REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOI, O'KUBASU & WAKI, JJ.A)
CIVIL APPEAL (APPLICATION) NO. 21 OF 2004
BETWEEN

KALI SECURITY CO. LIMITED ….……...……..……APPELLANT

AND

PATRICK MUREITHI …….……...……..RESPONDENT

(An application for extension of time to file a notice of appeal

out of time arising from the judgment of the High Court of Kenya at Kisumu (Tanui, J.) dated 23.05.03
in
H.C.C.C. NO. 458 OF 2001)
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RULING OF THE COURT

The application dated 2nd March 2004 is for dismissal. It was filed within the main appeal by the respondent seeking an order under Rule 80 of the Rules of this Court that the main appeal be struck out. The sole reason given for seeking the order is that the record of appeal was filed out of time without leave of the court.

Rule 80 which is invoked states: -

"A person affected by an appeal may, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

"Provided that an application to strike out a appeal or an appeal shall not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the respondent."

The record of appeal complained about was served on the respondent on 03.02.04 and the application was filed on 01.03.04. The proviso to Rule 80 was thus complied with.

The background to the application is this:

The superior court delivered judgment in the suit between the parties on 23.05.03. It was a claim for Shs.773,414/= being repair charges and other losses incurred when a motor vehicle belonging to the respondent here (the plaintiff in the superior court) was stolen and subsequently recovered in a severely burnt state. The respondent had blamed the appellant here (the defendant) for neglecting their duty to

guard and secure the vehicle. The superior court (Tanui, J.) found for the respondent and entered judgment for him accordingly.

Ordinarily, if the appellant was desirous of challenging that decision, it should have filed a notice of appeal within 14 days, i.e before 07.06.03; and served such notice within seven days after lodging it. Those are the provisions of *Rules 74(1)* and *76(1)* respectively. Again, ordinarily, the appeal should have been filed within 60 days of the date on which notice of appeal was lodged. That is Rule 81 of the Rules. That timetable was however not complied with by the appellant here. There was no notice of appeal lodged within 14 days or any record of appeal 60 days thereafter. The appellant therefore filed an application before a single judge of this Court under Rule 4 for extension of time to file the notice of appeal. There was no prayer for extension of time to file the record of appeal. That application came before O'Kubasu J.A who accepted the explanation that the appellant was not aware of the date of delivery of judgment by the superior court and had not inordinately delayed the application when he became aware of the judgment. In allowing the application the learned single Judge state: -

"The applicant has demonstrated that it wishes to exercise its right of appeal. That right cannot be exercised without a Notice of Appeal which Notice could not be filed in time for reasons already stated in this ruling. This application under Rule 4 of the Court's Rules is properly before me. It was brought without delay. The applicant has adequately explained why the Notice of Appeal could not be filed within the prescribed period. Clearly, the ends fo justice dictate that this application ought to be granted."

Leave was granted to file the notice of appeal within 7 days from the date of delivery of the ruling, i.e 15.11.03. The order was complied with and the notice of appeal was filed on 01.12.03. There is no complaint that it was not unduly served. On 29.01.04, the appeal was filed, that is within 60 days of the filing of the notice of appeal. The respondent however says it is an invalid appeal because leave of court was necessary.

In urging us to reject the appeal on that ground, learned counsel for the respondent Mr. Ragot relied on three decided matters. One was Wambua Mulili vs District Commissioner of Kitui & Anor C.Appl. NAI 3/99 (ur) where a notice of appeal was timeously filed after delivery of the superior court's judgment but the filing of the record of appeal was inordinately delayed. The appellant then sought extension of time to file the record of appeal but the single Judge (Kwach, J.A) rejected it for the reason that there was no valid notice of appeal, the earlier one having been deemed to have been withdrawn under Rule 82(a) when the appeal was not filed in time. He stated: -

"There is a second reason why the application must fail. In the Notice of motion the applicant only seeks an extension of time to lodge a record of appeal. The time stipulated under the Rules for lodging an appeal having passed, there is no valid notice of appeal in existence. So even if I had found the delay could be excused, it would have been pointless of appeal".

The second case was similarly decided on the basis that there was no valid notice of appeal on record and it was futile therefore to grant an application for extension of time to file a record of appeal. It was Major Joseph Mweteri Igweta vs Mukura M'Ethare & Anor Civil Appl. NAI. 8/00 (ur) where an earlier appeal had been struck out and extension of time was sought and granted to file a fresh notice of appeal. When further extension was sought to file the record of appeal out of time the issue arose as to whether the notice of appeal filed was valid. The single Judge, Lakha, J.A stated: -

"But one point which has caused me considerable difficulty is the contention that there was no subsisting valid notice of appeal. I now turn to consider rule 82 of our rules which was relied on in support of this contention".

So that in those two cases, the legal issue involved was whether a notice of appeal, having been validly filed, becomes automatically withdrawn by dint of *Rule 82(a)* if no record of appeal is timeously filed. The rule has its own peculiar difficulties in construction with conflicting decisions recently highlighted in Fakir Mohamed v Joseph Mugambi & 2 others, Civ. Aappl. NAI. 332/04 (Nyr. 32/04)(UR) (Waki, J.A).

But both cases are distinguishable from the present case where the record of appeal was filed within 60 days of the lodging of a notice of appeal. The third authority is equally inapplicable and furthermore the expressions of the court were made in obiter dicta..

It was Ithangi Gitonga vs Continental Credit Finance Ltd. & anor Civil Appli. NAI. 203/99 (Nyr.15/99) (ur) where a single Judge rejected an application for extension of time to file a notice of appeal because it was inordinately delayed and the explanation for the delay was not acceptable. On a reference to the full court, the single judge was upheld and the application was dismissed. But the court then stated, obiter,

"But the factor that obviously weighed quite heavily on the mind of the learned single judge was that the letter bespeaking copies of proceedings and ruling to enable the applicant to lodge the appeal was not copied to the advocates for the respondent. The time limited for lodging the appeal itself had already passed and there was no application for extension of time to lodge the record of appeal. Quite obviously any order for extension of time to lodge the notice of appeal would have been futile in the absence of an application for extension of time to lodge the record of appeal out of time."

The jurisdiction of this Court is conferred by statute and is precipitated by the filing of a notice of appeal. The notice of appeal is the launching pad, as it were and time does not being to run until the notice of appeal is lodged. Such notice may in civil matters filed in strict compliance with Rule 74 or on such extended date as the court may order upon application for extension of time under rule 4: In either case a valid notice of appeal is filed. The timetable for institution of the appeal then follows and is clearly spelt out in *Rule 81(1),* thus:

"…….an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged- "

emphasis supplied.

The only exception to that rule is where the registrar has certified some period as having been necessary for preparation of the record, in which event, the period is excluded from computation of time without the need to seek order of the court. *Rule 81(2)* must however have been complied with for the certificate of delay to be acceptable. Under Rule 81 therefore, it is our finding and we so hold, that the record of appeal herein, which is not challenged for any other fault, was validly filed within 60 days of the notice of appeal..

It may well have been desirable for the learned single Judge (O'Kubasu, J.A) when granting extension of time for filing of the notice of appeal to give directions on the filing of the record of appeal even where no order to that effect was sought. Such procedure was not faulted by this Court and was indeed expressly sanctioned when the Court in dismissing a reference to the full court on an application for extension of time under Rule 4 stated: -

"Mr. Gicheru next contended that the single judge was in error because he made certain orders which were not asked for in the body of the motion for extension of time. Once again, there is really no substance in that contention. It is true that the motion did not specifically pray for extension of time to serve the notice of appeal but having decided to extend the time to file then, it was inevitable that the learned single Judge would extend the time with which those documents were to be served. In the exercise of his discretion the learned single Judge did so and this was obviously in order that his order extending time is not rendered futile. This cannot be the basis to warrant our interfering with the Judge's exercise of discretion".

That was in the Standard Ltd & 2 others v Wilson K. Kalya & 2 others Civil Appl. No. NAI. 306/2002 (ur). For our part we think such procedure would have been uncalled for in this matter since time did not begin to run until the notice of appeal was filed and there was no reason to anticipate that the record of appeal would be delayed. In the end, the record of appeal was file timeously.

As we stated earlier, this application is for dismissal and it is hereby dismissed with costs.

Dated and delivered at Kisumu this 15th day of July, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR