IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 49 OF 2003

BETWEEN

GURCHARAN DASS AGGARWAL……...…….APPLICANT

AND

PARESH MANDALIA…….RESPONDENT

(to lodge and serve notice of appeal and record of appeal out

of time from the ruling and order of the High Court of Kenya

at Eldoret (Tunya, J) dated 1/11/0 2

in

H.C.C.C. NO. 90 OF 2002)

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RULING

The applicant, ***Gurcharan Dass Aggarwal,*** was sued by the respondent, ***Paresh Mandalia*** , in the superior court at Eldoret for recovery of a sum of Shs.3,500,000/= plus interest. The cause of action as pleaded was non-payment of a friendly loan advanced to the applicant by the respondent during the year 1999. The sum of Shs.3,500,000/= was allegedly advanced by way of delivery up by the respondent to the applicant of bearer certificates of deposit amounting to Shs.3,500,000/=. The respondent was the holder of the said bearer certificates. He transferred the same to the applicant on or about 16th February, 1999 and such 'transfer' was noted by ***Reliance Bank Limited*** (the issuer of the said certificates) on that date. On 30th October, 2000 ***Reliance Bank Limited*** credited to the applicant's account the value of the said bearer certificates. The credit advice in the sum of Shs.3,500,000/= issued by the said bank reads:

> ***"To amount of Bearer certificates of deposits (BCDS) placed under lien to service the facility now applied to the credit of your account".***

The said credit advice is dated 30th October, 2000 by which date the said Bank was already under liquidation having been so placed on 12th September, 2000. I say no more as there is an allegation by the applicant in the High Court to the effect that those certificates were on no value to the applicant since the Bank was "under receivership" as at 1999 and as such could not pay out any moneys. It is common

knowledge that prior to 13th September, 2000 the bank was under statutory management. I have gone into all this as I have to be satisfied that the intended could well be arguable. I cannot say that the intended appeal would be frivolous.

What I have before me, substantially, is an application for extension of time to lodge a notice of appeal. The application is stated to be brought under rules 4 and 42 of the Rules of this Court.

The applicant states that the ruling sought to be appealed against was at first to be delivered by the superior court (Tunya, J) on 29th October, 2002. On that day it was not ready and that it was delivered on 1st November, 2002 without the applicant knowing that that was the date set for delivery of the ruling. He states further that he did not become aware of the fact of delivery of ruling until 29th November, 2002 when he was confronted by auctioneers who had come to attach his properties in execution of a decree which arose out of the ruling. On that day the applicant's advocates lodged an application in the superior court seeking, inter alia, a review of the date of delivery of ruling and redelivery of that ruling so as to enable the applicant to lodge a notice of appeal against it. Tunya, J dismissed that application on 9th December, 2002 on the basis that the applicant's counsel was aware of the new date of delivery of the ruling, that is, 1st November, 2002. He however set aside the execution process on the ground that the execution took place without sanction of the superior court prior to the taxation of bill of costs. This he did by virtue of what is set out in section 94 of the Civil Procedure Act, following my decision in the case of ***Miniafu vs. Ndwiga (H.C.C.C. No. 2736 of 1990) (unreported)***. The applicant then applied to the superior court for extension of time to lodge a notice of appeal invoking the powers of that court under section 7 of the Appellate Jurisdiction Act, Cap. 9 and Section 3A of the Civil Procedure Act. That application was lodged on 9th January, 2003 and was dismissed on 20th February, 2003. The unfortunate aspect of that ruling (of 20th February, 2003) is that the learned Judge did not fully deal with the 7 week delay in bringing that application. He simply declined to exercise his discretion "having reviewed all the arguments".

Not being deterred by that ruling the applicant lodged the present application in this Court on 4th March, 2003 some 12 days after he failed to obtain extension of time to lodge the notice of appeal. What I have to consider here is whether or not the applicant is entitled to the orders he seeks in view of what has happened so far in the court below.

The crucial arguments hinged on the issue "whether or not the applicant's advocates were aware of the new date for delivery of the ruling, viz, 1st November, 2002". The applicant's advocates deny that they were so aware. In support of such denial they aver that the new date was not noted on court's record of the suit. The respondent's advocate says that they were aware of the new date. The applicant's advocates say that the court file does not show that the new date of delivery of the ruling was declared to be 1st November, 2002. The learned Judge has dealt with this issue by saying:

> ***"The truth is that the counsel for the dependant was aware of the ruling date on 29.10.02 and the subseque nt one on 1.11.02. Again Mr. Kuloba contended in his argument before this court that even on 1.11.2002, there is nothing to show it was delivered. Only a blind reader with no braids (sic) to touch would so state. The last sentence of the ruling is as fo llows: 'Dated and delivered at Eldoret on 1 st November, 2002'"***

The learned Judge has himself pointed out that each one of the counsel on record for the parties appeared before him in the presence of his court clerk, Mr. Kassachuon, to inquire about the said ruling. The court informed them that delivery thereof would be on 1st November, on which date, only a representative of counsel for the plaintiff/respondent attended.

Mr. Kimaru who appeared for the respondent before me was at pains to point out what the learned Judge thought of applicant's advocates.

On the other hand Mr. Katwa for the applicant laid stress on the fact that the advocate who appeared to take the ruling on 29/10/2002 was not named until 4th March, 2003 when the replying affidavit was filed by the respondent to this application.

The allegations and counter-allegations as well as the remarks made by the learned Judge have caused some anxiety to me. I am not sure which way the truth lies. I cannot be sure of the facts from the affidavits and record before me. It is possible that the new date of delivery of judgment was not noted on the superior court file. It is also possible that if it was noted it was not understood. It is also possible that the applicant's advocates are attempting to cover their tracks. But all these fall within the realms of conjecture. The party suffering is the applicant who was obviously not aware of the changed date for delivery of ruling. Does he lose his undoubted right of appeal for the alleged misdeeds of his advocates'? Should he not be given one chance to lodge his intended appeal which as I have pointed out is not a frivolous one?

If I were to punish the applicant for the misdeeds of his advocates there would be one more litigant who would say that he suffered on account of his advocates' mistakes, misfeasance, malfeasance or nonfeasance. He is the innocent party when it comes to deciding who is telling the truth as regards communication to counsel of the new date for delivery of the ruling sought to be appealed against.

I was told that the applicant is using all procedural technicalities to avoid the day of reckoning. That may well be so. Parties are entitled by law to make such applications as law and procedure permit. That is our system of jurisprudence. Unless the applications are a total abuse of the process of law one cannot penalize a party for wishing to assert his/her rights. The applications, if wrongly brought, would be dismissed with costs as happened here but I do not think the applicant was abusing the process of court by asking the superior court to extend the time for lodgment of a notice of appeal.

It has been suggested that the delay – from 29/11/2002 to the time this application was lodged is so inordinate so as to deprive the applicant of his right to lodge his notice of appeal and record of appeal. I bear in mind the fact that proceedings in the superior court from 29/11/2002 to the time Tunya, J dismissed the application for extension of time took some time. Thereafter this application was lodged within 12 days. I do not think the delay all told is too inordinate or unexplained.

I allow this application. The applicant will lodge his notice of appeal within the next seven days and his record of appeal within 45 days of lodgment of the notice of appeal. The applicant will however pay the respondent's costs of this application which I asses at Shs.12,500/= within the next 30 days failing which execution may issue.

Dated and delivered at Nairobi this 18 th day of March, 2003 .

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR