



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: WAKI, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 332 OF 2004 (NYR. 32/04)

BETWEEN

FAKIR MOHAMED.....APPLICANT

AND

JOSEPH MUGAMBI.....1ST RESPONDENT

WILSON MWONGERA..... 2ND RESPONDENT

HENRY STEPHANO KITHINJI.....3RD RESPONDENT

(An application to file a record of appeal out of time from the judgment of the High Court of Kenya at Meru (Kasanga Mulwa, J.) dated 02.20.03

in

H.C.C.C. NO. 73 OF 1989)

RULING

This is an application made under Rule 4 of this Court's rules ("the Rules") for extension of time to file a record of appeal out of time. The appeal intended to be filed is against the judgment of the superior court in Meru (Kasanga Mulwa J) delivered on 02.10.03 in what is commonly known as "running down" or "road traffic accident" Case. The cause of action arose some 17 years ago on 02.01.1988. It is intended to challenge the quantum of damages awarded by the superior court in the sum of Shs.708,940/=, since the issue of liability was compromised by consent of the parties.

The grounds for seeking the extension are stated on the face of the application as follows: -

"a. Judgment was delivered on 2nd October, 2003.

b. The applicant was not aware of the judgment until the 24th October, 2003 and did not get confirmation of the judgment until 24th October, 2003.

c. The applicant therefore had insufficient time to file the appeal or to apply for the proceedings within the time stipulated under Rule 81 of the Court of Appeal Rules.

d. *The High Court extended the time to file the Notice of Appeal on the 30th June, 2004.*

e. *The notice of appeal was filed on 7th July, 2004.*

f. *Copies of the proceedings were not available until the 3rd September, 2004 and were not received by the appellant's advocates in Nairobi until the 8th September, 2004.*"

The notice of appeal was timeously filed after leave was granted to file it. It meant that the latest time for filing the appeal was 07.09.04 but the record was not filed.

The explanation for failure to beat that deadline is in the affidavit of the applicant's advocate Mr. Kenneth Allison Fraser. He swore that: -

"13. Due to the delay in receiving information regarding the judgment, no application for the proceedings was filed within the time stipulated by Rule 81 of the Court of Appeal Rules.

14. I am informed by Mithega & Company that the application for the proceedings was made by letter dated 28th November, 2003 and followed by reminders on the 30th June, 2004, 7th July, 2004 and 3rd September, 2004.

Copies of the letters are at pages 24 to 27 of the exhibit hereto.

15. The proceedings were not ready until 3rd September, 2004 as shown by the certificate issued by the High Court on 7th September, 2004 a copy of which is at page 28 of the exhibit hereto.

16. My firm received the copy of the proceedings from Mithega & Company on 8th September, 2004.

17. On 24th September, 2004 my firm was informed by Mithega & Company that the decree had not been drawn.

18. My firm drew the decree and letter seeking approval all of which were dispatched to Mithega & Company on 5th October, 2004. My firm is still awaiting the certified copy of the decree."

The decree, I am informed, was ultimately obtained on 20.12.04 while this application was taken out on 11.11.04.

The application was not opposed by counsel for the 2nd respondents but it is vehemently opposed by learned counsel for the 1st respondent, Mr. Kioga. No affidavit in reply has been filed to challenge the facts stated in the supporting affidavit and Mr. Kioga says the facts are not challenged. He however raised some legal points: firstly, that the cause of action in the case arose some 17 years ago and so far one respondent is in liquidation while the applicant has not settled the decretal sum and may meet the same fate. Any further delay would therefore be oppressive and prejudicial to the 1st respondent. Secondly, even if there was extension of time to file the record of appeal out of time, there was no notice of appeal on record since the one filed with leave of court was deemed to have been withdrawn by dint of Rule 82(a) of the Rules. That rule states:

82 "If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time:

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court otherwise orders, be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served;

(b)"

Mr. Kioga finally submitted that, even if the facts deponed to by Mr. Fraser were accepted, they reveal undesirable dilatoriness and laxity on the part of the applicant and therefore the discretion of this court cannot be exercised in his favour.

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 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 Appl. NAI. 255 of 1997 (ur), **Mwangi vs Kenya Airways Ltd** [2003] KLR 486, **Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General** Civil Appl. NAI. 8/2000 (ur) and **Murai v Wainaina** (No 4) [1982] KLR 38.

In view of the uncontroverted facts stated in the supporting affidavit, I am not prepared to say that there was culpable delay on the part of the applicant or his counsel.

I think the purported period of delay complained of by Mr. Kioga is the period between the filing of the suit in 1989 up to the time the notice of appeal was filed in July 2004 which, on the face of it, is a long period. But there is nothing to show that the applicant had anything to do with such delay. Indeed the period cannot fall for consideration in this application since it must have been taken into account when the applicant applied for and was granted leave to file the notice of appeal out of time. The applicant thereafter explains the sequence of events leading to the filing of this application on 11.11.04, including a Certificate of delay in obtaining the proceedings and judgment, and I am satisfied with that explanation. I find no basis in the concern expressed that the applicant may follow the bankruptcy path of the 1st respondent and consequently I do not find the application oppressive. The only legal point raised by Mr. Kioga which is worth considering is the submission that the application would be granted in vain in view of the provisions of **Rule 82(a) (supra)**. No authority was cited to me for that profound proposition, but, for a period of time now, the construction of the rule has not been without difficulty. My efforts at locating an authoritative decision have only unearthed an unsettled construction of the rule and I need only cite some examples.

On 09.03.92, a majority of this Court (Cocker JA and Omolo Ag. JA, Gachuhi JA dissenting) considered the submission by counsel that the provision that a notice of appeal was "deemed to be withdrawn" was mandatory. The majority so agreed, stating through Cockar JA: -

"This is a novel point which I must confess has given me anxious moments. The rule itself, in my view, makes it mandatory for the notice of appeal to be deemed withdrawn by the appellant if the appeal is not instituted within the prescribed period. So, after expiry of 60 days from 28th October, 1987, when the notice of appeal was filed, the said notice of appeal for all purposes was, by virtue of the automatic operation of the provisions of the rule, withdrawn as if by the party itself. Therefore, the copy of the notice of appeal that formed a part of the record of appeal (rule 85 (1)(j) that was lodged on 12th May, 1988, on behalf of the appellant/applicant was a copy of a non-existent notice of appeal. It was a copy of what had by then become a worthless piece of paper in the appeal file. The record of appeal, therefore, was incomplete and the court could not have granted prayer 2 of the said notice of motion application which had prayed that the appeal filed on 12th May, 1988, be deemed to have been filed within time. How can the court make an order that an incomplete record of appeal be deemed to have been filed within time?"

To my mind the practical effect of the automatic withdrawal envisaged in rule 82(a) is that an appellant who has filed the notice of appeal and has not instituted an appeal within 60 days thereafter is debarred from taking any further steps in pursuit of his appeal. Any application or document filed, thereafter, will not be deemed to be properly before the court. The only way left for the appellant who thereafter wants to pursue the appeal would be for him first to

have a proper and competent notice of appeal filed, obviously on order of the court.”

That was in **Kamau Kibunja v Noordin Construction (k) Ltd** C.Appl. NAI. 172/88 (UR).

Several years later on 18.02.98 and without making reference to that Court’s majority decision, a single judge (Kwach J.A) expressed an opposite view in **Bullion Bank Ltd v Fulchand Manek & Brothers Civil Appl. NAI 239/97 (ur)** thus: -

“Mr. Sheth for the respondents submitted that by the time the Notice of Motion was taken out on 11.9.97, the Notice of Appeal had lapsed and was deemed to have been withdrawn under rule 82 of the Rules, but I do not agree because a notice cannot be deemed to have been withdrawn without an order of the Court to that effect”.

On 04.06.99, another single judge (Omolo J.A) without making reference to those earlier decisions, held that the withdrawal was not automatic. That was in **Dolphin Palms Ltd vs Al-Nasibh Trading & Co. Ltd & 2 others, Civil Appl. NAI. 112/99 (UR)** where he stated: -

“The prayer is that I should extend time to enable the applicant file a notice of appeal. There is, in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single judge; that is a province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 52 (b) an application to strike out a notice of appeal can only be heard and determined by the Court, not by a single judge. By deeming a notice of appeal to have been withdrawn, the single judge may well be usurping the powers reserved for the Court.”

That decision was referred to the full Court (KWACH, LAKHA, BOSIRE JJ.A) which Court in a decision made on 27.01.2000, agreed with Omollo JA and stated: -

“Regarding the submission by Mrs. Gudka, Counsel for the applicant, that the notice of appeal dated 31st July, 1997, was deemed to have been withdrawn under rule 82 of our rules, the learned single Judge ruled that an order of a full bench was necessary to either so declare or to strike it out. In his view before such an order was made he could not properly deem a notice of appeal to have been withdrawn and proceed to act as though there was in fact no notice of appeal.

It is against those holdings that this reference has been made.

Before us, Mrs. Gudka, submitted, on the main, that a plain reading of rule 82 shows that no declaration is necessary before a notice of appeal is deemed to be withdrawn, provided that default in taking the essential step on record is shown. She cited two decisions of this Court in support of her submission to wit Attorney General v. Kamlesh Mansukhlal Damji Pattni and 2 Others (Civil Application No. NAI.59 of 1999) (unreported), and Gibson Mugwe Murathi v. Wangari Kanyiri and Another, (Civil Application No. NAI.343 of 1996) unreported. With due respect to learned Counsel the two decisions are not in point.

As rightly pointed out by Mr. Khatib, for the first respondent, the court must be moved to make the order declaring a notice of appeal “deemed to have been withdrawn.” Rule 82, in pertinent part, provides that:-

.....

We concede there is no express provision requiring a party to move the Court in that regard, however, a careful reading of rule 82 clearly reveals that such an application is necessary.

The phrase “unless the court otherwise orders....” clearly shows that a court order is necessary and such order can only be validly made by a full bench in an application brought under rule 80 of the Court of Appeal Rules.”

That was a holding in direct conflict with the earlier decision of the same Court in the Kamau Kibunja case (supra) and therefore when subsequently a single judge (Lakha JA) considered the same rule in the Major Joseph Mweteri igweta case (supra) on 29.06.2000, he chose to follow the Court’s decision in the first case, the Kamau Kibunja case, reasoning: -

“On this state of the authorities, the existence of two conflicting decisions of the court, in my judgment, meant that I was entirely free to choose between them and did not have to start with any preference for one over the other. This is particularly so when the second decision of the Court was given as was the case in ignorance or forgetfulness of the first and the first decision had not been fully considered in the second.

I am not convinced on a fuller consideration and reflection that the first decision of the Court was wrong. In the circumstances, I need say only that I propose to follow and apply the first decision of the Court.”

Unfortunately none of all those decisions was cited before O’Kubasu JA in the latest decision available to me, made on 30.05.03. The single judge in K & K Amman Ltd vs Mount Kenya Game Ranch & Others (2003) 1 EA 106, stated: -

“since the applicant did not lodge its record of appeal within the appointed time, the notice of appeal must be deemed to have been withdrawn pursuant to rule 82(a) of the Courts Rules.”

In such state of affairs which provides no conclusive or binding decision, and since I cannot overrule the construction placed on **Rule 82(a)** by the full Court, I will follow the decision that commends itself to me. In making that decision I am guided by the provisions of **Rule 81** which allows the institution of a valid appeal record within 60 days of lodging the notice of appeal or, subject to compliance with the proviso thereto, any time beyond the 60 days after excluding the period required for preparation and delivery of copies of proceedings in the superior court. A certificate of delay from the registrar filed with the record is sufficient and the appellant need not make any application for extension of time. In my view, a construction of **Rule 82(a)** which would automatically deem the notice of appeal as automatically withdrawn would make nonsense of such a useful provision that is tailored towards saving the time of the parties and the Court. Furthermore **Rule 80** was amended on 04.07.2002 to shorten the period within which a respondent to the appeal may apply to strike out the notice of appeal if, amongst other things, there is reason to believe that the record of appeal was not being filed expeditiously. That would be the right and just moment when the Court would consider the validity of the notice of appeal and the order as to costs if the notice is deemed as withdrawn or struck out. It is instructive that there is no single rule allowing a party to withdraw a notice of appeal. Such reasoning obviously leads me towards the construction followed by the full Court in the Dolphin Palms Ltd case (supra).

Having said that, I venture to suggest that it is time the Rules Committee put an end to the uncertainty surrounding the construction of Rule 82(a). The upshot in this application is that the objections raised by Mr. Kioga are overruled and the application is granted as prayed. The record of appeal shall be filed and served within 14 days. Costs of the application shall be in the intended appeal.

Dated and delivered at Nyeri this 10th .day of June, 2005.

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR