



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: DEVERELL, J.A. (IN CHAMBERS)
CIVIL APPLICATION NAI 137 OF 2004

BETWEEN

SIMON MURUCHI THIGA APPLICANT

AND

NATION NEWSPAPERS LTD..... RESPONDENT

**(Application for extension of time to lodge an appeal from the
ruling of the High Court of Kenya at Milimani Commercial**

(Ondeyo J.) dated 29th September, 2003

in

HCCC NO. 2763 OF 1997)

R U L I N G

This is an application filed by Simon Miruchi Thiga (the applicant) against Nation Newspapers Ltd (the Nation) seeking an extension of time to lodge the record of appeal out of time in an intended appeal against a ruling of S.C.Ondeyo J. (as she then was) dated **29th September 2003** in which she dismissed an application by the applicant to amend his defence to include a counterclaim in HCCCNo.2763 of 1997.

The High Court application was by Chamber Summons filed on **2nd July 2003** which was just over six years from the date the applicant's contract with the Nation had been terminated.

The applicant's Notice of Appeal was dated **30th September 2003** and it was lodged in the High Court on **2nd October 2003** and should have been served (as provided in **rule 76 (1)** of the Rules) on the Nation no later than **9th October**. It was in fact not served until **16th October 2003**, which was 7 days late.

The current application before me was filed on **21st June 2004**. It seeks the following substantive order:-

1. **That leave be granted to the applicant herein to lodge a record of appeal from the orders of the**

High Court date 29th September 2003.

It is to be noted that there is no request for any order relating to the Notice of Appeal.

It would appear that the Notice of Appeal has long since been deemed to have been withdrawn in accordance with **rule 82(a)** since no appeal has been instituted within 60 days of the lodging of the Notice of Appeal in accordance with **rule 81**.

Unless and until there is an order granting leave to file a fresh Notice of Appeal it would be an exercise in futility to extend time for filing the record of appeal the pre condition for the filing of which is the existence of a valid notice of appeal. See 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.

There being no extant notice of appeal in existence and no application for leave to file a fresh notice of appeal out of time I have no alternative but to dismiss the application with costs.

However in case I am held to be wrong in reaching the above decision I will consider the arguments raised before me as to the length of the delay to be sought to be excused, the reason for that delay, whether the intended appeal is frivolous and whether the respondent is likely to be prejudiced by the extension sought.

In the grounds for the granting of the application stated in the Notice of Motion the applicant pleads that the delay in filing the record is not inordinate and is curable and no party is bound to suffer any prejudice.

The record of appeal should have been filed within **60 days of 2nd October 2003** being the date of lodging the notice of appeal which takes us to **Monday 1st December 2003** to which need to be added the 118 days certified by the Deputy Registrar of the High Court to have been required for the preparation and delivery of the typed proceedings. This takes us, after allowing for three weeks for the Christmas vacation to about **18th April 2004** as the date when the record of appeal should have been lodged. The current application to this Court for extension was not lodged until **21st June 2004** resulting in a delay to be explained of about **64 days**.

The typed record had been received on **28th January 2004**. The applicant’s explanation for the delay, as set out in paragraphs 5 to 9 of the applicant’s advocate **Mr. J. M. Njenga** is that it was not until 5th April 2004 that the applicant obtained the certified copy of the Order. There would appear to be no explanation as to why the Order had not been settled and certified many months previously. There is no evidence of any attempts by the applicant’s advocates to attend to this task which could have and should have been processed with effect from the time when the applicant instructed his advocates to file the notice of appeal immediately after the delivery of the ruling at the end of September 2003. It would appear that the applicants simply did not bother to get on with this aspect at all until about the 7th February 2004 when, in the words of Mr. Njenga in paragraph 8 of his affidavit **“it dawned on me that the Court Order was never issued and it was imperative that I applied for the same which I did in earnest.”**

The order was issued on 30th March 2004 and a certified true copy of the original was released to the applicant on Monday 5th April 2004. If the applicant’s advocates had proceeded diligently with the preparation of the record, there is no good reason why the record could not have been ready for lodging before expiry of the extended last date for so doing of about 18th April 2004, instead of which it took them another two months.

The applicant’s excuse for not being ready to do so was set out in paragraph 11 of the supporting affidavit of Mr. Njenga which reads as follows:-

“11. THAT during the weekend of 10th April, 2004 we had some repairs that were being done in our chambers as well as relocation of all closed files from our office our store in Lavington. In

the process the subject file amongst others inadvertently car- fed (sic) away together with the closed files and it was not until the weekend of 24-25 May, 2004 when we finally realized the mistake and were able to retrieve the file from the store after we had literally turned all the files in our chamber upside down looking for the instant file.”

In my view the record of appeal should have been ready before the alleged events of the week end of 10th April 2004 and if it were not ready the advocates handling the preparation should have been well aware of the approaching deadline with the result that the file would have been in active use so that its disappearance would have been immediately noticed. The advocate for the respondent described the evidence of the alleged events causing the delay as ***“intentional and deliberate”***. I would not go that far but I am satisfied that the attempts to explain away the substantial period of delay are insufficient to justify an extension being granted.

I will now consider whether the intended appeal is a frivolous appeal.

The applicant has not seen fit to include in the record of the application either a copy of the proposed amended defence, in which a counterclaim was to be included, or the plaint or the draft memorandum of appeal. It is possible that there may be an arguable issue as to whether the superior court was right in finding that the cause of action intended to be pleaded in the counter claim accrued outside the six years limitation period but on the information placed before me this seems unlikely.

I have considered as to whether there would be any special prejudice to the respondent if I granted the extensions sought and do not think there would be any other than that the inevitable delay in reaching finality in this matter which had its origin in the termination of a contract in excess of 8 years ago.

Having taken all of the above factors into account in the exercise of my discretion I have come to the conclusion that the application for extension of time fails.

I hereby order that the application by Notice of Motion dated 11th June 2004 is dismissed with costs.

Dated and delivered at Nairobi 13th day of October, 2005

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR