



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
IN NAIROBI
CORAM: DEVERELL, J.A. (IN CHAMBERS)
CIVIL APPLICATION NAI 229 PF 2005 (136/2005 UR)

BETWEEN

THE DELPHIS BANK LIMITED APPLICANT

AND

RECCO BUILDERS LIMITED1ST RESPONDENT

BHAJAN KAUR SOHAN SINGH REHAL2ND RESPONDENT

**(An application for extension of time to lodge the record of appeal
out of time from the ruling and order of the High Court of Kenya
at Nakuru (Mr. Justice Muga Apondi) dated 28th
May 2004**

in

H.C.C.C. NO. 31 OF 2003)

RULING

This is an application under **rule 4** seeking an extension of time within which to file the record of appeal. The application is brought by Delphis Bank Ltd. (hereinafter “the Bank”). The respondents are Recco Builders Ltd. and Bhajan Kaur Sohan Singh Rehal (hereinafter “the Borrowers.”)

The decision intended to be appealed against is that of **Muga Apondi J.** dated **May 28th 2004** in which he granted to the Borrowers an injunction to restrain the Bank from selling Nakuru Municipality Block 11/128 registered in the name of the second Plaintiff /Respondent herein Bhajan Kaur Sohan Singh Rehal.

The events giving rise to the application were that on June 11th 2004 the Bank lodged and served its Notice of Appeal within the time limit set by the Court of Appeal Rules (“the Rules”). The Bank then wrote to the Deputy Registrar of the High Court bespeaking certified copies of the proceedings in the superior court. This letter was also within the time limit. The letter contained an error in that the request was for certified copies of the proceedings, which are not required. However nothing turns on this in the

present case.

There was however a far more serious error in relation to this letter. It did not comply with rule 81(2) of the Rules which is in the following terms:-

“An appellant shall not be entitled to rely on the provisions of sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent.”

No such copy was sent to the respondent. The result of this mistake by the Bank’s advocates is that the Bank is not entitled to the automatic extension of time to lodge the Memorandum and Record of Appeal by the number of days certified by the Deputy Registrar of the superior court as having been required for the preparation and delivery to the appellant of the copy of the proceedings. This does not prevent such days being taken into account in the exercise of its discretion by the court considering an application for extension of time.

If the Bank had not omitted to send the copy of the bespeaking letter, the time for instituting the appeal would have been automatically extended to October 8th 2005, two months after the current application was filed on August 8th 2005

The Bank made a further mistake in that, not being able to lodge the Memorandum and Record of Appeal within the sixty days, it did not include in its application by Notice of Motion for an extension of time, a prayer for the validation of the original Notice of Appeal or, alternatively, extension of time to file a fresh Notice of Appeal.

The need for this arises from **rule 82(a)** of the Rules which provides as follows:-

“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 person on whom the notice of appeal was served.”

The Borrower in its replying affidavit dated September 9th 2005 drew attention to this issue stating as follows:-

1. THAT in any event a notice of appeal having been filed on 11th June 2004 and no record of appeal filed, the notice was deemed to have been withdrawn pursuant to rule 82 of the Rules of this court hence there is no valid notice of appeal on record.

2. THAT it is the notice of appeal that institutes the appeal so that no valid record of appeal can be filed without a valid Notice of Appeal.

3. THAT the applicant must therefore seek leave to validate the Notice of Appeal on record or otherwise file a fresh Notice of Appeal.

4. THAT the application by seeking for extension of time to file a record of appeal is therefore incompetent in law as the notice earlier on file is already spent and is of no force hence the same must be dismissed with costs.

The Bank, in an apparent attempt to heed this advice from the Borrower, when the hearing of the application came before me, made an informal oral application for leave to amend the prayers in the current application by the addition of a prayer for leave to lodge a notice of appeal out of time which was later expanded to include an alternative prayer that the existing Notice of Appeal be “validated”.

The hearing before me was adjourned by consent to enable counsel on both sides to research whether

there are any authorities relevant to the issue as to whether rule 82(a) results in a notice of appeal becoming a nullity without any express order of the court striking it out.

This produced the unreported case of **Major Joseph Mweteri Igweta v Mukira M'ethare and the Attorney General Civil Application No 8 of 2000** in which Lakha JA. in 1988, as a single Judge, followed the decision of the Court in **Kamau Kibanja v Noordin Construction Civil Application NAI 172 of 1988** unreported. Lakha JA, in his ruling said the following about the Court's decision in No 8 of 2000:-

"...this court held (albeit by a majority) that for a notice of appeal to be deemed to have been withdrawn under rule 82 of the Rules, then a court order is not required. This decision was delivered in March 9th 1992."

Lakha JA. then referred to two unreported decisions of single judges in which they held that a notice cannot be deemed to be withdrawn without an order of the court to that effect. Lakha JA comments that it is unfortunate that the decision of the **Court (in Civil Application No 172 of 1988 supra)** was not cited to either of the single judges. Lakha JA goes on to say:-

"With the greatest respect to both the single judges if their attention had been drawn to the decision of the Court they well might have reached a different conclusion. Be that as it may, the decision of the court was binding on both the single Judges and compelled the conclusion that the order of the Court was not required. A single Judge is not free not to follow a decision of the court on the ground that it is wrong. Finally, on the reference to the Court from the decision of a single Judge dated June 4th 1999 it held that an order of the Court was required for a notice of appeal to have been deemed to be withdrawn thus creating a conflict with its own decision given on 9th March 1992."

Given the conflicting decisions of the Court, Lakha JA. considered that he himself as a single judge was entirely free to choose between them. Lakha JA decided to follow and apply the first decision of the Court in **Error! Not a valid link.**

The application before him was for extension of time to file a record of appeal in a situation in which there had been a notice of appeal but the time for instituting the appeal had expired.

Lakha JA.'s decision, albeit as a single judge, was that:-

"The first respondent, therefore, succeeds in his contention. In the absence of any valid subsisting notice of appeal, it would be futile to grant the application. I am unable to exercise my discretion in favour of the applicant..... Accordingly, the application fails. It is dismissed with costs."

I regret that despite the efforts of the court librarian a copy of the decision of the Court in **Civil Application No 172 of 1988 supra** has not as yet been found.

There is one much more recent case which needs to be referred to despite it being yet another single judge ruling. This is the case of **K and K Amman v Mount Kenya Game Ranch and others** reported in East Africa Law Reports [2003] 1 EA 98)(CAK) which came before O'Kubasu JA in May 2003. In this case the applicant K and K Amman Limited sought the following orders:-

"9 (a)....

(a) Time for filing and serving fresh notice of appeal in place of the notice of appeal lodged on 4th April 2003 and deemed to have been withdrawn under rule 82 (a) of the Court of Appeal Rules is extended.

(b) Time for filing and serving record of appeal is extended and the record of appeal be

filed within 15 days of the date of filing the fresh notice of appeal.

(c)

It appears from the ruling of O’Kubasu JA in the Amman case supra that a previous notice of appeal had been struck out and leave had been granted to file a fresh notice of appeal. The fresh notice of appeal was then filed. The record of appeal was accordingly required to be filed within 60 days of the filing of the fresh notice of appeal in accordance with **rule 81(1)**. This was not done in time so application was made in the terms set out above.

Mr Mwenesi, counsel for the applicant in the Amman case, contended that time having expired, and the appeal not having been instituted in time, it followed that the said fresh notice of appeal was deemed to have been withdrawn. That is why the applicant applied for extension of time to file a notice of appeal.

Mr. Majanja for the first and third Respondents submitted inter alia that as there was a notice of appeal which had not been struck out then this application for extension of time was incompetent.

O’Kubasu JA then set out **rule 82(a)** in full and went on to say :-

*“That being the legal position then I see no difficulty in dealing with the notice of appeal filed by the Applicant. Since the Applicant did not lodge its appeal within the appointed time, then it follows that pursuant to rule 82(a) of the Rules the notice of appeal must be deemed to have been withdrawn. **As of now there is no notice of appeal on record.** If the applicant wants to proceed with its appeal it must start the process afresh by seeking extension of time in which to file notice of appeal. It would naturally follow that there must also be application for extension of time to in which to lodge the record of appeal. And that is what the applicant has done in the present application.” (emphasis added by me)*

Although no authority was cited, the learned single Judge was clearly of the view that **rule 82(a)** had the effect of removing a notice of appeal from the record without the necessity for an order of the court striking it out. I would respectfully agree that this would appear to be the natural meaning of the words in the rule “shall be deemed to have withdrawn”. If an intended appellant were to say, “*I hereby withdraw the notice of appeal filed by me*”, in my view, the result would be that the notice was no longer of any effect and could not be relied upon. When the rule provides that on the happening of an event (here the failure to file the record within the appointed time) the notice of appeal shall be deemed to have been withdrawn by the giver of the notice, the result, in my respectful view, is the same as it would have been if the giver of the notice had expressly stated that he was withdrawing the notice. There does not seem to me to be any need for a notice which has been withdrawn to require that it be struck out by the court before the withdrawal has any effect. If that were the intention then, in my respectful view, different wording would have been required in the rule.

It will be seen from the above that I believe that the decision of the court in ***Kamau Kibanja v Noordin Construction Civil Application NAI 172 of 1988*** unreported as described by Lakha JA supra was correct. Assuming as I think I must, in the absence of the report, that Lakha JA’s description of the court’s ruling was indeed correct, I am bound by that decision.

This being so it does appear that as of now there is no notice of appeal subsisting in the case before me. It would therefore appear to be a futile step for me to grant leave to the applicant to file the record of appeal unless the applicant had applied for, and been granted, leave to file a fresh notice of appeal out of time.

The Motion before me does not contain any prayer for such leave relating to a notice of appeal. This is the reason why the applicant is seeking in his informal application, leave to amend the prayers in the Motion to include a prayer for leave to lodge a notice of appeal out of time which was later expanded to include an alternative prayer that the existing Notice of Appeal be “validated”. By validated I think the applicant means the use of the wide powers in **rule 4** “*to extend the time limited by these Rules.....for the*

doing of any act.....whether before or after the doing of the act.....” Using that power the court would, it is hoped, extend the time within which the applicant had to lodge the appeal before the deeming of withdrawal of the notice of appeal took effect to some date in the future thus restoring validity to the notice of appeal. This seems over complicated to me and if there is to be any relief granted it would appear to be simpler to do so by granting leave to file a fresh notice of appeal by a given date which date will allow a diligent applicant to file the record of appeal within the 60 days stipulated in rule 81(1) of the Rules.

The issue that now needs to be tackled is whether or not the applicant should be given leave to amend the prayers in the Motion on an informal oral application to amend. This is critical because if the motion cannot be amended and the only relief sought is that expressed in the Motion being:-

“That the time for lodging the record of appeal be extended on such terms as this Honourable Court thinks fit and just. “

The argument of the respondent would be that an order in such terms without more would be futile because there would be no subsisting notice of appeal it being deemed to have been withdrawn. A valid notice of appeal is of course a primary document without which the record of appeal would have to be struck out.

If I am wrong in my findings as to the effect of **rule 82(a)** with the result that the notice of appeal remains valid unless and until there is an order of the court striking it out, then the amendment might not be so critical provided the applicant was able to file the record of appeal containing the original notice of appeal before it was struck out, and provided that it was not subsequently struck out.

The informal oral application to amend was made citing **rule 42(3)**

This provides that the provision requiring all applications to be by motion shall not apply to applications made in the course of a hearing, which application may be made informally.

The oral application in question was made by Mr. Konosi during his oral submissions on behalf of the applicant at the start of the hearing. It was immediately opposed by Mr. Odour the learned counsel for the respondent, his main objection being that the application to amend was prompted by the issue being raised in paragraphs 3 to 6 of the respondent’s replying affidavit. I would not regard the existence of such prompting as being an obstacle to an otherwise meritorious application to amend.

I think that the oral application does fall within the ambit of **rule 42(3)** and in the interests of justice I hereby grant the applicant leave to amend the prayers in the motion to include leave to amend the prayers in the current application by the addition of a prayer for leave to lodge a fresh notice of appeal out of time.

I order that the Amended Notice of Motion with the amendments duly marked in accordance with **rule 16(2)** of the Rules be filed and served within 3 days from the date of delivery of this ruling.

The length of and reason for the delay.

Sixty days from the lodging on **11th June 2004** of the Notice of Appeal takes us to **20th August 2004**. The current application was in fact filed on **8th August 2005**, which was nearly **11.5 months** later. This is the length of the delay to be satisfactorily explained by the applicant.

If the correct procedure had been followed by copying to the respondent’s advocates the request to the Deputy Registrar, a further 431 days would have been permitted taking us to 8th October 2005. It can be seen from all this that the applicant has acted promptly in all respects and his only significant mistake has been the failure to comply with rule 81 (2).

The merits of the intended appeal.

The intended appeal is from the decision of the superior court granting an interim injunction to the Borrower restraining the Bank from exercising its power of sale of the suit property under the charge. The amount claimed by the Bank, at the time the suit was filed, was in excess of Shs.12 million with interest accruing at 26.75% per annum. This will result in interest accruing at approximately 3.3 million per year and the total sum due doubling approximately every four years.

The Bank attacked the finding of the superior court on various grounds including that the superior court, having correctly stated in its Ruling the *Giella v Cassman Brown* basic principles for the grant of an interim injunction as being:-

1. *An applicant must show a prima facie case with a probability of success.*
2. *Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not otherwise be adequately be compensated by an award of damages.*
3. *Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.*

The superior court went on to say:-

“From the above submissions it is obvious that there are weighty and crucial issues which the court has to decide at the main trial. These issues can only be decided after the court has heard and seen the witnesses. Consequently, the Court will make specific findings and interpret the law. Given the nature of the case and the issues involved, the court cannot hazard a guess as to whether the case has high chances of success. Secondly, it is obvious that the suit premises has some commercial value, which can be quantified. Besides the above, the applicant was also aware that the property which he used as a security would be sold in the event that he defaults on to payment of the facilities.

However, due to the doubts that I have earlier expressed, the balance of convenience seems to be in favor of the applicant who resides in the suit property. The Court noted carefully that when the applicant alleged that when the applicant alleged that the suit premises were to be sold for a paltry sum of Kshs. 2.5 million the respondents counsel never challenged that assertion. Significantly the respondent never challenged the assertion that the market value of the property is now Kshs. 10 million. It is due to the above, that the Court feels compelled to issue an injunction.”

The applicant’s counsel submitted that, although the superior court had correctly stated the principles applicable, he had then failed to apply those principles. Although required to be satisfied that the applicant has shown a prima facie case with a probability of success the learned judge specifically stated that the court could not hazard a guess as to whether the case had high chances of success. The learned judge did not make a finding that the applicant in the superior court had shown a prima facie case with a probability of success.

I consider that the manner in which the superior court came to its conclusion to grant the injunction does raise issues, which are not frivolous.

I am enjoined by authority to take into consideration in the exercise of my unfettered discretion on applications of this nature as to the degree of prejudice to the respondent if the application for extension of time is granted. I do not consider that the extension of time will result in prejudice to the respondent. The respondent will remain protected by the superior court injunction until the eventual hearing of the appeal against the decision granting that injunction, and will only lose that protection if this court finds that the decision of the superior court was wrong.

In conclusion, in the exercise of my unfettered discretion under **rule 4**, I have taken into account the

length of the delay, the reasons for that delay and my conclusion that the **appeal is not frivolous**. I have further considered whether the respondent will suffer prejudice by the granting of the application as amended which cannot be compensated for by an order for costs and have reached the conclusion that the respondent will not be so prejudiced by the extensions of time I propose to grant.

I make the following further orders in addition to the grant of leave to amend the prayers in the motion as above:-

- 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 lodge and serve the record of appeal within twenty one 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 orders (1) and (2), or either of them, within the stated periods then in the event of any such failure the orders 1, 2 and 3 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 14th day of October, 2005.

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR