REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CORAM: DEVERELL, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 287 OF 2004

BETWEEN

CALTEX OIL KENYA LIMITED …….. APPLICANT

AND

JANEVANS LIMITED …….. RESPONDENT

(An application for leave to appeal out of time from the judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice J.W. Onyango Otieno) dated 4th March, 2003

in
H.C.C.C. NO. 3325 OF 1994)
****

R U L I N G

This is a ruling on an application under **rule 4** of the Court of Appeal Rules (*"the Rules"*) for leave to file out of time an appeal from the judgment and decree of the superior court (Onyango Otieno J. as he then was) delivered on 4th March 2003 in Nairobi HCCC No. 3325 of 2004.

The Notice of Appeal was filed in time on 13th March 2003 but was served out of time on the respondents on 9th April 2003, which was late by 19 days. The reason for this delay was claimed to be a mistake or oversight by the applicant's then advocates though no affidavit evidence from the advocate who made the mistake was adduced.

In all applications for extensions of time to file the record of appeal one of the most critical documents is the application in writing from the applicant to the deputy registrar bespeaking the supply of a copy of the proceedings in the superior court. The document is critical because the automatic exclusion of the from the time within which the appeal is to be instituted as certified by the deputy registrar of the superior court *"as having been required for the preparation and delivery to the appellant of such copy"* pursuant to the proviso to ***rule 81(1)*** is only available to the applicant if the application for such copy is made in writing and a copy is sent to the respondent (see rule 81 (2)).

In the case before me no copy of that important critical document was exhibited to the affidavit in support or otherwise included in the papers before me. The Certificate of delay issued by the deputy registrar did however state that the application for the copy of the proceedings was made by the applicant's then advocates on 7th March 2003.

The applicant claims to have applied for certified copies of the proceedings and judgment on 7th March 2003. There was no evidence of a copy of the letter having been sent to the respondent's advocates. Mrs. Ndungu, learned counsel for the respondents, did submit that there was no proof of the sending of the copy to the respondents but there was no express denial of receipt of a copy it by the respondents in their affidavits.

However Mrs. Ndungu submitted, rightly in my view that the burden of proving compliance with rule 81(2) is upon the applicant for extension of time. The copy of the proceedings was eventually received by the applicant from the superior court on 18th August 2004 after what appeared to have been two months delay by the applicants in obtaining the copy after notification that it was ready for collection against payment on 14th June 2004.

The applicant's applied for the certificate of delay on 6th September 2004 but did not receive it until 4th November 2004 but it should be remembered that the certificate of delay was a document that was not required to be part of the record of appeal. The certificate states that the applicant wrote to the Deputy Registrar reminder letters dated 6th, 8th and 19th June 2003 and 6th April 2004 and 29th July 2004. On 14th June 2004 the Deputy Registrar notified the applicant that the certificate would be supplied on payment of the requisite fees.

The court fees for the proceedings were paid on 8th July 2004 and fees for the judgment were paid on 13th July 2004.

The certificate further stated that the time taken by the court to prepare and supply certified copies of the proceedings and judgment was from 7th March 2003 to 18th August 2004, which was calculated to be 519 days (by my calculation this should be 530 days). If the applicant was entitled to take advantage of the proviso to rule 81 the date by which the appeal should have been instituted by the lodging of the Memorandum and Record of appeal was 23rd October 2004. The current application was not filed until 18th November 2004.

Therefore the delay in relation to the record of appeal if the proviso to rule 81 is applicable (as to which see below) the delay to be explained to the satisfaction of the court is 26 days. The delay in service of the notice of appeal was 19 days. These two periods were not however cumulative since the delay in service, though wrong, had no effect on the production of the record.

The principal point in opposition to the application made by Ms. Ndungu learned counsel for the respondent in her oral submissions, other than that relating to the lack of proof of the sending of the copy of the application for the proceedings to the respondents was as follows:-

There was no proper explanation of the delay in service of the notice of appeal. The advocate who is alleged to have made the mistake should have provided an explanation as to how it happened so that the court could decide whether it was credible. In support of this submission she relied on the case of Eshban Crispus Nduriri Githiaka v Flaurine Nyambura Nduriri Civil Application No 294 of 2003 (unreported)."

The evidence produced by the applicant as to the mistake is contained in paragraph 4 of the affidavit of ***Edith Mawia Malombe*** the chief corporate Counsel East Africa of the applicant. She says *"That I have been informed by Timothy Waweru Kairu of Mbai & Kibuthu our former Advocates that due to a mistake or an oversight on his part, a copy of the Notice of Appeal was not served on P.M. Ndungu & Co., the Respondent's Advocates, until 9th April 2003 which was outside the prescribed 7 days by 12 days.*

Mrs Ndungu attacked the applicant for its failure to explain adequately the nature of the mistake which gave rise to the failure to serve the Notice of Appeal within the 7day time limit. The explanation given in the affidavit in support of the application sworn by ***Edith Mawia Malombe*** was that she was informed by ***T. W. Kairu of Mbai & Kibuthu***, the applicant's former advocates, that the delay was due to a mistake or oversight on his part. Mrs Ndungu submitted that the counsel who made the mistake should himself have sworn to this and explained fully just how the mistake arose. While this would have been best practice I

do not think that there is much more that can be said once an oversight is admitted. It would be different, perhaps, if there were any grounds for suggesting that the delay in service was deliberate for some reason but there is nothing to suggest that here.

It is settled law that in applications of this nature the mistake of an advocate is not a matter which is necessarily fatal to the grant of an extension such as the one sought in this case. It is one of the several factors which need to be weighed in the balance when exercising the unfettered discretion bestowed by ***Rule 4*** of the Rules.

As we have seen Mrs. Ndungu stressed that there was no evidence that the letter to the Registrar of the superior court bespeaking the production of copies of the record was copied to the respondent in accordance with rule 81 (2) of the Rules which reads:-

"An appellant shall not be entitled to rely on the proviso to sub rule (1) unless his application was in writing and a copy of it was sent to the respondent."

The effect of this is to prevent the time certified in the certificate from being automatically excluded from the computation of time within which the appeal is to be instituted. It does not, however, prevent the time so certified from being taken into account in the exercise of the discretion bestowed by ***rule 4.***

I consider that there were sufficient reminders to the deputy registrar in the letters exhibited to the affidavit of E. M. Malombe sworn on 2nd September 2004 to counter any argument that there was insufficient chasing up of production of the proceedings by the superior court.

In these circumstances I am, in the exercise of my discretion, going to bear in mind the fact that nearly a year and a half was used up in obtaining the record. I have considered the merits of the intended appeal, which are only of possible relevance in the exercise of the discretion as to whether to extend time. The less I say about the reasons for my conclusions as to this the better but I can and do say that I do not consider the appeal to be patently frivolous. There would appear to be at least two issues that are clearly arguable namely the finding by the superior court awarding general damages for a breach of contract and the award of interest for the period prior to the filing of the suit.

Having considered all of the above factors and in the exercise of my discretion, I have come to the conclusion that the delay in excess of that resulting from the length of time it took to obtain the record, though longer than it should have been, is not so inordinate that time should not be extended.

I therefore allow the motion lodged on the 18th November 2004.and make the following orders: -

> ***1. The applicant must file a fresh notice of appeal in accordance with rule 74 (1) and serve it on the respondent within 10 days of the date of this ruling.***
>
> ***2. The applicant must thereafter file the record of appeal within fourteen days from the date the notice of appeal is lodged in the superior court.***
>
> ***3. The costs of this motion shall be in the intended appeal, but should the applicant fail to comply with any of the above orders, the motion shall stand dismissed with costs to the respondent.***

Dated and delivered at Nairobi this 8th day of July, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR