



**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**CIV APPLI 211 OF 2006**

**NATIONAL BANK OF KENYA LTD. .... 1<sup>ST</sup> APPLICANT**

**GRAHAM J.G. SILCOCK ..... 2<sup>ND</sup> APPLICANT**

**NAVAL J.N.G. SOOD ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KISUMU PAPER MILLS LIMITED ..... RESPONDENT**

*(Application for extension of time to file and serve record of appeal out of time in an intended appeal from the ruling and orders of the High court of Kenya at Kisumu (Tanui, J.) dated 18<sup>th</sup> January, 2006*

*in*

**H.C.C.C. NO. 413 OF 2001)**

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**R U L I N G**

The notice of motion before me seeks two substantive orders under **rule 4** of the rules of this Court as follows:-

**“1. The time within which to file and serve a Notice of Appeal in an intended appeal against the ruling and orders of the superior court given on 18<sup>th</sup> January, 2006 be extended and the Notice of Appeal filed on 26<sup>th</sup> June, 2006 and served on 29<sup>th</sup> June, 2006 be deemed to have been filed and served within time.**

**2. The time within which the appeal and record of appeal from the ruling and orders of the superior court given on 18<sup>th</sup> January, 2006 is to be filed be extended on such terms as this Honourable Court may deem just and appropriate.**

The second prayer was however abandoned at the hearing of the application and so, only the first prayer remains for consideration.

Shorn of the frills and ugly side-shows which were noted by the superior court in form of pungent literature exchanged between learned counsel on both sides of the matter, the background to the application is fairly straightforward. The applicants in the matter, **M/s National Bank of Kenya Ltd (the bank)** and two of its appointed receivers/managers, were sued in the superior court by **M/s Kisumu Paper Mills Ltd, the respondent**, on account of some charge and debenture instruments purportedly held by the bank over the respondent's property, including **LR NO. KISUMU/KORANDO/4189**, to secure loan

advances in excess of Shs.600 million together with interest thereon at 35% p.a. from *June, 1998*. The respondent asserted that the charge and debenture instruments were defective in law and could not give any legal rights to the Bank over the respondent's property aforesaid. There was no legal basis therefore for the bank to appoint any receivers or threaten to auction the property as they had done. The respondent sought, amongst other prayers, declarations that the instruments be declared null and void, and a permanent injunction to restrain the bank from enforcing the securities. The bank of course insisted that the transactions between them and the respondent were valid and lawful. They had therefore no intention of relenting in the enforcement of their securities. The bank also raised other legal issues in its defence.

The respondent then filed an interlocutory application in *November 2001* seeking a temporary injunction to restrain the bank from selling by public auction or private treaty or otherwise disposing of the property before the hearing and determination of the main suit. Before the hearing of that application for injunction, the respondent filed yet another application under various provisions of the **Civil Procedure Rules**, the **Registered Land Act**, the **Companies Act** and "**all enabling powers of the Court and Provisions of the Law**". That application sought the opinion of the Court on several issues relating to the security documents the subject-matter of the main suit. It also sought orders for cancellation of registration of the securities and the discharge thereof if the court was persuaded about their invalidity. The bank opposed the application but it was granted in a ruling delivered on *24<sup>th</sup> January, 2003* and the parties were directed to file their issues for the Court's opinion. That was done by counsel on both sides and the stage was set for protracted submissions the last of which was made on *2<sup>nd</sup> May, 2005*. The ruling was reserved for *13<sup>th</sup> June, 2005*. It was not delivered as scheduled and the bank's lawyers say they did not hear anything more about it until *April 2006* when they were informed that it had been delivered before Tanui, J. on *18<sup>th</sup> January, 2006*, in favour of the respondent whose advocate was present.

The circumstances leading to the delay in delivery of the ruling without notice to the bank's Advocates were fully examined by the superior court, Warsame J, and he held in his ruling made on *22<sup>nd</sup> June, 2006*, that indeed the applicants were not aware of the delivery of the ruling by Tanui, J. (now retired) on *18<sup>th</sup> January, 2006*. I need not therefore cover that ground again. Warsame J. was considering an application by the bank for extension of time to seek leave of the court to appeal against the ruling of Tanui, J.; leave to appeal against the order ensuing from the ruling; and a stay of further proceedings pending the hearing and determination of the intended appeal. Those orders were granted. Five days after the ruling, the notice of appeal was filed and served on *29<sup>th</sup> June, 2006*. A copy of the proceedings and the ruling was also applied for and has yet to be supplied to them. That is why they abandoned the second prayer in this application.

The notice of appeal was obviously filed out of time, hence the necessity for the application now made before me. The principles upon which I ought to consider the application are well settled and have been restated in many decisions of this Court. I will take it from my decision in **FAKIR MOHAMMED V. JOSEPH MUGAMBI & 2 OTHERS Civil Application No. Nai. 332 of 2004** which was approved by the full Court:-

*"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See **Mutiso vs. Mwangi, Civil Application No. Nai. 255 OF 1997 (ur)**, **Mwangi vs. Kenya Airways Ltd. [2003] KLR 486**, **Major Joseph Mwereri Igweta vs. Murika M'ethare & Attorney General, Civil Application No. Nai. 8 of 2000 (ur)** and **Murai vs. Wainaina (No. 4) [1982] KLR 38.**"*

The delay in this matter, according to learned Counsel for the applicants, Mr. Otieno, was between the *22<sup>nd</sup> of June, 2006* when leave was granted to the applicant to file an appeal and the date of filing the

application for extension of time on 23<sup>rd</sup> July, 2006, which is **30 days**. Learned Counsel for the respondent, Mr. Wasuna, however contends that the delay went back to 26<sup>th</sup> April, 2006 when the applicant's Counsel admittedly received information that the ruling had been delivered on 18<sup>th</sup> January, 2006. In his submission, there was no reason to await for grant of leave to appeal in order to file a notice of appeal. Mr. Wasuna is of course right in that submission as he is borne out by **rule 74(4)** of the rules of this Court which Mr. Otieno appeared to be oblivious about. Mr. Otieno nevertheless explained that he feared that the applicant may be met with an objection that there was no leave granted before the notice of appeal was filed, hence his desire to establish that the intended appeal was meritorious and his frantic efforts to obtain leave between 17<sup>th</sup> May 2006 and 22<sup>nd</sup> June, 2006. When leave was obtained, the notice of appeal was filed and served promptly, albeit out of time. He further explained that it had taken the applicant's advocates considerable time obtaining and perusing voluminous records in order to advise their clients on the suitability of an appeal. In Mr. Otieno's view, the opinions expressed by the superior court (Tanui, J.) on the matter totally ignored the submissions made by the applicants and was against the weight of the facts before the Judge. The Judge also made an error in ignoring the interlocutory application for injunction which the applicants were ready to pursue and instead making an order that the main suit be listed for hearing. Those matters were not frivolous, he submitted, and the applicants would argue them on appeal. The matter was also weighty as it involved a large amount of money owed to a banking institution.

For his part, Mr. Wasuna found no explanation for the delay occasioned between **April** and **June 2006** in which event there was no basis for invoking the discretion of the Court. For that proposition, he cited a line of authorities from this Court. He further submitted that the intended appeal had no merits at all and there was no disclosure of any grounds for challenging the decision by Tanui, J. Finally, he submitted, there was no prejudice caused to any party by the order that the main suit be heard before disposing of the interlocutory matter which was admittedly not prosecuted.

I have considered the matter fully. I am in no doubt, as stated earlier, that there was no need to await the grant of leave before lodging the notice of appeal in this matter and Mr. Otieno was obviously wrong in thinking that he had to await such leave. His view was obviously guided by ignorance of the relevant provision of the rules or an erroneous construction of it. However, I am not prepared to condemn the applicants themselves for such transgression by counsel which may not be pardonable but is nevertheless not unusual. The words of Madan, J.A. in Murai v. Wainaina (No.4) [1982] KLR 38, quickly come to mind:-

***“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”***

I am satisfied that the delay was caused in the erroneous desire to obtain leave to appeal and in perusing the records of the litigation which is evidently protracted. In view of the explanation offered, I do not find the delay inordinate.

As for the merits of the intended appeal which was the other factor raised by the parties, it is not a matter that a single judge must minutely analyse to arrive at a definite view that the appeal will or will not succeed. That is the province of the full Court. I need only be satisfied that there is some material on record to show that the intended appeal is not a frivolous effort. I have looked at the pleadings, the ruling intended to be impeached and the affidavit of the applicant's counsel which discloses some of the grounds that will be urged on appeal, and I am satisfied that the intended appeal would raise serious issues of law which are of public importance, particularly to the banking industry. It cannot also be argued that the final order made in the ruling for the main hearing of the suit without disposing of the interlocutory matter upon which a temporary order of stay had been granted against the applicant, was not prejudicial. At all events, the very fact that leave was granted by the superior court to appeal must of itself indicate that the matter is not frivolous.

For these reasons, I am inclined to exercise my discretion in favour of the applicant and I make the following orders:-

- (1) *The application dated the 24<sup>th</sup> July 2006 be and is hereby granted.*
- (2) *The notice of appeal filed on 27<sup>th</sup> June, 2006 and served on 29<sup>th</sup> June, 2006 be and is hereby deemed to have been filed and served within time.*
- (3) *The costs of the application assessed at Shs.10,000 be personally borne by M/s Otieno Ragot & Company Advocates, for the applicants.*
- (4) *In default of payment of the costs within 14 days, execution for the said costs to issue.*

*Dated and delivered at Kisumu this 1<sup>st</sup> day of December, 2006.*

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**