



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: DEVERELL, J.A. (IN CHAMBERS)
CIVIL APPLICATION 84 OF 2005

BETWEEN

KENYA PORTS AUTHORITY APPLICANT

AND

SALIM KAZUNGU RESPONDENT

*(An application seeking the extension of time to file notice and
record of appeal out of time in an intended appeal on the judgment
of the High Court of Kenya at Nairobi (Mr. Justice Mulwa) dated 21st*

November, 2000

in

H.C.C.C. NO. 1436 OF 1998)

RULING

This is an application by notice of motion dated April 6th 2005 in which the applicant, the Kenya Ports Authority is seeking leave for the extension of time to file a notice of appeal and the record of appeal out of time in an intended appeal from the judgment of the High Court of Kenya (Mulwa J) dated November 21st 2000.

In this case it is clear that the application for an extension of time was filed nearly four and a half years after the delivery of the judgment intended to be appealed. That period can be divided into two distinct phases. The first being from the date of judgment up to the record of appeal being lodged on 13th March 2002 and the second being from 28th February 2005 to April 6th 2005.

28th February 2005 was the date on which the applicant's advocates discovered the error made by them in believing that the record of appeal could not be filed until a certificate of delay had been issued by the Deputy Registrar. April 6th 2005, was the date when the appellant filed the Notice of Motion now before me.

The *first* phase of delay was explained, partly by the certificate of delay issued by the Deputy Registrar, which covered 335 days and partly by the mistaken belief in the minds of the applicant's advocates that it was essential to include the Certificate of Delay in the record of appeal. The period resulting from this latter mistake might possibly have been excusable although this is unlikely. However I do not consider it necessary to base my decision on that aspect.

I now turn to the second phase which ran for 36 days after the discovery by the applicants that they had been mistaken as to the necessity for including the Certificate of delay in the record of appeal. This period while not huge is nevertheless sufficiently long to require explanation from the applicant's.

I have carefully examined the affidavits in support and the submissions made to me by counsel for the applicants and have not found any explanation whatsoever for why it took so long to file the current application. I consider that where an intended appellant becomes aware that, as a result of its mistake, substantial delays have arisen resulting in breach of the Court of Appeal Rules it is incumbent on the applicant to waste no time in applying for the discretionary remedy of a grant of an extension of time. The way in which the applicant's advocates handled this demonstrated a woeful lack of urgency so that further delay was caused as to which no explanation has been offered.

I have next considered the merits of the intended appeal. The appellant was seriously injured in an accident that occurred at the Port. He was the driver of a lorry sent to collect goods from the Port, which were being loaded by the Port's crane onto the lorry. The applicant needed to be near the lorry so as to be able to count the sacks being loaded onto the lorry. A number of bags fell from the crane due to the breaking of a rope, one of which struck the appellant causing him very serious injuries. The learned trial judge who had the advantage of hearing the evidence came to the conclusion that the Respondent /defendant was wholly to blame for the accident.

The Memorandum of Appeal raised the following issues:

1. The Learned Judge erred in law and fact by finding that the defendant was subject to strict liability under Section 3 of the Occupiers Liability Act .
2. The learned trial Judge erred in fact in finding that the respondent was not guilty of contributory negligence.
3. The learned trial judge erred in law and in fact in completely disregarding the evidence tendered on the Defendant's behalf and finding the defendants wholly responsible for the accident.
4. The learned judge erred in law in awarding damages for loss of future earnings.
5. The learned Judge erred in law and fact by making the award he made which was manifestly excessive.
6. The pleadings filed by counsel for the Respondent were defective, and the proceedings before the superior court were null and void as counsel for the Respondent was not qualified and competent to conduct the case on behalf of the Respondent.

Having considered the matters raised in the Memorandum of Appeal it appears that there are some issues, which are arguable so that the intended appeal cannot be said to be frivolous.

In the exercise of my discretion as to whether to grant or decline the application for extension of time I should consider the degree of prejudice to the respondent if the consent is granted.

The respondent having been seriously injured in the accident, will be prejudiced if he is left in a state of uncertainty as to his entitlement, if any, for a substantial further period. This must be a matter of very real concern to a man in his unfortunate position even if he has received some or all the judgment amount already. There was no mention before me as to whether or not payment has been already made in whole

or in part.

Having weighed up all the above factors relevant to the exercise of my unfettered discretion I have come to the conclusion that the application for extension of time should be dismissed with costs.

It is hereby so ordered.

Made at Nairobi this 26th day of September, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR