem, however, was that when Mwera, J delivered the judgment prepared by Tanui, J, only the Advocates for the 1<sup>st</sup> Respondent were present. It appears that a notice for the delivery of the judgment was sent out but it is clear from the record that the notice was sent only to the Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The copy of the "NOTICE" annexed to the "REPLYING AFFIDAVIT" of Mitesh Fulchand Shah, a director of the 1<sup>st</sup> Respondent, shows that that notice was sent only to the Advocates for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. So I find as a fact and hold that the Applicant did not receive the notice appointing 10<sup>th</sup> August, 2006 as the date on which judgment was to be delivered. It follows that the Applicant did not know about the delivery of the judgment.

In support of the application for extension of time, Mr. Mwagambo swore a supporting affidavit containing some twenty four (24) paragraphs. He swears that Tanui, J was to deliver the judgment on 30<sup>th</sup> March, 2006 (paragraph 5), that the judgment was not delivered on that day (paragraph 6), that the Judge thereafter retired (paragraph 7), that thereafter he heard nothing about the judgment (paragraph 8) and that it was with surprise and consternation that on 31<sup>st</sup> October, 2006 they received a letter from Mr. Wasuna enclosing a draft decree for their perusal and approval (paragraph 9). So, according to Mr. Mwagambo, they only came to know about the existence of the judgment on 31<sup>st</sup> October, 2006, and that is why they did not lodge a notice of appeal (see paragraph 14 of supporting affidavit). After checking the position in the Kisumu file, the Applicant's Advocates eventually lodged an application similar to the one under consideration at the Central Registry of the Court in Nairobi. This was on 15<sup>th</sup> December, 2006. That application was in fact No. NAI. 315 OF 2006 (176/2006 UR). It appears to have come for hearing before Githinji, JA on 29<sup>th</sup> December, 2006, when it was adjourned with an order that Mr. Mwagambo was to file a supplementary affidavit. The matter again came before Onyango Otieno, JA on 21<sup>st</sup> March, 2007. No replying affidavit had been filed and the motion was withdrawn. Mr. Mwagambo told me it was withdrawn because it was incurably defective. I do not know and I was not told why an application would be treated as being incurably defective. The present motion was then filed on 24<sup>th</sup> May, 2007, i.e. some two months from the date of the withdrawal of the first motion.

It is now settled law that whenever there is a delay, the party guilty of the same should offer some explanation for it before an extension of time in his favour can be considered. In KENYA PORTS AUTHORITY VS. SILAS OBENGELE, Civil Application No. 297 of 2004 (unreported) the Court put it thus:-

"Mr. Orao-Obura next attacked the single Judge's decision on the ground that there were periods of inordinate delay which remained unexplained, the learned Judge was not entitled to exercise his discretion in the manner he did. We agree that it is now settled that wherever there is delay, even for one day, there must be some explanation for it otherwise an extension may not be granted."

That remains the legal position. In the application before me, I think there are two periods of delay which required explanation, namely,

(i) from 10<sup>th</sup> August, 2006 when judgment was delivered to 15<sup>th</sup> December, 2006 when the first motion which was withdrawn was filed,

and

(ii) from the 21<sup>st</sup> March, 2007 when the first motion was withdrawn to 24<sup>th</sup> May, 2007 when the present motion was filed.

I have already held that the Applicant was not aware of the date when the judgment was delivered; so the Applicant cannot be blamed for not being present at the delivery of the judgment.

Mr. Mwangambo swears that they only came to know about the existence of the judgment on 31<sup>st</sup> October, 2006 when they received Mr. Wasuna's letter enclosing a draft decree for their approval. But the 1<sup>st</sup> Respondent contests that contention. Mr. Wasuna says that a day after the delivery of the judgment, i.e. on 11<sup>th</sup> August, 2006, he wrote one letter to the respective advocates for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and that letter was in the following terms:-

“11.08.06

OKOTH & KIPLAGAT CO.

ADVOCATES

BRUCE HOUSE, 12<sup>TH</sup> FLOOR,

STANDARD STREET

P.O. BOX 9807-00100

NAIROBI.

MURIU MUNGAI & CO

ADVOCATES

P.O. BOX 75362

NAIROBI.

Dear Sirs,

RE: KISUMU HCCC NO. 272 OF 2001

GRANDWAYS VENTURES LIMITED –VS-

RELIANCE BANK LIMITED

(IN LIQUIDATION) AND SOUTHERN

CREDIT BANKING CORP. LIMITED

Please note that Judgment in the above suit was read by the Hon. Justice Mwera on 10<sup>th</sup> August 2006 and

the Judgment entered for the Plaintiff as prayed in the plaint.

Yours faithfully,

FOR: WASUNA & CO ADVOCATES

F. E. WASUNA.”

In the withdrawn motion, Mitesh Fulchand Shah had sworn a replying affidavit and copy of this letter was one of the documents annexed to the affidavit. In his affidavit in support of the present motion Mr. Mwagambo says absolutely nothing about this letter and when I inquired from him the position respecting the letter, he bravely told me he was seeing the letter for the first time. That, of course is not and could not have been correct because a copy of the same letter was attached to Shah’s replying affidavit to the withdrawn application. Surely, if that letter had not been received in the offices of M/s Okoth & Kiplagat Advocates, or if it had been received but was not brought to the attention of Mr. Mwagambo before 31<sup>st</sup> October, 2006, one would expect Mr. Mwagambo to give that explanation when he swore the affidavit in support of the present motion. Mr. Mwagambo’s affidavit in support of the present motion was sworn on 23<sup>rd</sup> May, 2007, long after the first motion was withdrawn and as I have already pointed out, a copy of the letter had been annexed to the affidavit in reply to the withdrawn motion. In the circumstances, I must reject Mr. Mwagambo’s contention that they only came to know about the existence of the judgment on 31<sup>st</sup> October, 2006. They must have known about the existence of the judgment some three (3) or so days when Mr. Wasuna’s letter of 11<sup>th</sup> August, 2006 must have reached their offices. I accordingly reject as untruthful the explanation that they only came to know of the existence of the judgment on 31<sup>st</sup> October, 2006.

Again from the 31<sup>st</sup> October, 2006 they did not file their withdrawn motion until 15<sup>th</sup> December, 2006. That is again a delay of about one and half 1½ months though I am prepared to ignore this because they say they were looking for proceedings.

But they filed their withdrawn application on 15<sup>th</sup> December, 2006. It came for hearing on 29<sup>th</sup> December, 2006, and on that day, GITHINJI, JA ordered as follows:-

“ORDER:

The applicant has not annexed to the application a copy of the judgment of Tanui, J dated 10<sup>th</sup> August, 2006 and delivered by Mwera, J. The applicant has not also annexed a copy of the lease dated 27<sup>th</sup> March, 1996 which allegedly gave the applicant authority to assign the lease. In the absence of those material documents, it is impossible for the court to make a judicial determination of the application particularly on the prima facie merit of the intended appeal.

As, therefore, the applicant has not placed sufficient material before the Court to enable the Court to make a judicial determination of the application, the application is taken out of the hearing list and adjourned to a date to be fixed by the Deputy Registrar on priority basis. Leave to the applicant to file a supplementary affidavit within twenty one years (sic) . Leave to the respondent to file a further affidavit within 10 days upon service of the supplementary affidavit. -----“

No supplementary affidavit was filed as directed by the learned Judge and when the matter next came up on 21<sup>st</sup> March, 2007 before Onyango Otieno, JA the motion was withdrawn.

After that withdrawal, the Applicant was next heard of on 24<sup>th</sup> May, 2007. Not a single word in explanation is offered in the supporting affidavit of Mr. Mwagambo as to what they were doing between 21<sup>st</sup> March, 2007 and 24<sup>th</sup> May, 2007. In fact in his supporting affidavit, Mr. Mwagambo swears as follows:-

“4 THAT the subsequent application has been filed with all due expedition and alacrity.

19. THAT the applicant has come to court without any delay.”

Any applicant who treats a delay of sixty-four (64) days as amounting to

“All due expedition and alacrity”

or as amounting to

“without any delay”

and, therefore, requiring no explanation is really not being fair to the single Judge who is being asked to exercise the discretion conferred by Rule 4. In the circumstances, I must reject the Applicant’s explanation that they were totally in the dark about the existence of the judgment until 31<sup>st</sup> October, 2006; Mr. Wasuna’s letter of 11<sup>th</sup> August, 2006 must have alerted the Applicants advocates that the judgment had in fact been delivered on 10<sup>th</sup> August, 2006. As I have already pointed out, the Applicants’ advocates do not say anything about that letter except for Mr. Mwagambo’s feeble contention before me that he had not been aware of the existence of that letter until Mr. Wasuna raised its existence before me. That contention is untenable.

Then there is the delay of 64 days to which I have referred and in my view, that delay remains unexplained, and as have stated, any amount of delay, even if it be for one day, ought to be explained in some way.

It may well be that the Applicant has a good appeal but even good appeals must be filed within the prescribed periods and when that is not done, some explanation must be given in explanation of the delay.

Mr. Wasuna also raised the issue of whether Mr. Mwagambo had the authority of the liquidator to represent the Applicant who is under liquidation but I do not think I have sufficient material before me on which I can answer that question, one way or the other.

In the final analysis, the Applicant has not convinced me that I should exercise my discretion in its favour. That being the view I take of the matter, my order shall be that the Applicant’s notice of motion dated 23<sup>rd</sup> May, 2007 and lodged in the Court on 24<sup>th</sup> May, 2007 be and is hereby dismissed with the costs thereof to the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent did not participate in the proceedings before me.

Dated and delivered at Nairobi this 13<sup>th</sup> day of July, 2007.

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR.**