



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 316 of 2005**

PRADIP KUMAR VASANT BHAI PATEL1ST APPLICANT

MOHINI HARDWARE LIMITED2ND APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED1ST RESPONDENT

TITUS KILONZO MUTUA T/A MBWALA AGENCIES2ND RESPONDENT

HELLEN NGINA KAATINE3RD RESPONDENT

MBWALA AGRO SUPPLIES LTD4TH RESPONDENT

GLADYCE LANGAT5TH RESPONDENT

CHRIS A. ABELE T/A ABELE & CO. ADVOCATES6TH RESPONDENT

ERIC MUTISYA MUSYOKI7TH RESPONDENT

JOSHUA IKATAI KIMEU8TH RESPONDENT

PAUL MUHOKA MBOLE9TH RESPONDENT

DAVIS MAINA MAHINDA10TH RESPONDENT

CYRUS N. MBUGUA11TH RESPONDENT

CO-OPERATIVE BANK OF KENYA LTD12TH RESPONDENT

BARCLAYS BANK OF KENYA LTD13TH RESPONDENT

STANBIC BANK KENYA LTD14TH RESPONDENT

AFRICAN BANKING CORPORATION LTD15TH RESPONDENT

STANDARD CHARTERED BANK KENYA LTD16TH RESPONDENT

(An application for leave to dispense with service of all the documents Relating to this appeal on the

respondents from the judgment and decree of the High Court of Kenya at Milimani Commercial Courts (Mr. Justice P. J. Ransley) dated 21st October, 2005

in

H.C.C.C. NO. 507 OF 2005)

RULING

On the 21st October, 2005 the superior court (P.J. Ransley J as he then was) delivered a Ruling in High Court Civil Case No. 507 of 2005.

The plaintiff in that case was the Kenya Commercial Bank Limited (hereinafter “KCB”). There were 17 defendants of which the 11th and 12th defendants were Pradip Kumar Vasant Bhai Patel (hereinafter “Mr. Patel”) and Mohini Hardware Limited (hereinafter “Mohini”).

The Ransley J Ruling arose from what was described by the superior court as “*an omnibus application of 16th September, 2005in which the applicant KCB seeks order (sic) against the various respondents herein for injunctive relief.*” The application against the 11th and 12th defendants, Mr. Patel and Mohini, sought an order that:-

“13. (a) pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the 11th and 12th defendants and their respective agents from dealing or gaining access to their accounts held with the plaintiff as follows:-

“.....11th defendant ... Kitengela Branch Account No. [particulars withheld].

12th defendant Kitengela Branch Account No. [particulars withheld].”

The superior court granted the orders sought with costs in the cause.

Mr. Patel and Mohini, gave Notice of Appeal dated 31st October, 2005 lodged in the High Court on the same date against the whole decision, ruling and order of Ransley J.

On 20th November, 2005 Omangi, Musanga & Company the advocates for Patel and Mohini lodged in the Court of Appeal Registry at Nairobi a “*Notice of Motion Ex-Parte*” (**Rule 76** of the Court of Appeal Rules) dated 3rd November, 2005.

The relief sought in the Motion was “*that leave be granted to the applicant to dispense with service of the documents relating to this appeal upon the defendants and for an order that the costs of an (sic) incidental to this application do abide the outcome of the said appeal.*”

The grounds stated in the Motion were:-

(a) That the 2nd respondent to the 16th respondent did not take part in the proceedings in the superior court the subject of this appeal.

(b) That no prejudice will be caused by the dispensation of service upon them.

The application was supported by the affidavit of Mr. Jonathan Omangi Esq., dated 3rd November, 2005 which reads as follows:-

1. *That I am an advocate of the High Court of Kenya practicing as such in the firm of Messrs Omangi, Musanga & Company Advocates for the applicants and authorized by the applicants to swear this affidavit.*
2. *That I reside and carry on my practice in Nairobi.*
3. *That I have the conduct of this matter on behalf of the applicants.*
4. *That I conducted this matter in the superior court when we were ordered to proceed as we indicated we were ready to proceed.*
5. *That on the day we proceeded with the application, we were the only party that took part in the proceedings with the rest of the defendants opting to take other dates. The result of the proceeding was that a ruling was delivered granting the injunctive relief to the respondent herein the subject of an intended appeal. Annexed is a copy of ruling marked "JA 1".*
6. *That it is therefore clear the rest of the defendants numbering 15 did not take part for various other reasons save the applicant.*
7. *That as each individual was sued on a distinct cause of action in different circumstances, the outcome of the intended appeal and application is not likely to adversely prejudice their interest.*
8. *That it is in the interest of justice that service of all the documents relating to this appeal on the rest of the defendants be dispensed with as no prejudice will be occasioned to it by its failure to serve the said defendants.*
9. *That I swear this affidavit in support of the application filed herein.*
10. *That what is stated hereinabove is true to the best of my knowledge, information and belief.*

The ex-parte application under **rule 76** came for hearing before me on 20th February, 2006. Mr. Omangi stated that he had just realized that the Notice of Appeal was not on the record of the application under **rule 76** although it was in the record of appeal.

He applied for leave to file a supplementary affidavit exhibiting the Notice of Appeal. I granted to him leave to file the supplementary affidavit on that day and adjourned the hearing of the application to the following day being 21st February, at 9.00 a.m. The supplementary affidavit exhibiting the Notice of Appeal was sworn and filed on 20th February, 2006.

When hearing resumed before me on 21st February, 2006. Mr. Omangi stated that he had now realised that his application by Notice of Motion dated 3rd November, 2005 under **rule 76(1)** had not been **lodged** within the 7 days from the date of **lodging** the Notice of Appeal on 31st October, 2005, which 7 days expired on 7th November, 2005. Mr. Omangi informed me that he intended to file an application under **rule 4** for an extension of time to enable the existing Notice of Motion lodged on 22nd November, 2005 to be deemed to have been filed in time. He further requested that hearing of the **rule 76** application lodged on 22nd November, 2005 be adjourned to a date to be fixed at the Registry. I acceded to this request and it was so ordered.

The application under **rule 4** which Mr. Omangi had indicated on 21st February, 2006 he would be filing was dated and eventually filed on 4th July, 2006. This is the application now before me.

The total length of delay sought to be excused by a grant of extension of time is from 7 days after the lodging of the Notice of Appeal which takes us to 7th November, 2005 to the date of lodging the current application for extension on 4th July, 2006. This is a period of approximately 133 days or about 7

months. This is a long period of delay especially as much of the delay, was after the applicant's advocate had become aware of the problems on 21st February, 2006 four months prior to the eventual filing of the application for extension.

The reasons for the delay were mistakes by Mr. Omangi in not appreciating that the 7 day limit applied and that it ran from the lodging of the Notice of Appeal. The delays after 21st February, 2006 were stated by Mr. Omangi from the bar to have been occasioned by the Registry informing him that he could not file any further application for extension until the application for leave to dispense with the service of the record of appeal on the fifteen respondents other than the KCB had been granted. If the Registry did so inform Mr. Omangi the information would appear to have been mistaken.

The chances of the application under **rule 76** succeeding would be strong, in the circumstances of this case in which none of the respondents other than KCB took any part in the superior court proceedings and the KCB represented by Miss B. N. Kamau were not opposing the application. The expense and probable further waste of time in serving all the other respondents would be substantial and there does not appear to be any prejudice to the parties intended not to be served.

Having taken all of the above into consideration I have decided, in the exercise of my unfettered discretion under **rule 4** of the Court of Appeal Rules which I have exercised judicially, that this is a case in which the extension of time should be granted.

I therefore order that time is hereby extended by sufficient time to result in the application under **rule 76** of the Court of Appeal Rules dated 3rd November, 2005 being deemed to have been filed in time. Since the necessity for this application resulted from mistakes made by the applicants I make no order for costs of the application.

Dated and delivered at Nairobi this 14th day of July, 2006.

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR