REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, J.A (IN CHAMBERS)
CIVIL APPLI NAI 244 OF 2005
BETWEEN

PATRON CARD INTERNATIONAL LIMITED ……..……..APPLICANT

AND

HARAMBEE CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED
…….RESPONDENT

(An application for extension of time to file memorandum of appeal out

of time in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Emukule, J.) dated 22.11.2004
in
H.C.C.C. NO. 1832 OF 2001)
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R U L I N G

There is before me an application brought under ***Rule 4*** of this Court's Rules for extension of time to file a memorandum of appeal and a record of appeal out of time. It is taken out by ***M/S. Patron Card International Ltd.*** (the"applicant") who were the plaintiffs in the superior court claiming a tidy sum of Shs.29.4 million from ***Harambee Co-operative Savings and Credit Society Ltd*** (the respondent) on account of breach of contract. The alleged contract was for printing and supplying some security identification cards for the 98,000 members of the respondent at a cost of Shs.300/= per card. The suit was however dismissed by the superior court (Emukule, J.) after a full hearing, on 22nd November, 2004.

Being aggrieved by the dismissal, the applicant lodged and served notice of appeal timeously on 02.12.04. They also applied for a certified copy of the proceedings and eventually those were supplied together with a certificate of delay confirming that the period of 03.12.04 to 31.03.05 was taken to prepare the proceedings and was therefore for exclusion in computation of time. On the face of it there was thus, sufficient time to file the record of appeal before expiry of 60 days from the date of lodging the notice of appeal on 02.12.04. But no appeal was filed until the applicant found it necessary to file the application now before me on 23.08.05 which was almost five months since the proceedings were supplied by the court.

As I said in **Fakir Mohammed v Joseph Mugambi & 2 other**s

Civil Application Nai. 332/04 (Nyr. 32/04) (ur):

"**The exercise of this Court's discretion under Rule 4 has followed a well-beaten path**

since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38."

What explanation do the applicants give for the five months of apparent inactivity? It appears in six paragraphs of the affidavit in support as follows: -

"9. THAT thereafter I am informed by the applicant's advocates on record which advise I verily belief to be true that they could not prepare and file the record of appeal as they had not been supplied with the applicant's and respondent's list of exhibits in the superior court and which is a key component of the record of appeal.

10. THAT a list of (sic) applicant's exhibits was later supplied by the superior court but did not seem to include the respondent's and indeed the applicant's advocate wrote to the superior court by letter dated 1/4/2005 and subsequent one dated 12/5/2005 both of which I attach hereto as exhibits "DK7".

11. THAT on 3/6/2005 the applicant's advocates received a letter dated 20/5/05 from the superior court clarifying the issue of list of exhibits as per copy attached hereto and marked exhibit "DK8".

12. THAT on the above clarification by the superior court, the applicant's advocates applied for a fresh and amended certificate of delay given that the list of exhibits which forms part of the court proceedings was supplied late and the advocates paid for issuance of the amended certificate on 14/5/05 under receipt number 0046699 and do attach hereto copy of the said receipt and letter of complaint dated 27/5/05 as exhibits "DK9".

13. THAT despite the said payment, the superior court has never issued an amended certificate of delay to date as per subsequent applicant's advocates letters of complaint dated 6/6/05 and 27/06/2005 attached hereto and marked exhibits "DK10".

14. THAT owing to exhibit DK10, the applicant's advocates was able to peruse the superior court's file on 2/8/05 where he found that the court had on 13/6/2004 written a letter to the said advocates copy whereof I attach hereto as exhibit "DK11" which I am verily advised by the applicant's advocates that it has never reached the said advocates to date though allegedly posted to them.

15. THAT it is hence upon discovery of exhibit "DK11" above that has necessitated the drafting and filing the applicant's current application for leave to file memorandum of appeal herein out of time."

The letters referred to as "exhibits" to that affidavit were all copied to counsel for the respondent and the respondent was therefore aware all along that the applicants were pursuing exhibits and an amended certificate of delay. Indeed there is no affidavit in reply filed by the respondent to challenge any of the facts stated in the 20 paragraphs of the affidavit in support. The only challenge raised by learned counsel for the respondent Ms. Kalewa is that despite receipt by the applicant of the list of exhibits in June 2005, there was still a delay of 60 days before the application was filed which in the absence of credible

explanation amounts to inordinate delay. At any rate, Ms. Kalewa submitted, there was no reason to apply for the exhibits since the applicants had them in their possession in the first place. I think, in passing, that this is a factual objection that ought to have been dealt with in an affidavit as there is no admission that the exhibits were in possession of the applicant's counsel.

The more pertinent question is whether the exhibits the applicant's counsel was pursuing were necessary in the appeal, and if so whether the delay ensuing after receipt of the exhibits was explained. Evidently by their letter dated 23.11.04, the applicant's advocates applied for *"typed and certified copies of proceedings and judgment*". There was no mention of any other documents. At all events for purposes of the proviso rule 81, it was not necessary to apply for certified copies as the rule refers only to "a copy of the proceedings". This Court has said before in **Republic vs. The Minister for Transport & Communications ex-parte Kenya Consumers organization & Anor.** Civil Appeal No. 276 /96 (ur) that: -

> **"Only such time as may be required for preparation and delivery to the appellant of copies in question is to be excluded in computing the 60 days period for lodging an appeal. Time which may be taken by obtaining a certificate of delay is not to be excluded in computing such time for the simple reason that the record of appeal does not need certified copies of proceedings, judgments or ruling".**

The registrar issued his certificate on 31.3.05 and declined to amend it on 13.06.04 (sic) although he had collected fees for such extension. The time taken in waiting for the certificate of delay is therefore not for consideration under the provision to ***rule 81.*** It is for explanation and learned counsel for the applicant's Mr. Wanyama pleaded that he was apprehensive that the appeal would be rendered incompetent if it was filed without the exhibits produced before the superior court and that is why he was persistent in pursuing them. He was not sure whether such exhibits were primary documents or whether they were admissible in a supplementary record.

Although the rules of this Court do not expressly use the expression *"primary*" or "*secondary"* documents, such labels have acquired enough notoriety to admit of no misconception by counsel. Rule 85 enumerates the documents which must be contained in a record of appeal on a first or second appeal, and the amendments by ***Legal Notice 76/90 in Rule 85(2A)*** enumerates those documents which may with leave of court be included in a supplementary record. This Court indeed made a clear distinction of such documents in

Commercial Bank of Africa Ltd vs. Ndirangu [2000] 1 EA 29; thus: -

> **"Rule 85(1) above, enumerates documents to be included in a record of a first appeal to this Court. The documents are of two categories, primary and secondary. The omission of any or parts of a document in the primary category renders an appeal incurably defective and therefore incompetent. We have already held that documents which were filed in court after the ruling appealed against are superfluous. Among those documents are the amended defence and counterclaim, the reply thereto and defence to the counterclaim. The trial court's notes whether or not either party considers them relevant and essential to the determination of the appeal, provided they were made before the decision appealed from, are primary documents and unless specifically excluded by a judge's direction given under Rule 85(3) aforesaid, their omission from the record, as is the case here, renders the appeal incompetent. Likewise all interlocutory applications and orders made pursuant thereto, and all exhibits, must be included in the record of appeal unless excluded as aforesaid. A party in a suit has no discretion to exclude from the record of appeal any document, whether primary or otherwise in view of that provision. Had the rules-making authority thought otherwise, there would have been no necessity of specifically vesting the power on the Superior court to give a direction in that regard." - emphasis added.**

So that, the exhibits produced before the superior court would in this case be primary documents. The

applicants were justified in seeking their inclusion in the record otherwise their labour would have simply amounted to an incompetent appeal. They have their share of blame in not seeking such documents earlier, but it is evident that when they embarked on the pursuit of the documents, they made it clear to the respondents that they were resolutely intent on challenging the decision of the superior court. There is no contention that the respondent will be prejudiced by the grant of the prayers sought and I see none save for the delay in recovery of costs. A substantial sum is in issue and I am told issues of law relating to interpretation of the alleged contract between the parties will be raised.

In all the circumstances I am inclined to exercise my discretion in favour of granting the application. Accordingly I extend time for filing the memorandum of appeal and the record of appeal and order that the said appeal be filed within 15 days of the date hereof. Costs of the application shall abide the result of the appeal.

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

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR