REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CORAM: GITHINJI, J.A. (IN CHAMBERS)
CIVIL APPLICATION NAI 181 OF 2005 (KSM. 17/2005)

BETWEEN

JEREMIAH ACHILA GOGO ……..……. APPLICANT

AND

TELKOM KENYA LIMITED ……....…….….RESPONDENT

(An application for leave to file an application for striking out the

the notice of appeal from the ruling of the High Court of Kenya at Kisii (Mr. Justice Kaburu Bauni) dated 9th February, 2004
in
H.C.C.C. NO. 147 OF 1999)
****

R U L I N G

The applicant seeks an order under *rule 4* of the Rules of the Court (Rules) that the time prescribed by proviso to *rule 80* for filing an application to strike out an appeal be extended.

The applicant sued Kenya Posts and Telecommunications Corporation (KP&TC) in HCCC No.147 of 1999 for wrongful retirement. The main reliefs sought in the plaint were:-

> ***(a) A declaration that the purported retirement was unlawful.***
>
> ***(b) General damages for breach of contract,***
>
> ***(c) Damages for torts of injurious falsehood, negligent misstatement and conspiracy to defraud and injure***
>
> ***(d) Damages for loss of earnings, profits and pecuniary embarrassment.***
>
> ***(e) Redeployment of the plaintiff with full benefits or alternatively payment of the plaintiff's terminal dues and benefits on termination of employment contract.***

By a judgment dated 2nd April, 2003, the superior court (Wambilyangah J) found that the retirement of the applicant was wrongful and entered judgment for the applicant thus:-

> ***"So I award the plaintiff general damages of, Shs. 400,000 in addition to any other termination benefits to which he was entitled if he had been properly retired at under the S.A.P. He shall be***

paid interest and costs of the suit."

S.A.P. mentioned above is short for Structural Adjustment Programme.

The applicant's advocates filed a Draft Decree on 5th June, 2003 which they asked the Deputy Registrar to approve and which contains in paragraph 4 particulars of the decree as follows:-

"PARTICULARS OF DECREE

(a) General damages	***Kshs. 400,000***
(b) Pension Lumpsum	***Shs. 512, 104.5***
(c) Golden Handshake	***Shs. 60,000***
(d) 3 Months , Gross salary per year for	
19 years worked. 14684x3x19 836,988	
(e) 3 months salary in Lieu of notice	***72,000***
(f) Salary unpaid from 1st May, 1998	
to 3rd April, 2003	***1,386,169/70***
	Total 3,265,745.30

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The defendant do pay the plaintiff his monthly pension from date of retirement/judgment at the rate of Kshs.11,380.10 as per, the Pensions Act."

The Draft Decree was signed by the Deputy Registrar of the High Court on 5th June, 2003 perhaps signifying his approval of the decree. There is no other decree other than the draft decree in this record.

Although the decree was against the Kenya Posts & Telecommunications Corporation, motor vehicles belonging to Telkom Kenya Limited (Respondent) (Telkom) were attached. Properties of Kenya Postal Corporation were also attached. Both Telkom and Kenya Postal Corporation filed separate objection to attachment under order 21, rule 56 and 57 of the Civil Procedure Rules. The main ground for objection was that the defendant in the suit – KP&TC ceased to exist in 1998 upon enactment of Kenya Communication Act – No.2 of 1998 and the objectors were created as separate legal entities by separate statutes. It was contended for the objectors that the objectors were never joined in the suit and that the execution of the decree against them was unlawful.

The objection by Telkom was dismissed by the superior court on 9th February, 2004 the Court holding that after KP&TC became defunct its liabilities were transferred to Telkom and that Telkom indeed defended the suit. The objection by Postal Corporation of Kenya was however, allowed. Telkom ultimately filed Civil Appeal No. 20/2004 (Kisumu) now Civil Appeal No. 153/2004 Nairobi.

A copy of the memorandum of appeal dated 9th February, 2004 is annexed to the application. If this application is allowed, the applicant intends to file an application to strike out the pending appeal on the grounds that; the appeal does not lie as postal corporation, a party affected by the appeal has not been served with the record of appeal contrary to *rule 76 (1)*; that leave to appeal was not obtained and that the appeal does not raise any arguable grounds.

Before the Court can exercise its unfettered discretion in favour of the applicant the applicant has to

show, among other things, that the intended application is not frivolous; that the delay in bringing this application has not been inordinate and that the extension of time will not cause undue prejudice to the respondent (see ***Wasike v Swala 1984 [KLR] 591, Leo Sila Mutiso v Rose Hellen Wangare Mwangi*** – Civil Application No. Nai. 255 of 1997 (unreported)).

I will consider first the question of delay. The proviso to rule 80 of the Rules provides that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of 30 days from the date of service of the record of appeal on the respondent. The applicant concedes that his advocates were served with the record of appeal on 14th July, 2004.

The present application was filed on 9th June, 2005 almost 11 months after the service of the record of appeal. The explanation given for the delay is that the applicant's advocates were preoccupied with and distracted by Civil Application No. Nai. 206 of 2004 filed by respondent seeking leave to file appeal out of time against the judgment given on 9th June, 2004. The respondent contends that the reasons for delay are lame for the reasons stated in paragraph 5 of the replying affidavit.

It is not conceivable that the applicant's advocates were engaged in the application referred to on daily basis. In any case that application was determined on 10th December, 2004 – three months before the present application was filed. Moreover, by a letter dated 20th April, 2005 the applicants advocates had intimated to the respondents advocates that they intended to file an application to strike out the appeal if the appeal was not withdrawn. By a letter dated 18th May, 2005 the respondent's advocates informed the applicant's advocates that they were not ready to withdraw the appeal. I am satisfied that the delay in the circumstances of this case is inordinate and is not justified. Indeed it seems that the application is an after thought and is ostensibly intended to facilitate the speedier termination of the appeal and ultimately access to the decretal sum which is deposited in a bank account.

I would, for comprehensible reasons refrain from dealing with the merits of the intended application except to say that the appeal raises issues of law and that the appeal is not ex facie incompetent.

Moreover I have confirmed from the record of Civil Appeal No. 153 of 2004, that the approved Draft Decree filed in this application is in fact the decree and that by the attachment, the applicant sought to recover Shs. 3,834,244/45 as at October, 2003.

The record of appeal further shows that after the hearing of the suit the applicant's advocate filed written submissions in which he computed the unpaid salary and loss of leave allowance at over Shs.4,000,000/=; lumpsum pensions at Shs.500,450/25 and monthly pension at Shs.11,121/25. However, the learned trial judge only gave judgment for Shs. 400,000/= as general damages and termination benefits, which he did not compute.

The specific large sums contained in the particulars of the decree other than the Shs.400,000/= were not specifically awarded by the trial Judge. They were not quantified or claimed in the plaint. They are not shown to have been computed by a competent authority under the Pensions Act or in accordance with the Pensions Act. They do not appear to have been assessed and awarded by the court. It seems that the figures were unilaterally and arbitrarily computed by the applicant's advocates and inserted as a decretal sum. It is surprising that the respondent has not brought appropriate proceedings either under ***section 34*** of Civil Procedure Act or under other laws to rectify the decree.

It is apparent that the decree is far in excess of the judgment in contravention of ***order XX rule 6*** Civil Procedure Rules. That is a strong reason why the respondent should be allowed to prosecute the appeal.

Lastly, I am of the view that if the application is allowed there will be undue delay in the prosecution of the appeal resulting in prejudice and unnecessary costs to the respondent.

For those reasons, the application has no merit. It is dismissed with costs to the respondent.

Dated and delivered at Kisumu this 1st December, 2005.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR