



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Application 183 of 2003

PATRICK NG'ANG'A KAMAUAPPLICANT

AND

ISAAC RIBIRO KAMERE RESPONDENT

(Application for extension of time to file and serve Notice and Record of Appeal in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Kuloba J) dated 25th February, 2002

in

H.C.C.C. NO. 462 OF 2001

RULING

This is an application by P. N. Kamau for extension of time to file and serve a fresh Notice of Appeal and serve a Record of Appeal. The intended appeal is from the decision of Kuloba J (as he then was) in HCCC No. 462 of 2001 (hereinafter “the Kuloba Judgment”) striking out the applicant’s defence. The applicant claims to have filed the notice of appeal in time but then did not file the record in time with the result that the notice of appeal was deemed to have been withdrawn in accordance with **rule 82 (a)** of the Court of Appeal Rules (hereinafter the Rules).

The applicant states that the cause of the delay has been the Registry of the High Court’s delay in furnishing the record of proceedings which at the time of the filing of this application still had not been supplied.

The dates relevant to the application would *appear* from the affidavit of the applicant in support and the affidavit in reply to be as follows:-

25th February 2002. Decision of Kuloba J. striking out the defence of the applicant dated 9th May 2001

28th February 2002. Lodging of the notice of appeal.

27th February 2002. Letter to the Deputy Registrar bespeaking copies of the proceedings and order marked as copied to the respondent.

9th July 2003. The lodging of the current application.

*31st July 2003 Aluoch J gave judgement in HCCC No. 462 of 2001 (the **Aluoch Judgment**) in favour of*

the applicant, the respondent's defence having been struck out by Kuloba J.

*15th August 2003 the Decree was issued in respect of the **Aluoch Judgment**.*

There is no certificate of delay and indeed it is asserted by the applicant in the affidavit dated 8th July 2003 in support of the application sworn by the applicant Patrick Ng'ang'a Kamau that this is because the record of the High Court proceedings and Order of Kuloba J were still not ready for delivery to the applicant. The affidavit in support makes no mention of any effort having been made by the applicant or his advocates to chase up the production of copies of the proceedings. Mrs. Waiganjo who appeared before me for the applicant did say during her submissions that "*we have written several letters to the High Court registry. They have not been exhibited.*"

It is clear from the above that there was a delay of a year and a half between the letter bespeaking the copies in February 2002 and the filing of this application in July 2003 without any **evidence**, in contradistinction to statements from the bar, of any steps taken to speed up the supply of the record.

In the case of *South Coast Fitness and Sports Centre Ltd versus Clarkson Notcutt Ltd. [2001] 1EA 230 CAK* this Court was dealing with an application to strike out the Notice of Appeal for delay although in that case the relevant delay was three and a half years. This court cited with approval the case of *Kenya Commercial Finance Ltd v. Pindolia[1997] LLR 2584 (CAK)* in which the court (Gicheru (as he then was), Akiwumi and Shah, JJ.A. said this :-

"As things stand, apart from the two letters which counsel for the respondent had initially written to the High Court registry requesting for the proceedings, he has neither written any reminder thereafter requesting the court to expedite the preparation and delivery of the said proceedings nor is there any evidence of diligent personal enquiries or other steps taken in order to expeditiously obtain the said proceedings. It is up to the respondent to satisfy us that despite his due diligence in the matter, the High Court had failed to provide the said proceedings to him and he, although still interested to file the intended appeal, is unable to do so for no fault of his own. We are far from satisfied that the respondent has come to expect (sic) of those who seriously pursue their right to appeal. There is a certain limit to when a successful party can be expected to wait and be deprived of the immediate fruits of the judgment in his favor".

In the *South Coast Fitness* case (supra) this Court said:-

"Although this observation relates to a delay of six years, it is in our view, applicable with equal force to the period of three years and six months when the respondents sat back and made no effort through written reminders, credible diligent personal enquiries or other steps to expeditiously obtain the record of appeal. It would be grossly unjust to allow this litigation to continue to hang over the head of the applicant any longer."

The length of delay required to be excused in the present application before me is from the expiry of 60 days from the lodging of the Notice of appeal which takes us to the end of April 2002. The current application was filed on 9th July 2003 so that the relevant length of delay is over one year and two months.

Given the submissions made and the evidence such as it is adduced in support I would have been inclined to dismiss the application. This view has been reinforced by the evidence produced in the replying affidavit sworn by the respondent, I.R. Kamere on 31st August 2003 in which it was deponed that as long ago as 31st July 2003 Aluoch J gave judgment in HCCC No. 462 of 2001 (the **Aluoch Judgment**) in favour of the respondent herein embodied in a decree issued on 15th August 2003. The orders made therein were: -

1. "THAT judgement be and is hereby entered for the Plaintiff against the Defendant.

2. **THAT an injunction be and is hereby issued restraining the Defendant by himself, his servants, agents or howsoever from alienating LR No. Githunguri/Githunguri/1310 together with all the Plaintiff's properties and assets standing thereon.**

3. **THAT the defendant and any other persons or persons claiming through him be and are hereby ordered to vacate and deliver vacant possession of the buildings and Land Reference Number Githunguri/Githunguri/ 1310 forthwith and in default an Order of Eviction be and is hereby issued for eviction of the defendant and any other person or persons claiming any interest in the subject property through the defendant.**

4. **That the defendant do pay to the plaintiff the costs of this suit to be taxed and certified by the taxing officer of this court."**

Mr. Simon Kamere, the learned advocate for the respondent, submitted before me that the **Aluoch J. judgment**, in respect of which no Notice of Appeal has been filed, means that the present application has been overtaken by events. He argued that even if an extension of time to enable an appeal to be filed against the **Kuloba judgment** was granted such an appeal would not undo the final decree in the suit based on the **Aluoch judgment**.

In further support of his submissions **Mr. S Kamere** wished to introduce as evidence two documents which were not exhibited to the replying affidavit dated 21st August 2003. These were a copy of an Eviction Order made in HCCC No. 462 of 2001 dated 17th December 2003 and an Eviction Warrant issued by the superior court on 23rd January 2004 in the same suit. Mrs. Waiganjo objected to the production of this further evidence which she maintained should have been exhibited to the replying affidavit. In order to save time I admitted the two documents into the record of the hearing before me on a provisional basis and indicated that I would rule on their admissibility in my ruling on the application for extension. My ruling is that the two documents are not admissible in evidence in opposition to the application without the consent of the respondent in the absence of their being exhibited to an affidavit. The respondent seeking to rely upon them should have applied for leave of a Judge to lodge a further supplementary affidavit in reply to which the documents could have been exhibited in accordance with **rule 50 (2)** if such leave was granted.

I would add that I do not consider that the additional evidence of steps taken to enforce the **Aluoch Judgment** would have added any significant weight to the respondent's argument that that judgment and decree made it impossible for the court now to undo that judgment in the absence of any appeal against it.

In her opening submissions before me, **Mrs. Waiganjo** for the applicant did not challenge the existence of the **Aluoch judgment** and the decree which had not been referred to either in the affidavit in support of the current application or in her opening submission before me. In her submissions in reply she submitted that the applicant did not participate in the hearing of the superior court case (before Kuloba J.) and the subsequent decree issued is not a bar to the applicant appealing against the **Kuloba judgment**.

No application was made at any stage for a stay of further proceedings in the suit pending the hearing and determination of the intended appeal against the **Kuloba judgment**.

While it is to be observed that the merits of the intended appeal is only of possible relevance in an application for extension of time and while the applicant has produced in the record of the application a draft memorandum of appeal and a copy of the struck out defence, the applicant's have failed to include a copy of the plaint and the **Kuloba judgment**. This precludes making any meaningful assessment of possible merits of the intended appeal.

After taking into consideration all of the above factors I have come to the conclusion, in the exercise of my unfettered discretion under **rule 4** of the Rules, which I am mindful must be exercised judicially and not capriciously, that the application for extension of time should not be granted.

Accordingly I hereby order that the application by Notice of Motion dated 8th July 2003 be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 3rd day of February, 2006.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR