IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Lakha, Owuor & Keiwua JJ A)

CIVIL APPLICATION NO NAI 50 OF 2002 (UR. 29/2002)

AFRICAN AIRLINES INTERNATIONAL LTD …...….PLAINTIFF

VERSUS

EASTERN & SOUTHERN AFRICAN TRADE

& DEVELOPMENT BANK (PTA BANK)……..…..DEFENDANT

(Application for extension of time to file Notice of Appeal and Record of

Appeal in an intended appeal from Ruling of the High Court at

Nairobi (Hewett J) dated 20th April 2000 in High Court Civil Case

No 1361 of 1999)

JUDGMENT

This is an application by the unsuccessful defendant by way of a reference under rule 54(1)(b) of the Rules of this Court seeking to reverse the decision of Gicheru JA sitting as a single judge refusing to extend time to file notice of appeal and record of appeal in an intended appeal from the ruling of the superior court at Nairobi (Hewett J) given on 20 April 2000.

The matter comes before us in these circumstances. Hewett J on 20 April 2000 gave a judgment in favour of the plaintiff. The action arose out of these brief facts. There was a loan agreement between the parties which was secured by the defendant's property charged by way of a security for repayment of the debt. Upon failure to repay, the plaintiff sought to exercise the statutory power of sale. This was resisted: hence the claim.

Following the judgment, the defendant's advocates considered the desirability of appeal but ended up by filing an application for review, which was on 17 July 2000. Hewett J dismissed the application on 23 January, 2001. This application was not filed until 7 March 2002 as the parties had agreed to refer their dispute to arbitration as provided by the loan agreement. But arbitration did not take place so the applicant applied to court for stay.

The learned single judge after hearing advocates for the parties found in favour of the respondent and dismissed the application for extension with costs on the basis that there was a long delay. Admittedly,

the applicant is guilty of delay. The real point of the matter is the reason for the delay. The whole of the matter, it seems to us, depends upon whether or not, we can properly look upon a delay as being an exceptional one. In this case, the delay is inordinate but the plaintiff's advocates knew at all times that there was in all likelihood to be an appeal, so that there was no question of their proceeding upon a false assumption that they had achieved finality for their clients.

In dealing with the application for extension, the learned single judge had to take into account all the relevant matters when approaching the determination of the application before him. In our judgment, all the relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reasons for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendants if time is extended.

Unfortunately and, with great respect, the learned single judge failed to consider the reasons for the delay although Mr Kang'ethe for the respondent before us conceded that there was material before him for the purpose. Nor did he consider whether there was an arguable case on the appeal. Finally, and, with respect, the learned single judge failed to consider prejudice to the defendant if time was extended.

There was no question of any prejudice arising to the defendants in the circumstances, which we have described. Although Mr Kang'ethe for the respondent submits that he made submissions on the issue of prejudice, we do not find even a single word on this matter in the learned judge's notes and conclude that this must not have arisen at all. And in that situation, there was, in our judgment, absolutely no need to go into the complex and time consuming question as to whether or not there was a good arguable case on the appeal. There is no invariable rule which requires that consideration, and it would obviously involve the very reverse of what is now designed to be achieved if on every application to extend time there was a pre-appeal hearing in order to consider what was the prospects of success. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal; because it may be wrong, and indeed an unkindness to the appellant himself, to extend his time for appealing, after he has allowed the time to elapse, to enable him to pursue a hopeless appeal. But this is not such a case.

It is thus clear that the learned judge failed to consider all the necessary factors before he exercised his discretion to refuse an extension of time.

That being so, we now turn to consider whether we should interfere in any way with the exercise of that discretion.

Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of *Mbogo v Shah* [1968] EA 93 which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang VP said at page 94:-

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion".

Applying these principles to the present case, we are satisfied that this is one of those cases where, with the greatest of respect, we have no hesitation in interfering with the exercise of the discretion of the learned judge.

Considering, we hope, all the factors which are relevant to be considered in coming to a conclusion as to the result of this reference, we are of the clear opinion that this is a case in which the grant of reliefs sought would be appropriate.

We would finally add that Mr Kang'ethe contended that because the applicant preferred a review, it thereby lost its right of appeal. There is no merit in such a contention. The legal position is, we think, well settled.

It was succinctly stated in *Sarkar's Law of Civil Procedure* Eighth Edition Volume 2 at page 1592 as follows (omitting the citation of the case law):-

"Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with."

For these reasons, we would allow this reference, set aside the order of the single judge and substitute therefor an order granting an extension of time as sought by the application. A notice of appeal shall be filed within seven days from today and the record of appeal within forty five days thereafter. Costs of this application and those before the single judge shall be costs in the appeal.

Dated and delivered at Nairobi this 7th day of March, 2003

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

…….

JUDGE OF APPEAL

M.M.O. KEIWUA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR