REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Application 137 of 2002

MANSUR JIWANI T/A COMPUTER CITY…… APPLICANT

AND

OVIDIAN ADVERTISING AND DESIGN LTD ….....……. RESPONDENT

(An application for extension of time to file notice of appeal and record of appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Court (Ole Keiwua, J.) dated 15.02.1999

in

H.C.C.C. NO. 459 OF 1997)

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RULING OF THE COURT

For the fifth time in seven years, the applicant herein is making yet another attempt at mounting an appeal against a ruling which was delivered in 1999! The matter now before us is a reference made under ***rule 54 (1) (b)*** of this Court's rules to vary, discharge or reverse the decision of a single Judge of this Court, Deverell J.A who, on 05.11.04 refused to extend time as sought by the applicant for filing a fresh notice of appeal and a record of appeal out of time. What is the context of the applicant's tribulations in this matter?

In February 1997, the applicant ***Mansur Jiwani***, (hereinafter "***Jiwani"***) was sued by ***M/S. Ovidian Advertising and Design Ltd*** (hereinafter "***Ovidian")***. The matter that precipitated the suit arose in October 1996 when Jiwani is alleged to have sold to Ovidian a machine which could not perform the tasks Ovidian intended it for. Ovidian describes itself as an advertising business specializing in fleet and other outdoor advertising. This essentially entails the advertising of products for their customers through photographic images which are then stuck on vehicles and other prominent places. To achieve this, they had to design the graphics and then send the art works or designs to South Africa for processing and return because there was no company in Kenya with such capability. But then information came through to Ovidian from the European producer of a machine that was capable of processing the design graphics. It was the ***Laser Master Display Pro***, manufactured by ***M/S. Laser Master Europe Ltd*** whose local dealer in Kenya was Jiwani, trading as "***Computer City".*** Connections were then made by the manufacturer and discussions were held between Ovidian and Jiwani. According to Ovidian, representations were made and warranties given about the machine, and on the strength of those representations and warranties, Ovidian entered into an agreement on 16.10.96 to buy the machine which

Jiwani delivered and installed in their premises on 14.11.96. Ovidian paid Shs.1,581,250/= for it. Two days later they found that the machine could not produce any kind of outdoor graphics let alone fleet graphics and they repudiated the contract. Attempts by Jiwani to have it repaired were in vain and he promised to refund the purchase price only to change his mind thereafter, hence the suit. Ovidian sought court orders for rescission of the contract, a refund of Shs.1,581,250/= and damages.

In his defence, Jiwani said he was wrongly sued as he never traded as ***Computer City*** or acted or represented himself as an agent of the European Company. He denied giving any warranties or representations to Ovidian on the performance of the machine. All he did was to sell the machine to Ovidian after being given a description of the kind of machine they required for their business.

Ovidian thought that defence was frivolous and vexatious, and otherwise an abuse of the court process and so filed an application to have it struck out in July 1997. The response by Jiwani was to file an application of his own in August 1997 seeking to have the suit struck out. He also filed an objection contending that the application for striking out the defence was itself frivolous, vexatious and an abuse of court process and that the affidavit in support of it contained several paragraphs which irregularly adduced factual evidence and ought to be struck out. Hayanga J however, in a ruling delivered on 05.11.97, refused to strike out the supporting affidavit or the impugned paragraphs. There was no challenge to that ruling.

Both the application for striking out the defence and the application for striking out the suit were heard before Ole Keiwua J. (as he then was) and a ruling was delivered on 15.02.99 allowing Ovidian's application and dismissing Jiwani's. In allowing the application the learned Judge found that the defence was a sham and was only filed to delay the fair disposal of the suit. He believed Ovidian's contentions that: -

"**The defendant presented himself as dealer and therefore agent of the company in Europe for its products. It was also shown by the plaintiff on balance of probability that the defendant trades as Computer City. I also accept that the plaintiff has shown to my satisfaction that the machine the subject matter of the suit was sold to it by the plaintiff and warranted by the defendant to be in good working order and for the purposes it was purchased for."**

It is against that ruling that Jiwani filed **Civil Appeal No. 147/99** to challenge. The appeal was however struck out on 27.11.00 as it was incurably defective. The notice of appeal and the ruling appealed from were at variance. He applied on 20.12.00 for extension of time to mount another notice and record of appeal which application was granted on 18.04.01, by O'Kubasu J.A stating:

*"**In my view, the delay has been adequately explained to warrant me to exercise my discretion in favour of the applicant."***

The delay in filing the notice of appeal in that matter was four days while the delay in filing the application for extension of time was 21 days.

Another record of appeal was then filed in **C.A. No. 97/01** on 15.05.01 but again it was struck out on 06.05.02. The defect this time round was that the ruling of Hayanga J made on 05.11.97 was not included in the record although it was material to some of the grounds of appeal set out in the memorandum.

Jiwani then waited for 24 days and filed another application for extension of time to file another notice of appeal and record of appeal. His application was dismissed by Shah J.A for non-attendance on 10.06.03 but was apparently reinstated on application and eventually came before Deverell J.A for hearing on 01.11.04. It was dismissed on 05.11.04 and that is why Jiwani now comes before us on this reference.

A reference to the full court is not an appeal although it is in the nature of one. In exercising the discretion under ***rule 4***, the single Judge was exercising the power on behalf of the full court and his discretion would not therefore be easily upset except on sound principles which this Court has stated many times before. These in substance, are that the single Judge took into account an irrelevant matter

which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to that issue, or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong. A breach of any or all of such principles would entitle the full court to interfere and the applicant must satisfy us that we ought to do so.

Throughout the entire litigation Jiwani has been ably represented by advocates. In this reference, his advocates **M/S. Rommel Da Gama Rose** and **A.N. Ngunjiri & Co.** who are on record for him, were led by senior counsel Mr. Nagpal. Mr. Nagpal raised three issues in an attempt to persuade us that the learned single Judge was in error of principle. He argued firstly, that the view taken by the single Judge about the delay of 24 days was drastic. Furthermore the reason given for the finding that the delay was inordinate was the wrong approach in such matters. In his view, it was irrelevant to consider the two previous appeals which had been struck out because the applicant had been punished for his mistakes in those appeals. Conceding that there was no explanation given for the delay of 24 days, Mr. Nagpal nevertheless submitted that this Court has, in many other cases before, allowed longer delays and the inclination of the court ought to tilt towards allowing a party to agitate his appeal in Court. The period of delay was not therefore considered judiciously.

It is indeed correct as Mr. Nagpal submits, that this Court has excused longer periods of delay and it is unnecessary to catalogue the number of cases in which it has done so. Suffice it to say that the period of delay is one of the factors a single Judge is at liberty to consider in an application for extension of time under ***rule 4***. But there is no yardstick for determining inordinate delay, and indeed there cannot be, since every case must depend on its own facts and circumstances. That explains the disparity in the numerous decisions of this court. The only requirement in the guiding principle, where the learned single Judge considers the length of delay, is to go further and consider the reasons for the delay, if any, and decide in his unfettered discretion whether or not the delay is excusable. Once that is done, the full court has no reason to substitute its own discretion for that of the single Judge. We need only therefore examine whether the learned single Judge applied his mind to those principles.

The period of delay, as we have seen, was considered by the learned Judge. It was 24 days from the time the previous record of appeal was struck out. He did not consider the delay occasioned since the ruling the subject-matter of the intended appeal was delivered in 1999. We think there was a clear appreciation by the Judge that such period was covered by the two previous appeals which were struck out. With respect, we do not agree with Mr. Nagpal that the Judge used the two struck-out appeals as a basis for finding 24 days inordinate. The learned Judge stated this:

"**The current notice of motion was filed on 30th May 2002 which was 24 days after 6th May 2002 which was the date when Civil Appeal 97 of 2001 was struck out. I consider that, especially given the past history of two struck out appeals, it was incumbent upon the applicant to act swiftly if he wished to obtain the further extensions now sought. I do not consider that in the circumstances the 24 days above referred to was a sufficiently short period not to require an explanation of the reason for this delay. No such explanation was given. Paragraph 17 of the affidavit in support of the application merely stated that the "Applicant has wasted no time" in filing the application."**

In our view, as it was Mr. Nganga's, the respondent's counsel, the focus of those statements was the explanation for the delay which the single Judge was entitled to expect from any applicant and particularly one who had two previous scares of losing his right to access the court. It was not an inappropriate expectation and we do not fault the learned single Judge for it. Perhaps the result would have been otherwise if there was some explanation for the delay which was admittedly lacking. In **First American Bank of Kenya Ltd. & Anor v. Grandways Venture Ltd Civil Appl. NAI. 173/99 (ur)**, this Court stated:

"**In Savill v Southend Health Authority [1995] 1 WLR 1254, Balcombe LJ, having considered various authorities, stated as follows at 1259:**

"I have to say that the authorities are not all entirely easy to reconcile. I prefer to go back to first

principles and to the statement made by Lord Guest in the Ratnam case .... that in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. He went on to say, and it is worth repeating: "If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation." ..... Nevertheless, there must be some material on which the court can exercise its discretion. There was no such material before the judge. In my judgment, therefore, it cannot be said, as this court would have to say, that in exercising his discretion to refuse to extend the period of time for appeal in the case he was acting contrary to principle. It seems to me that he was acting in accordance with the principles laid down by Lord Guest. I would dismiss the appeal."

Mann LJ said (at 1259):

"I agree. The Rules of the Supreme Court are the rules for the conduct of litigation. They are there for the benefit of plaintiffs and the protection of the defendants. Here, the rule was not complied with. We are asked to exercise our discretion to waive the application of the rule. There is no material put before us on which we should grant a waiver. I do not see how one can exercise a discretion without material upon which to consider it. If I went beyond that point I would regard the way in which this litigation has been conducted as entirely antipathetic to the exercise of discretion....."

In the instant case there is no affidavit in support by the advocate who allegedly committed the mistake. Nor is there any material by way of any explanation. As a matter of common sense, though not making it a condition precedent, the Court will want to take into account the explanation as to how it came about that the applicants found themselves with an appeal that was incompetent. If the omission was deliberate and not due to accident the Court would, in our view, be unlikely to grant an extension. But, again, with respect, there was no material before the learned single Judge. Nor was there any material before her to show that the omission was the result of any inadvertence or accident to enable her to exercise her discretion.

We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the Court that despite their default, the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants have not discharged."

We think that passage, which we have cited *in extenso* applies appropriately to this case and we reject the submission that the learned single Judge erred in principle in considering the factor of delay.

That was not the end of the matter. The single Judge went further and considered whether the respondent would suffer any prejudice and he found that an award of costs was not enough since,

"……further delay in achieving certainty will inevitably involve some loss which may not be possible to quantify

or recover."

Mr. Nagpal was not happy with such finding which he termed "*nebulous*". In his view, litigation is always accompanied by loss and it is not a reason for denying a party a chance to appeal. The costs awarded to the successful party are sufficient compensation.

Once again, the degree of prejudice to the respondent if the application is granted was a relevant factor for consideration and the learned single Judge obviously applied his mind to it. It may well be substantially correct that costs are a panacea to many a litigation ills, but they are at the discretion of the court and again the circumstances of each case must be examined. The respondent here acquired a right in a decision made in their favour some 7 years ago and they are not to blame for the long wait they have endured to enjoy the fruits of that right. As observed by the learned single Judge there would be

continued uncertainty for another indeterminate period if yet another extension was granted to the applicant, and we think the observation is not far-fetched that the respondent would suffer further loss which is prejudicial to his rights. In our view there was no error in principle in considering that factor.

The last factor considered by the learned single Judge was "*the chances of the appeal succeeding*". In the end however, the learned single Judge did not find it weighty enough and therefore made no appreciable reliance on it in making his decision. He stated:

"**I do not consider that in this case the chances of success or failure carry significant weight either way in deciding whether or not to grant the requested extensions".**

That however did not stop Mr. Nagpal from attacking the manner in which the learned single Judge evaluated the factor. He referred to expressions made by the Judge that:

"**I bear in mind that the merits of the appeal are of less significance in applications for extension of time than they are in applications for stay of execution. While I would not go as far as to say that the intended appeal is frivolous, it is not in my view an appeal which is bound to succeed."**

Such expression, Mr. Nagpal submitted, introduced a higher standard of evaluating the chances of success of an intended appeal which standard has no precedent. There was no requirement that an intended appeal was "*bound to succeed"*. At all events it was irrelevant to consider that factor since on a previous occasion an application for extension of time had been made before another single Judge who had granted it. The presumption is that the appeal was not found frivolous and it was not open therefore for the learned single Judge to make another finding to the contrary.

We think those objections would have been irresistible if it was the case that the single Judge made his decision on the basis that the intended appeal was "*not bound to succeed"*. But that is clearly not the case. The Judge put forward the arguments of counsel in relation to the issue of the likelihood of the appeal succeeding and, upon weighing the arguments, decided not to place any significance to it one way or the other. He was entitled to do that and we have no reason to disturb the exercise of his discretion.

In the result we are not persuaded that we ought to interfere with the decision of the learned single Judge of this Court and we dismiss the application with costs.

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

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR