REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NAI 340 OF 2004

BETWEEN

RAMESH SHAH ……APPLICANT

AND

KENBOX INDUSTRIES LIMITED ……...……RESPONDENT

(An application for leave to file and serve a notice of appeal and record of appeal out of time in an intended appeal from the judgment of the High Court of Kenya (Mr. Justice Ransley) dated 10th June, 2003 in H.C.C.C. NO. 1107 OF 1990)
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R U L I N G

This is an application under ***Rule 4*** the Court of Appeal (the Rules) under a certificate of urgency.

The judgment appealed against was that of ***Ransley J.*** delivered on ***10th June 03*** in HCCC No 1107 of 1990 in which he gave judgement in favour of the Plaintiff/Respondent Kenbox Industries Ltd (***Kenbox***)and ordered the Defendant/Applicant Ramesh Shah ***(Shah***) to pay to the Plaintiff Shs.27,433,888/-plus Shs.20,000/- general damages plus costs and interest.
The notice of appeal was lodged by Shahon 10th December 2004 over17 months late.

The orders sought in the application were that:

> ***1. The Honorable Court be pleased to grant the applicant leave to file the Notice of Appeal out of time.***
>
> ***2. The Notice of Appeal dated 10th December 2004 and filed on 10th December 2004 the same day be deemed to be served within time.***
>
> ***3. The Honourable Court be pleased to grant leave to the Applicant to file and serve Record***

of Appeal out of time AND for an order that costs incidental to this application abide the result of the said Appeal.

There were two affidavits filed in support of the application.

The affidavit of ***Shah*** ("the Shah Affidavit") was dated 17th December 2004.

The affidavit of ***Justri J.P.Nyaberi*** ("the Nyaberi Affidavit") was sworn on the same day.

The ***Shah Affidavit*** ended with a paragraph in these terms:-

> ***"37. That what is deponed to herein is true to the best of my knowledge, information and belief."***

The ***Nyaberi Affidavi***t had a final paragraph in identical terms except for the last word which was "*understanding"* in place of "belief"

Learned Counsel for the ***Kenbox, Mr. O.P. Nagpa***l, submits that the contents of the ***Shah Affidavi***t must be disregarded altogether due to serious defects in its content. His submission was succinctly summarised in Paragraph 3 of the affidavit, dated 24th May 2005, in reply to the application of ***Dipsang Darbar*** a director of Kenbox which is in the following terms:-

> ***"That I am advised by my said advocates (O.P. Nagpal & Co) and verily believe that the supporting affidavit of the Defendant (i.e. the Shah Affidavit) attached to the said application is fatally defective in that it does not state which of the matters set out therein are within the knowledge of the deponent thereof and which are based on information and belief and who has supplied that information. I am further advised by the said advocates and verily believe that the said affidavit contravenes the rules and law applicable to affidavits and ought not to be accepted by the Court...."***

Mr. Nagpal, in his oral submission on this issue, cited ***Noormohamed v. Kassamali*** 20 EACA 8 and relied on the 7th holding that ***"an affidavit which does not say whether the facts stated are of the deponent's own knowledge or on information given by someone else, ought not to be accepted by a court."***

Mr. Nagpal further relied upon ***Assanand & Sons v. E.A.Records*** [1959] E.A.360 in which the deponent had stated in his affidavit as follows:-

> ***"That the facts deposed herein are true to the best of my knowledge, information and belief and I make this affidavit in support of plaintiff's application....."***.

At page 364 Sir K. O'Connor P. said:-

> ***"The affidavit of Mr. Cambell was deficient in three respects. First, it did not set out the deponent's means of knowledge or his grounds of belief regarding the matters stated on information and belief, and, secondly, it did not distinguish between matters stated on information and belief and matters deposed to from the deponent's knowledge see (see Order XVIII, r.(3)(1))and Standard Goods Corporation Ltd v. Harakhchand Nathu & Co (1) (1950), 17 EA,CA 99). The court should not have acted upon an affidavit so drawn. Thirdly, the assertion that payment of the account was to be made at Nairobi was a bare assertion not based on any alleged facts. There was nothing to show whether this assertion was a fact, and inference from undisclosed facts, or a conclusion of law."***

Order XVIII, r. (3)(1) provides:-

> *"Affidavits shall be confined to such facts as the deponent is able of-his own knowledge to*

prove:- Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof." (Emphasis added.)

Paragraph 37 of the Shah affidavit follows almost exactly the words that were held to be ineffective in the Assanand Case (see above) and of which this Court's predecessor said that the court should not act upon an affidavit so drawn.

However in interlocutory proceedings, if the deponent does identify the source of his information and belief in respect of particular statements of fact stated in a particular paragraph of an affidavit, those statements of fact would, in my view, be admissible despite the presence of a paragraph in similar terms to paragraph 17 of the ***Shah Affidavit***.

It is therefore necessary to examine the ***Shah Affidavi***t to see what if any statements of fact therein can be considered.

In my view paragraph 1 of the ***Shah Affidavit*** can be considered as it relates to a description of himself and his knowledge.

In my view paragraph 2 of the ***Shah Affidavit*** can be considered since it relates to the production as an exhibit of a written contract to which he is a party and which will speak for itself as to what was agreed.

In my view paragraph 3 of the ***Shah Affidavit*** can be considered since the source of information is stated in that paragraph to be "as per the agreement" which is the exhibited contract.

Since the applicant was the intended payee of the Shs. 2 million he would know whether or not that sum had been paid with the result that I am of the view that paragraphs 4 and 5 of the ***Shah Affidavit*** could have been considered where it not for the contents of the last paragraph of the ***Shah Affidavit*** which gives three possible sources of the facts stated as to the failure of Kenbox to pay the Shs. 2,000,000 and the delivery of the machines by ***Shah to Kenbox.*** Since ***Shah*** did not identify whichof the three sources were the source of these statements of fact the latter statements have not been proved and cannot be taken into consideration by me in the exercise of my discretion under r***ule 4.***

Paragraphs 6 to 13 cover the production, as exhibits to the affidavit, of documents which speak for themselves being a copy of the ***plaint*** filed by the respondent in HCCC No.1107 of 1990, the ***defence*** and ***counterclaim*** in that suit, the order of Githinji J. as he then was dated 15rd May 2003, the plaint in HCCC No. 2793 filed by the respondent against the applicant, the defence in HCCC No. 2793, the order of the Shah J as he then was, a ***Notice of Motion*** filed by the applicant for dismissal of the HCCC No.2793 for want of prosecution, and the ruling dated 23rd May 2003. In my view these 7 documents so produced are admissible for consideration since they speak for themselves but none of the allegations of fact outside those documents in paragraphs 6 to 13 can be considered.

. I would apply the same reasoning to Paragraphs 16, 17, 18, 19, 28, 29 and 30 of the Shah Affidavit in so far as they all deal with production of documents which speak for themselves. I will therefore take those paragraphs into consideration to that extent.

Paragraph 28 of the ***Shah Affidavit*** creates some difficulty since the copy of the 2004 Ransley J. judgement exhibited is clearly dated 27th March 2004 yet Shah is claiming that it was delivered 6 months later on 27th September 2004 without any attempt to disclose the source of his information or belief as to this assertion. The affidavit does not disclose any source in respect of the assertion that Ransley J's 2004 ruling was delivered on 27th September 2004. I will therefore not take into consideration Shah's assertion of that fact – in any event this does not seem to be of any particular relevance to the present application as this ruling of Ransley J. is not the ruling appealed against.

Paragraph 29 of the ***Shah Affidavit***, in so far as it states that ***Shah*** instructed his advocates on record to file an appeal immediately against the ruling of Ransley J delivered on 27th March 2004 in which he

dismissed the application to set aside his ex parte judgement dated 10th June 2003 (the subject of the present intended appeal), could be taken into account by me being evidence by Shah as to what himself did. However this does not appear to be material to the present application which relates to an intended appeal against the earlier 2003 Ransley J. ruling.

Paragraph 30 of the ***Shah Affidavit*** does contain otherwise admissible material that ***Shah's*** initial Advocate Mr. Odera failed to file a notice of appeal against Civil Case 1109 of 1990 but the latter case is not mentioned elsewhere in the application record before me. Whether this was a typing error for 1107 of 1990 has not been clarified.

Paragraph 31 of the ***Shah Affidavit*** asserts first that Shah's machines were taken by the respondent and secondly that this was done without payment of a single cent to Shah. This is a repetition of facts alleged in Paragraphs 4 and 5 of his affidavit and I will not take them into consideration for the same reason as set out in my treatment of Paragraphs 4 and 5 above.

Paragraph 32 and 33 of the ***Shah Affidavit*** contain arguments rather that facts and does not establish any fact relevant to the exercise of my discretion.

Paragraph 34 of the ***Shah Affidavit*** states that the cause of the delay in filing the appeal was caused by *"lack of files from my initial advocates as well as failure to file a notice of appeal and disagreements with my advocates"*.

The statement in Paragraph 35 of the ***Shah Affidavit*** that ***Shah*** had himself requested copies of the proceeding and judgement has not been backed up by production, as an exhibit to any affidavit, of a copy of the letter from the applicant bespeaking the copies of the proceedings. There is contained in the record of the application at page 86 a ***copy of a letter from the applicant's present advocates Nyaberi & Co dated 29th August 2004 requesting a certified copy of the proceedings.*** This letter appears from the High Court stamp to have been received by the High Court Registry a month later on 29th September 2004 which is well over a year and a quarter after the judgement intended to be appealed from was delivered on 10th June 2003. ***Mr Nyaberi*** deposes in his affidavit dated 17th December 2004 that he was able to make copies of the relevant court documents two weeks previously i.e. on or about 3rd December 2004. This is inconsistent with Paragraph 35 of the ***Shah Affidavit*** in which ***Shah*** deposed that the proceedings are still being typed.

No Certificate of Delay appears to have been sought or issued. For this reason I do not consider that the applicant has brought himself within the proviso to ***rule 81 (1)*** and so he cannot rely on the automatic exclusion from the time within which the appeal is to be instituted of the time taken to produce the proceedings. Although thus not automatic, it is still open to me to take into account, in the exercise of my discretion, delay resulting from the time taken to by the High Court to produce the record. However in this case there is no evidence in the form of correspondence or other action chasing up the production of the record. It was submitted by counsel for the applicant that one of the reasons for the delay in getting the record was the fact that the superior court case file was unavailable due to it being required by the judge for the purposes of making a ruling on the application to set aside the ex parte 2003 judgement of Ransley J. intended to be appealed against. There is no evidence before me of any attempts to explain to the superior court the need for the proceedings to be released by the judge for sufficient time for the copies to be made.

The ***Nyaberi Affidavit,*** as stated above contains a similar last paragraph to that in the Shah Affidavit but it mostly consists of paragraphs in which, if facts as opposed to argumentative material is contained, the source of the information is stated in the particular paragraph relating to each fact and is therefore to be considered.

Mr. Nyaberi was instructed in November 2003 some 7 months after the Ransley J. 2003 ruling was delivered. He states in Paragraph 5 of his affidavit that he only managed to make copies of the relevant court documents on about 3rd December 2004 which is more than a year after he was appointed and he gives this as the reason for the lateness in filing the Notice of Appeal which should have been filed and

served in June 2003.

This does not appear to me to be an explanation of the delay in drafting and filing the Notice of Appeal that is at all convincing. A Notice of Appeal is a relatively simple document to draft.

The other reason for the delay put forward was the retention by ***Shah'***s former advocate of his files relating to the case resulting from a disagreement with his former advocate. There is no evidence before me of any attempt to get a court order against the former advocate for release of his files. There is no evidence of the nature of the dispute with the former advocate. Another reason for the non filing of the Notice of appeal was stated to be the belief of the then advocate for the applicant that the application for review of the Ransley J. 2003 Ruling was likely to succeed which would make an appeal unnecessary.

The length of the delay between the delivery of the 2003 Ransley ruling and the filing of the Notice of Appeal on 10th December 2004 and the current application on 16th December 2004 is approximately 18 months.

In my view, exercising my discretion, judiciously upon such evidence as is properly before me, the reasons given for this very lengthy delay are totally inadequate.

The other factor which I need to consider is whether the intended appeal is frivolous or, in other words, lacking in a reasonable probability of success.

There is no draft Memorandum of Appeal in relation to the Ransley 2003 Ruling in the documents before me. The grounds numbered 5 to 8 inclusive for the current application have this to say in relation to the merits of the intended appeal.

> ***5. "That the judgement delivered by Justice Ransley is misconceived as it did not take into account all the facts such as the agreement herein was faulted (sic) by the respondent who is now going to gain from the judgement unfairly.***
>
> ***6. That it is clear that the Respondent took possession of the 209 Jukebox machines out of the 255 provided for in the agreement and 107 flippers out of 170 and never paid the applicant a single cent.***
>
> ***7. That the transaction has made to the Applicant (sic) impecunious and the judgement flouts the rules of justice and become a form of syphoning more money from the Applicant.***
>
> ***8 That the Appeal is arguable and has high chances of success."***

These grounds are stated to be "***based on the annexed affidavits***" which are the Shah Affidavit and the Nyaberi Affidavit sworn a day or two after the date of the Notice of Motion.

This ill expressed and ungrammatical pleading, supported by what little I have ruled above to be admissible in the ***Shah Affidavit*** and the ***Nyaberi Affidavit***, is, in my view, insufficient to satisfy me that there is an arguable appeal against the Ruling of Ransley J. delivered on 10th June 2003.

However this is not the end of the consideration of the frivolous or arguable aspect. I do need to consider the submissions in support made by ***Mr. Wagara,*** learned counsel for the applicant at the hearing of the application before me.

He attacked the 2003 Ransley J Ruling putting forward the following points:-

Mr. Wagara submitted that a key finding of the superior court was expressed by the judge in his judgement to be ***"I am satisfied that the agreement was that the machines were to be in working order and that the defendant was in breach of the written agreement by not supplying machine (sic) in working order and also in not having the goods which had been purchased available to meet his***

obligations under the agreement."

The learned judge did not elaborate on what it was that satisfied him that "the machines were to be in working order." The written sale agreement did not use the words ***working orde***r. The adjective employed to describe the machines in the sale agreement was simply ***"used***". The learned judge did not say whether the "*working order"* stipulation was an implied term or give any other explanation for its existence given that the contract includes clause 7 which reads:

> ***"That all used machines are Purchased by the Purchasers as seen and agreed with NO GUARANTEE of whatsoever (As is)."(sic)***

It may also relevant that the Plaint does not allege the existence of a stipulation that the used machines were to be in working order. It does however, in paragraph 9, plead that the existence of an obligation upon the defendant to supplyspares to the plaintiff which spares the defendant knew were intended to be used to make functional such of the contract machines as were not functioning on delivery. This may indicate that it was indeed envisaged that used machines which were not in working order could be supplied.

It is not for me to decide or say what the result will be if the matter goes on appeal: my task is merely to consider whether an appeal is arguable. Given that the reasoning of the superior court in coming to its decision does seem to me to be faulted I have come to the conclusion that the intended appeal is arguable.

I have taken into consideration whether there is any special prejudice to one side or the other which cannot be compensated in orders for costs and am of the view that there are not.

I have weighed up all the above factors and have in the exercise of my discretion come to the conclusion that the application should be allowed despite the unsatisfactory reasons for the lengthy delay.

I make the following orders:

> *1. That the applicant do file and serve a fresh notice of appeal within seven days of the date of this ruling.*
>
> *2. That the applicant do file and serve its record of appeal within fourteen days from the date the notice of appeal is lodged in Court.*
>
> *3. That the costs of this application shall be in the intended appeal.*
>
> *4. If the applicant fails to comply with conditions (1) and (2) within the stated periods then in the event of any such failure the orders above shall automatically stand vacated and the application shall stand dismissed with costs, no further order of the court being necessary for that purpose*.

Dated and delivered at Nairobi this 12th 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