



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Application 218 of 2005

KISSI PETROLEUM PRODUCTS LTD. APPLICANT

AND

KOBIL PETROLEUM LTD. 1ST RESPONDENT

FIDELITY COMMERCIAL BANK LTD 2ND RESPONDENT

CO-OPERATIVE BANK OF KENYA 3RD RESPONDENT

(Application to seek extension of time to validate notice and record of appeal of the applicant’s existing appeal from the decision of the High Court of Kenya at Nairobi

(Osiero, J) dated 3rd April, 2003

in

H.C. Winding Up Cause No. 35 of 2002)

RULING

This application by way of notice of motion dated 25th July, 2005 is brought pursuant to **rules 4, 42 and 43** of the Court of Appeal Rules (the “**Rules**”). It is seeking two orders which are that:

“1. The period for filing and serving the Notice of Appeal and Record of Appeal against the decision of Hon. Justice J.L.A Osiero delivered on 3.4.03 in Nairobi – Milimani Winding Up Cause No. 35 of 2002 – in the matter of Kissi Petroleum Products Ltd, be extended so that the Notice of Appeal filed herein and dated 10.4.03 and the Record of Appeal filed herein and lodged on 26.6.03 are deemed to have been properly filed and served.

2. Costs of this application be in the appeal.”

The circumstances giving rise to this application as are revealed by the record are briefly that in a plaint filed in court on 11th December, 2002, the respondent in this application, Kobil Petroleum Limited claimed **Ksh.154,148,401.29** from the applicant in this application, Kissi Petroleum Products Limited. The applicant filed memorandum of appearance but immediately thereafter the respondent filed a notice of motion under **Order 35 rules 1 and 2** of the Civil Procedure Rules seeking summary judgment as prayed in the plaint. The applicant later filed defence and counter-claim to that suit. Ringera, J. (as he

then was) heard the application and in a fairly lengthy ruling allowed it and a summary judgment was granted together with costs. Armed with that judgment, the respondent commenced winding up proceedings against the applicant by way of Winding Up Cause No. 35 of 2002. That petition came up for hearing before the superior court (Osiero, J) who after hearing it granted it and ordered that the present applicant company be wound up by the court under the provisions of the Companies Act and the official receiver was appointed as the provisional liquidator. That order was given on 3rd April, 2003. The applicant felt aggrieved and intended to appeal against the same ruling and order. The applicant, it would appear from the record, also intended to appeal against the order for summary judgment granted by Ringera J, (as he then was) and filed an application for extension of time for filing and service of notice of appeal and record of appeal from the same ruling but that is not before me.

Back to winding up cause. As I have stated, the applicant wanted to appeal against the decision of Osiero, J. It filed through its advocates, M/S Otieno, Ragot & Company, notice of appeal dated 10th April, 2003 on 11th April, 2003. That notice of appeal is filed in the name of Kissi Petroleum Limited which name is different from the applicant's full name. The effect of that on the entire appeal is again not for me to decide in the application before me. Before filing the same notice of appeal, and on the very date of the ruling delivered by Osiero, J., i.e. 3rd April, 2003, the applicant wrote a letter to the Deputy Registrar, High Court of Kenya at Milimani seeking certified/uncertified copies of the proceedings and ruling for purposes of appeal. I will revert to that letter later in this ruling. One believes that the Registry supplied the same proceedings or ruling, for the applicant later filed Civil Appeal No. 144 of 2003 which was filed after the prescribed time. I say one believes the proceedings were supplied because there is no certificate of delay to go by. Be that as it may, after the memorandum and record of appeal were filed, the respondent by way of notice of motion dated 25th July, 2003 filed an application seeking to strike out the same appeal on grounds that the appeal had not been filed within the time limited by **rule 81(1)** of the **Rules**. In the short affidavit sworn by the respondent's learned counsel, A.A.K. Esmail, the respondent maintained that its firm of advocates had not been served with nor had they received a copy of any request in writing which the applicant might have made to the court for proceedings in winding up cause. The third respondent in the appeal, the Co-operative Bank of Kenya Limited, also swore an affidavit through their counsel, J.M. Ohaga, also stating that they never received any copy of a letter (if any) seeking proceedings and ruling from the Deputy Registrar. In short, the two respondents, the first of whom was the applicant in that application to strike out the appeal, were stating that the applicant in this application, Kissi Petroleum Products Limited, had not complied with the provisions of **rule 81(2)** that would entitle an appellant to benefit from the proviso to **rule 81(1)** and so **rule 81(1)** would be applied to its appeal and if that was done, then the memorandum and record of appeal which were filed out of time would not be valid. Thus, the validity or otherwise of the appeal and by extension the notice of appeal (even if filed in time) depended on whether the appellant was entitled to benefit from the provisions of **rule 81(2)** i.e. whether a letter seeking copies of proceedings and ruling was written and whether the letter was sent to the respondents.

In reply to that application, the applicant's learned counsel, J.T. Ragot, swore an affidavit stating that copies of the letter they wrote to the Deputy Registrar, seeking copies of proceedings and ruling were served upon the respondents. He also caused the alleged process server, Michael Mwangi, who allegedly served it, to swear an affidavit to that effect. They exhibited copies of the same letter showing that the same were copied to the respondents' advocates. The respondents' advocates, seeking to unearth the whole truth swore a replying affidavit after correspondence with the applicant's advocate and after a search in the registry and particularly in the relevant file. In the correspondence which were all annexed, the applicant's advocate together with Mwangi both maintained that the letter in question was served upon the first respondent's firm on 3rd April, 2003 between 9.30 a.m. and 11.00 a.m. The respondent's learned counsel after all these filed an affidavit demonstrating, first, that the letter that was written by the learned counsel for the applicant dated 3rd April, 2003 seeking copies of the proceedings and ruling could not have been the letter copies of which were exhibited by the applicant and that the actual letter that was at the registry was not copied to the respondents and therefore could not have been sent to them let alone being served (which is not in any case a requirement of **rule 81(2)**). Secondly, the copy of the cause list for the proceedings in court on 3rd April, 2003 showed clearly that the ruling in respect of Winding Up Cause No. 35 of 2002 was listed for delivery at 2.30 p.m. and thus must have been delivered at that time

or thereafter but certainly not in the morning hours and thus a copy of a letter written in respect of an intention to appeal from the same ruling would not have been served or sent to the respondent in the morning of that day as that would have been against the order of nature. Faced with those facts, the applicant decided to file this application.

The affidavit in support of the application is sworn by the learned counsel for the applicant, Mr. Ragot, and at paragraph 19, of the same affidavit, Mr. Ragot states as follows:

“19. THAT I verily believe that the process server had carried out my instructions and affected service of the letter requesting for proceedings on the respondents, but in view of the documents and affidavit of Esmail Advocates for the 1st Respondent disputing that service there appears to be several contradictions over the issue of service and I have no reason to doubt Mr. Esmail’s contention disputing service and accordingly I have opted to seek extension of time to validate the existing Notice of Appeal and Record of Appeal to eliminate any doubt, if any on the issue of service of that letter on the respondents.”

The first respondent opposed the application and filed replying affidavit sworn by its learned counsel, Mr. Esmail. Several documents were annexed to the same affidavit.

Before me, Mr. Chacha Odera, the learned counsel who appeared for the applicant, readily admitted that the applicant’s advocate had made a mistake in his conduct but argued that such a mistake being by an advocate should not be visited upon the applicant. Mr. Esmail, on the other hand, contended that there was no genuine mistake made but that all there was was an advocate coming before court with unclean hands and thus deserved no equitable remedies. He went further to submit that in the entire affidavit, no explanation was given for the delay which was a delay for over two years.

The law as regards the principle to be applied when considering applications brought under **rule 4** of the **Rules** is now well settled. A summary of it is contained in Lakha, J.A’s (as he then was) observation in the case of **Major Joseph Mweteri Igwate v. Muhura M’Ethare & Attorney General – Civil Application No. Nai. 8 of 2000 (unreported)** where he stated as follows:

“The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance to them.”

The above factors are not in any way exhaustive. I agree with Waki, J.A on his comments in the case of **Kagai Kimomori Watatua vs. Ngatia Kareko – Civil Application No. Nai. 77 of 2005** where he stated:

“The discretion under Rule 4 is unfettered and there is no limit to the number of factors that the court will consider.”

In my mind, the factors stated by Lakha, J.A (as he then was) above are guidelines that would help the court in the exercise of its discretion for as is now accepted along the corridors of justice, any discretion granted to the courts or to any tribunal or any body exercising judicial or *quasi* judicial authority even though unfettered, must be exercised on reason and not caprice and the exercise must not be arbitrary or oppressive. (see the case of **Samken Limited and another vs. Tussel and another (1999) LLR 898 (CAK)**). I would add that the explanation that would entitle a party to the benefits of **rule 4** of this Court’s Rules must be genuine explanation based on facts and not any fabricated stories put together to fit

a situation for it is now trite law that he who comes for equity must come with clean hands and **rule 4** being a rule that provides for equitable remedy can only be sought by a party who bases his explanation on a genuine story whether mistake or otherwise.

It is with the above principles in mind that I now consider this application before me. The ruling from which the appeal is being preferred was delivered on 3rd April, 2003. Notice of appeal was filed on 14th April, 2003. That was within the time prescribed. The memorandum and record of appeal which were to be filed sixty days thereafter (**rule 81(1)**) were filed on 26th June, 2003, a few days after the time prescribed. They were thus filed out of time and without leave of the court. This was on grounds that the appellant believed it was a beneficiary of the proviso to **rule 81(1)** of the **Rules** as its advocates had obtained copies of proceedings and of the ruling late but had requested for the same vide a letter dated 3rd April, 2003 which letter according to the applicant's original stand, had been copied to the respondents and served upon the respondents through its process server, one Michael Mwangi. There is no copy of certificate of delay in the record before me and I am therefore unable to state for certain as to whether the court acted on that letter. In any case, there are two sets of copies of letters dated 3rd April, 2003. One set annexed by the applicant indicates that the letter was copied to the respondent whereas the other set annexed by the first respondent was not copied to anybody at all. The applicant has accepted the respondent's version (see paragraph 19 of Ragot's affidavit referred to above). That in effect means that the notice of appeal was filed in time but the memorandum and record of appeal were filed out of time. The applicant's counsel says he believed all the time that they were filed in time as he believed he was beneficiary of the proviso to **rule 81(1)** as the delay was caused by delay in supplying him with copies of proceedings and ruling for which he had requested in time and copied the letter of request to the respondents. He has now learnt that the facts upon which he based that belief did not exist and so he now wants to put the record straight by having the notice of appeal and record of appeal validated. The delay period is in my calculation from 14th April, 2003 when he filed the notice of appeal to 28th July, 2005 when this application was lodged. That is a period of two years. On the other hand, even assuming that the applicant's counsel was not aware of the problem with his appeal, he still knew or ought to have known about it, i.e. about lack of compliance with **rule 81(2)** of the **Rules** on or about 25th July, 2003 when the first respondent filed notice of motion seeking to strike out the appeal on that same ground that the letter seeking copies of proceedings and ruling which could have given the applicant the benefit of proviso to **rule 81(1)** was not served or forwarded to the respondents. I want to state here that both parties seem to have acted on the erroneous belief that that letter under **rule 81(2)** was to be served upon the respondents or that the applicant had a duty to prove that the respondent received it. In my mind, that letter need not be served and **rule 17(5)** of the **Rules** is very clear that such a letter, "**may be sent by hand or by registered post.**" There is clear difference between service and "sending". Be that as it may, even calculating the delay period from that time i.e. about 25th July, 2003 when the first respondent sought striking out of the appeal, still the delay period in question is about 2 years. That is the period that the applicant needed to explain. Its explanation is that its counsel believed the letter under **rule 81(2)** was served upon the respondents. In my mind, and noting that the applicant has not disputed the copies of the letters annexed by the first respondent in their affidavit in reply and marked "**A**" and has not disputed the allegations backed by the annexed copy of the cause list which clearly shows that the copies annexed by Mr. Ragot could not have been served or forwarded to the first respondent in the morning of 3rd April, 2003 as the ruling that they were challenging was actually delivered in the afternoon of that same day clearly after 2.30 p.m. and not before, I cannot consider the explanation of the applicant's counsel as genuine. I think, I am being kind when I say the applicant's counsel cannot be said to have been candid with the Court. As he admits, the letters that he wrote to the court seeking proceedings and ruling were not copied to the respondents (see copies annexed by the first respondent and marked "**A**"). As I have stated above, an attempt to mislead the court cannot amount to a genuine explanation of a delay. The applicant's explanation that the delay was over the contradictions and confusion as to whether the same letter was served or not can at best be termed as self made. Self made in that he wrote a letter seeking copies of proceedings and ruling on 3rd April, 2003. That letter was not copied to the respondents (see exh. **A** in the first respondent's Replying Affidavit). He filed notice of appeal in time but having received proceedings, he proceeded to file memorandum and record of appeal which he filed out of time oblivious of the earlier omission to seek the benefit of proviso to **rule 81(1)**. On the first respondent filing an application to strike out the appeal, the appellant's counsel, instead of coming clean of it all and accepting

that an essential step had not been taken in the matter, prepared a letter showing that it was copied to all the respondents and he then swore an affidavit and convinced one Michael Mwangi to swear false affidavit that the letter was served. This became their stand in defending the application for striking out the appeal till the first respondent confronted them with hard facts showing that the letter seeking copies of proceedings and ruling was not copied to the respondents and could not have been served at the time they were alleging in their affidavits. That is the time they came to their senses but again they did not act immediately. They delayed for another two months. It is my view that confusion or contradictions on service of the letter seeking proceedings and ruling cannot be cited as genuine explanation for the delay in filing the record of appeal. What other explanation is there? None has been offered and on my own, I can see none. In my view, the applicant has only itself and its advocate to blame. If they had taken early action when that matter of non receipt of the letter under **rule 81(2)** was raised by the first respondent on 25th July, 2003 and made appropriate application, they would have saved the day. However, as matters stand, the applicant's advocate sought to risk it by being non candid, and the applicant cannot benefit from the unfettered discretion of the court as equity is only for those that come to court with clean hands. In the case of **Mutiso vs. Mwangi (1999) 2 EA page 231**, this Court stated as follows:

“In our judgment, with respect, the period of delay of almost three and a half months, on any view of it, is substantial. In Samkan and another v. Tussel and another (1999) LLR 898 (CAK) this Court found a delay of about three months long. In Ravashdeh v. Lane (1988) 40 Eh 100, a delay was said to be much longer – it was six months in fact. In addition there is no explanation for the delay. None is put forward in the affidavit of the applicant

Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.”

Even if I were to calculate delay from 13th May, 2005 when the first respondent's replying affidavit was filed to the date of filing this application on 28th July, 2005, there is still over two months unexplained delay. Whatever the applicant may say, as at the date of the replying affidavit, it knew from the annexures to that affidavit, that its letter of 3rd April, 2003 was never copied to the respondents and never sent to the respondents.

In my view, a party whose advocate makes genuine mistake should not suffer but to benefit a party whose advocate is clearly non candid with the court would amount to a party benefiting from the “proceeds” of what is close to contempt of court. That would be wrong.

I think I have said enough to indicate the direction this ruling is taking. I need however to comment on the other aspect all be it briefly. The notice of appeal together with record of appeal are already before the Court. Notice of appeal was in fact properly filed but as a result of the late filing of the record of appeal without taking an essential step – namely availing to the appellant the benefits of proviso to **rule 81(1)**, the entire appeal may very well face a problem and hence this application to validate the same. This might suggest that I am being asked to treat the notice of appeal on record as withdrawn. I cannot do that as that is what only a full bench of this Court can do and not a single Judge.

The second aspect that I need to comment on briefly is that in this matter, the applicant is seeking that I extend the period for filing and serving the notice of appeal and record of appeal so that the notice of appeal dated 10th April, 2003 and filed already and record of appeal filed and lodged on 26th June, 2003 are deemed to have been properly filed and served. That, in my humble view, would have been validly done only if the letter seeking copies of proceedings and ruling had been copied to the respondents and shown to have been sent to the same respondents. In this case, however, upto the hearing of this application, no such copies had been sent to the respondents. (See also affidavit of John Morris Ohaga for the third respondent). This in effect means that none of the respondents has formally had copies of that letter sent to them. To validate the dates when the record of appeal was filed would mean ignoring that aspect and making the applicant benefit notwithstanding the omission. That to me is not justice which must underlie the entire exercise before me.

Lastly, I have no doubt at all as this Court did find earlier that the applicant's appeal is not frivolous, but that, in my mind is no good reason why rules should be trampled and ignored altogether. Rules of procedure are meant to be obeyed as without them, there would be no route to reach justice. In any case, for a court of law to ignore glaring aspects of what would very well amount to attempts to mislead the court by an officer of the court, would mean encouraging a state of lawlessness where the more non candid a party is the more successful in court he becomes. I cannot be a party to that state of affairs.

This application cannot therefore succeed. It is dismissed with costs to the first respondent. As the other respondents though served, did not file any replying affidavit to this application nor did they appear for hearing, I will make no order for costs in their favour.

Dated and delivered at Nairobi this 10th day of March, 2006.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR