REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CORAM: DEVERELL, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 260 OF 2005 (KSM 32/05)
BETWEEN

STANDARD ASSURANCE LIMITED …….APPLICANT

AND

BERNARD OTIENO RAPUODA …….RESPONDENT

(Application for extension of time to file and serve the notice

of appeal out of time in the intended appeal from the ruling

and order of the High Court of Kenya at Kisumu (Mr. Justice

B. K. Tanui) dated 31st May, 2005

in H.C.C.C. NO. 148 OF 2004)

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R U L I N G

This is an application for an extension of time to file a Notice of Appeal out of time.

It came before me on Friday 2nd December 2005 at which hearing the applicant herein was represented by learned counsel Mrs. D.M.Thangei. There was no appearance before me for the respondent to the application despite the hearing notice for the application having been served on Muriu Mungai & Co the advocates for the respondent. Mrs D.M. Thangei indicated that she would like to proceed with the application.

The judgment intended to be appealed against is that of **B.K.Tanui J**. delivered in **HCCC No.148 of 2004** on 31st May 2005 in the presence of Mr. Ochieng' the advocate for the plaintiff applicant in the superior court but in the absence of the defendant respondent or his advocates.

The Notice of appeal dated 6th June 2005 was lodged by the respondent herein in the High Court Registry on 22nd June 2005 which was eight days outside the fourteen days from the date of judgment allowed by rule 74(2) of the Court of Appeal Rules (hereinafter "the Rules").

The Notice of appeal was served on the respondent's advocates on 28th June 2005, which was within the 7days allowed by rule 76(1) of the Rules. However that Notice of appeal wrongly stated the date of the delivery of the judgment to have been 27th May 2005 instead of the actual date of delivery, which was 31st May 2005.

There were thus two errors made by the advocates for the applicants: the first was the eight days of delay in filing and the second being the wrong statement as to the date of judgment in the Notice of appeal.

The explanation for the second of these two errors given by Mrs. Thangei was that the applicant had been given notice by the superior court that the Ruling on the application to strike out the defence was to be delivered on 27th May 2005. This notice was not received by Miriu, Mungai & Co Advocates until 30th May that is after the notified date of delivery. No notice changing this date of delivery had been given to the applicant herein so the advocates assumed that the ruling was given on that date while, in fact it was delivered four days later on 31st May 2005 in the absence of any representative of theirs and without notice of the change of date. It is to be noted that the applicant's advocates were the Nairobi based firm of Miriu, Mungai & Co Advocates and would need to use Kisumu advocates for inquiries and minor attendances in Kisumu. No mention is made in the documents before me that any instructions were given for anyone to attend on the day they expected the Ruling to be given but this was not surprising since the notice for 27th May had not been received by then.

According to the affidavit of Mr. Gekonde Omariba, a Kisumu based advocate, he was instructed by the applicant's Nairobi advocates on 30th May 2005 to check the file and advise them as to the result of the Ruling. Mr. Omariba could not trace the court file and it was not until 3rd or 4th of June that Mr Omariba was able to ascertain, by telephone, the adverse result of the ruling from P. Ochieng' Ochieng' & Co. who were the advocates for the plaintiffs in the superior court. However the actual date of the ruling was not asked for by, nor volunteered to, either Mr. Omariba in Kisumu or Miriu, Mungai & Co Advocates in Nairobi and the latter firm assumed that the Ruling had been delivered on 27th May 2005. This assumption led to the wrong date being inserted in the Notice of appeal Mrs. Thangei's submission in relation to the first error which was the failure to file the Notice of appeal within 14 days of the date of delivery of the Ruling was that the court file could not be traced at the Kisumu High Court Registry so that the Notice could not be filed. She relied on the affidavit dated 26th August 2005 in support of the application by **Gekonde Omariba.**

He deponed on this issue in the following terms:

"7. That on Monday 6th June 2005 I informed Mr. P Munge Murage that the plaintiff's application had been allowed though I had not been able to trace the court file to enable me advise him on all the entire contents of the ruling.

8. That I received from Mr. P. Munge Murage the Notice of appeal and the request for proceeding on 9th June 2005 before lapse of time but I was not in a position to file them within the stipulated period as the court file could not be traced in the registry and I only managed to trace it on 22 June 2005. The court file had been taken for typing and that was the reason I was not able to file the notice of appeal and the request for proceedings in time.

9. That upon filing the Notice of appeal and request for proceedings I served the firm of Messrs. P Ochieng' Ochieng' & Company Advocates as instructed by Mr. P. Munge Murage and forwarded the copies back to the defendant's advocates."

Mr **Isaac Kitur,** the advocate employed as the legal officer of the applicant herein, in his affidavit dated 19th August deponed on this issue that:-

"17. That I verily believe that the mistake in failing to file the Notice of appeal within time was occasioned by mistakes beyond the control of the advocate of the applicant and inadvertent mistakes by the applicant's counsel, and the applicant should not be penalized or shut out of the doors of justice when it has a good appeal with high chances of success."

As stated above the delay in filing the Notice of Appeal was 8 days. However this was not the only relevant delay for consideration because the current application was not filed until 19th August 2005 which was approximately two months after the applicant knew that that they had filed the Notice of appeal out of time. The reason for this lengthy period that was given by Mrs Thangei in her submissions

was that the attention of Mr. P. Munge Murage was distracted by the need to file applications for stay of execution with the result that he over looked the filing of the current application before me. The stay applications were the subject of paragraphs 13,14,and 15 of the affidavit of Isaac Kitur dated 19th August 2005 as follows:-

" 13 . THAT I am further informed by Mr. P Munge Murage, the applicant's advocate on record which information I verily believe to be true that on 19th July 2005 the applicant's advocates filed an application seeking orders of stay pending appeal and a replying affidavit subsequently filed by the respondent.

Annexed herewith and marked "IK 9"are copies of the application and replying affidavit.

14. THAT the applicant also filed another application seeking that the applicant's application in H.C.C.C. No 148 of 2004 seeking stay pending appeal be heard during the High Court's vacation and orders were thus granted by Hon. Justice Warsame. Annexed herewith and marked "I K 10"are copies demonstrating the foregoing.

15. That I am informed by Mr. P Munge Murage, the applicants advocate on record which information I verily believe to be true that the applicant's said advocates (sic) was wholly engaged by the numerous applications in this file hence delay in filing this application."

This is far from a cogent reason for the delay in filing the application. Once it is learnt that a Notice of appeal has been filed out of time, it is incumbent upon the intended appellant through its advocates to act promptly without undue delay in making application for extension of time.

The next factor I need to consider is whether there is any merit in the intended appeal although this has been held to be of only possible relevance in an application for extension of time.

The intended appeal is against the ruling by ***B.K.T***anui J ***HCCC No.148 of 2004*** striking out the defence filed by the applicant insurance company in a suit brought by the respondent herein Mr.B.O. Rapuoda (hereinafter Rapuoda) against the applicant claiming that the applicant has become liable pursuant to section 10 (2) of the ***Insurance (Motor Vehicles Third Party Risks) Act Cap 405 of the Laws of Kenya to pay to Rapuoda the decretal amount in HCCC No.242 of 2002***.

The amount claimed in ***HCCC No.242 of 2002*** was the amount, which Rapuoda claimed consequent upon him being injured in a motor vehicle accident by a motor vehicle Registration ***No. KAG 399A*** which was an Isuzu tanker. The first defendant was Ken Investments Ltd. which company was alleged to be the owner of ***KAG 399*** and the second defendant was F.O.Onyoni who was alleged to be the "Driver, Servant, Agent and or employee" of the first defendant.

The decree following the judgment dated 12th February 2004 by **B.K. Tanui J.** in Rapuoda's favour against Ken Investments Ltd and **F.O.Onyonyo** in **HCCC No.242 of 2002** was for a total of Shs.2.1 million plus costs and interest.

As one would expect there was no reference to insurance in the pleadings or judgment.

There are at least two issues relating to insurance in HCCC No.148 of 2004 in which Rapuoda is the plaintiff and Standard Assurance Kenya Ltd. is the defendant.

The first is as to who was the person or entity insured by the Standard Assurance and the second was as to whether the notice required by section 10 (2)(a) of the **Insurance (Motor Vehicles Third Party Risks) Act Cap 405** as a precondition to liability of the Insurer was given. The relevant parts of section 10 are as follows:

"10 (1)

If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefits of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;"

On an application for extension such as this it is not for me to decide these issues. I am merely required to consider whether or not there are arguable issues.

I have come to the conclusion that these two issues are arguable.

The final matter for my consideration in the exercise of my unfettered discretion under **rule 4** is whether there is any relevant prejudice likely to be suffered by the respondent Mr. Rapuoda if I grant the extension sought. I do not find that there is any particular prejudice to the respondent if I was to allow the application. It would prolong the uncertainty facing the respondent as to whether his only remedy is against the defendants in **HCCC No.242** or whether he will have an additional remedy against the Insurer.

Having weighed up all of the above I have come to the conclusion that an extension should be granted. In the prayers to the application the applicant sought no less than eight separate orders including an application to amend the existing Notice of appeal.

I consider that all that is needed are the following orders which I hereby make:-

1. That the applicant may lodge a fresh Notice of Appeal, which shall replace any previous notices of appeal, which are deemed to be withdrawn under ***rule 82 (a).***

2. That the fresh Notice of Appeal shall be filed within 7 days of the delivery of this order and shall be served by the applicant in accordance with rule 76.

3. That the intended appeal shall be instituted by lodging the Memorandum and Record of appeal within 60 days of the date when the fresh Notice of Appeal is lodged.

4. The respondent having filed no affidavit in reply and not having appeared at the hearing of this application and the need for this application having been caused by errors on the side of the applicant there shall be no order as to costs of this application.

Dated and delivered at Nairobi this16th day of December, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR