



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLI NAI 17 OF 2001

S. W. NJUGUNA

N. KARANJA

J. M. NJOROGE

S. N. TIMOTHY APPLICANTS

AND

MATAARA TEA FACTORY CO. LTD

E. G. KARANJA

JOHN KARANJA KAMAMO

JAMES E. WATENGA

FRANCIS M. KIMANI

DAVID N. WATAKI

SAMMY G. CHEGE

RIABA GACHERA

KENYA TEA DEVELOPMENT AUTHORITY.....
RESPONDENTS

(Application for leave for extension of time to file and serve Memorandum and Record of Appeal in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Githinji J) dated 7th June, 2000 in H.C.C.C. NO. 1287 OF 1999

RULING

This is an application by the amended Notice of Motion dated 27th September 2001 and lodged on 12th February 2003 for orders that :

That leave be granted to the applicant for extension of time to file and serve a fresh Notice of Appeal.

That leave be granted to the applicant for the extension of time to file the Memorandum and Record of

Appeal.

That costs of this application abide the result of the intended appeal. The grounds for the application were briefly stated to be :-

That the applicant lodged the said Memorandum and Record of Appeal this being Civil Appeal No. 188 of 2000 on 26th day of July 2000 well within the stipulated time.

That the applicant withdrew the said Memorandum and Record of Appeal through a Notice of Withdraw (sic) of Appeal lodged in this Court's registry on 14th December 2000 upon discovery that the Memorandum and Record of Appeal had not been served in accordance with the provisions of Rule 87 (1) of the Court of Appeal Rules.

The application was supported by the Supporting affidavit and Supplementary affidavit of Mr.E.K.Kagiri, learned counsel for the applicant dated 31st January 2001 and 14th April 2005 respectively.

The judgement intended to be appealed against was that of Githinji J. as he then was dated 7th June 2000.

The reason for the first mistake made by the applicants in failing to serve the Memorandum and Record of Appeal in time was stated by Mr. Kagiri in his supporting affidavit to have been occasioned by a mix up in his offices. No details of how the mix up arose were given and no date was given as to the date when the mistake was discovered. The applicants then took steps to withdraw the appeal which had been filed in July 2000 by lodging a notice of withdrawal of the appeal on the 14th December 2000.

On the 16th January 2001 the applicant's advocates received a letter dated 5th January 2001 from the Deputy Registrar confirming that the Appeal had been marked as withdrawn. That letter was copied to the respondents who then took 16 days to file the application for extension of time which they did on 1st February 2001. Mr. Kagiri claims in his Supplementary affidavit that 16 days was the time it took to get the necessary instructions and prepare and file the said application.

This application however was imperfect in that the need for an extension of time to file and serve the Notice of Appeal had not been included in the relief sought in the application filed on 1st February 2001. This was eventually remedied in the Amended Notice of Motion dated 27th September 2001 but not lodged until 12th February 2003.

The need for filing a fresh notice of appeal was brought to the applicant's attention by the Replying Affidavit on behalf of the Respondent sworn by Mr. G. N. Sichanga learned counsel for the respondent on 12th March 2001 in which he deponed at paragraph 15 that "the application herein is unprocedural and bad in law as the same has been brought before this Honourable Court before the applicants have complied with the mandatory provisions of Rule 74 (1), (2),(3) and (6) of the Rules." This was indeed correct as once the appeal was withdrawn or struck out the original Notice of Appeal ceased to exist.

In all these circumstances I consider that the period of delay which needs to be explained begins on the expiry of 60 days from the lodging on 20th June, 2000 of the original notice of appeal which takes us to about 19th August 2000 and it ends on the date of filing of the amended Notice of Motion now before me which was lodged on 12th February 2003. This by my calculation comes to a total of approximately 900 days.

This period of 900 days delay cannot be lessened by the application of the proviso to rule 81 since there is no certificate of delay and the letter to the registrar of the high court bespeaking the copies of the proceedings and judgement was not itself sent to the respondent.

The period of 900 days was made up of a number of different causes: the failure to serve the respondents with the record of appeal; the eventual withdrawal of the appeal as a prerequisite to the filing of the application for extensions of time to file a fresh appeal; the post withdrawal delay in filing the current application elongated by the need to amend the motion for extension to include the fresh notice of appeal.

All of this accumulation of errors and lack of a sense of urgency adds up to a very long period of delay much of which has not to my mind been satisfactorily explained.

While it is not a matter which must be taken into account in applications for extension of time I have considered whether the intended appeal is arguable and I am of the view that issues which are not wholly frivolous are raised in the Memorandum of Appeal dated 19th July 2000.

Having taken into consideration all of the above matters and having taken them into consideration in the exercise of my unfettered discretion bestowed upon me by Rule I have come to the conclusion that the application before me should be dismissed with costs and it is hereby so ordered.

Dated and delivered at Nairobi this 24th day of January, 2006.

W. S. DEVERELL

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR