



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 342 OF 2002**

**BETWEEN**

**ARI CREDIT & FINANCE LIMITED.....APPLICANT**

**AND**

**SAFARI IMAGE LIMITED.....1ST RESPONDENT**

**REMESH M. SHAH.....2ND RESPONDENT**

**SHANTILAL M. SHAH.....3RD RESPONDENT**

*(Being an application for extension of time to file*

*Record of Appeal and notice of Appeal out of time from*

*the Judgment of the High Court of Kenya at Nairobi*

*(Hewett, J) delivered on 22 nd March, 2 001*

**in**

**H.C.C.C. NO. 980 OF 1995)**

**\*\*\*\*\***

**RULING**

The applicant ***Ari Credit & Finance Limited*** (now in liquidation) filed a suit in the superior court – H.C.C.C. NO. 980 OF 1995 – on 28th March, 1995. It sought judgment against the three defendants (the respondents here) in the sum of Shs.3,192,605/= with compound interest at the rate of 45% per annum from 8th December, 1994 until date of payment in full. The respondent filed a defence and counterclaim. The counterclaim was in respect of a sum of Shs.1,400,000/- plus interest which sum the first respondent had deposited with ***Ari Credit & Finance Limited*** on 28th November, 1991.

The applicant, after close of pleadings, applied for summary judgment against the three respondents. The defence to counterclaim, according to superior court (*the late Hewett, J*) does not deny either the existence of the fixed deposit nor the fact that the same was for security against the loan given to the first respondent by the applicant. At that time the applicant was not in liquidation. It was placed in liquidation

later. I am not told when it was put into liquidation.

When *Ole Keiwua, J* (as he then was) entered summary judgment against the respondents on 24th January, 1996 he dealt with the issue of deposit raised in the counterclaim. What he said about the deposit is reproduced by *Hewett, J* in his ruling at page 32 of the record before me. *Ole Keiwua, J* went on to give judgment on the claim but did not deal with the counterclaim. The applicant in its affidavit in support of the application for summary judgment had said through one *Mr. George Omondi* as follows:

***“That as regards the Defendants’ counter - claim against the plaintiff, I depone that the said sum of Shs.1.4 million is being held by the plaintiff as security and on lien and it is not payable to 1st defendant until the amount owing from the Defendants to the plaintiff inclusive of all accrued interest and other charges is fully liquidated in terms of Agreement entered into between the plaintiff and the defendant.”***

The respondents lodged a notice of appeal against the decision of *Ole Keiwua, J* on 29th January, 1996. The respondents then applied for extension of time to lodge a notice of appeal and record of appeal out of time. That application was dismissed on 11th November, 1998. That was in *Civil Application No. Nai. 168 of 1998.*

The respondent’s application for stay of execution was dismissed by this Court on 3rd December, 1998.

The respondents then filed in the superior court an application dated 12th October, 1999 seeking to declare all proceedings from 5th December, 1997 null and void. That application was dismissed by *Mbaluto, J* on 10th March, 2000.

Finally the respondents filed an application for review of the decision of *Ole Keiwua, J* on 13th February, 2001. At this time the applicant was in liquidation. *Hewett J* ruled on the review application on 22nd March, 2001 and did actually review the decision of *Ole Keiwua, J* by changing the interest rate in respect of the original claim from 45% compounded, to:

***40% per annum from 1 st January, 1996***

***35% per annum from 1 st January, 1997***

***30% per annum from 1 st January, 1998***

***25% per annum from 1 st January, 1999***

***20% per annum from 1 st January, 2000***

In addition, *Hewett J* decreed that credit ought to be given to the respondents for the aforesaid sum of Shs.1,400,000/= from a date and at a rate of interest to be determined on the hearing of the counterclaim, there being a stay of execution until then. Effectively, *Hewett J* put the matter in order. He ruled on the interest to be applied so as to leave no room for doubt and also put the matter of Shs.1,400,000 counterclaim at rest as *Ole Keiwua, J* had not dealt with the same.

What happened thereafter is important. The notice of appeal against the ruling of *Hewett J* was due for filing (last day) on 5th April, 2001. It was filed one day late. The one day delay was put right when time was extended by a learned single Judge of this Court. The copies of proceedings and judgment were ready and received by the applicant’s advocates on 26th September, 2002 so that the last day to lodge the record of appeal was 26th November, 2002 or thereabouts.

The applicant’s advocates had sufficient time between 5th April, 2001 (date of notice of appeal) and 26th September, 2001 (date of receipt of copies of proceedings and ruling) to goad their client into giving them instructions to appeal. *M/s. Machira & Company* did seek instruction from the applicant for lodgment of

the appeal but the applicant did not instruct them until 18th November, 2002. The Deposit Protection Fund Board's Mr. Arithi (the liquidation agent) was dealing with the matter. I do not see how the liquidation agent could not give instructions to M/s Machira & Company to lodge an appeal for a period of nearly six months. Even if the instructing gentleman in the liquidator's office was away on leave six months is a long time. Even two months is a long enough time to enable the liquidator to instruct M/S Machira & Company to lodge the appeal. I am not satisfied that the liquidator acted with reasonable diligence. It was really his fault when he neglected to instruct his advocates to appeal.

As I see it this litigation must end. The applicant ought to take what it has been given after the small issue of the hearing of the counterclaim is sorted out. It is not a major issue. The deposit of Shs.1,400,000/- is not denied. Surely the respondents are entitled to be credited with that sum plus interest when the deposit was agreed to be used specifically as a security (part) for repayment of the loan. I think the applicant's advocates are being too technical. They want to have their cake and eat it. That ought not to be allowed.

This application is dismissed with costs. Before I depart from this application I would want to point out to the applicant that it ought to have obtained, prior to lodgment of its notice of appeal, the sanction of the superior court or the committee of inspection, to lodge the notice of appeal as proceedings in this Court are commenced by a notice of appeal see Trade Bank Limited vs. L.Z. Engineering Construction Limited [2000] 1 E.A.L.R. 266. Validating time for filing a notice of appeal by the one day extension granted by this Court is not equivalent to granting of the sanction as required under Section 241(1)(c) of the Companies Act, Cap. 486.

***Dated and delivered at Nairobi this 10 th day of April, 2003.***

**A.B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**