



IN THE COURT OF APPEAL

AT NYERI

(Coram: Tunoi, Shah & Keiwua JJ A)

CIVIL APPEAL NO 7 OF 2000

KENYA SHELL COMPANY LTDAPPELLANT

VERSUS

CHARLES.....RESPONDENT

(Appeal from a Ruling and Order of High Court at Meru (Omwitsa CA)

dated 9.11.1999 in HC Misc Civil App No 70 of 1999)

JUDGMENT

This is an appeal from the ruling of the High Court of Kenya at Meru (G A Omwista, Esq Commissioner of Assize) given on 9th November, 1999, whereby the Court dismissed an application to extend time within which to lodge an appeal against the judgment of the Senior Resident Magistrate at Meru in CMCC No 1097 of 1997.

By a plaint dated 20th June, 1994, originally filed in the Superior Court, the respondent sued the appellant and two others for special and general damages arising out of a road traffic accident in which her husband was fatally injured. She instituted the suit on her own behalf and in her capacity as the legal representative of his estate.

Though the appellant filed a written statement of defence, it showed a lamentable lack of interest in the trial of the suit and was absent at almost all stages of the trial. For example, on 15th August, 1998 after the respondent had closed her case, the appellant's counsel sought adjournment to another date so as to enable him to mount the appellant's defence. This he was not able to do so on more than four occasions thus necessitating unnecessary adjournments. However, on 12th January, 1999, the Senior Resident Magistrate ruled as follows pursuant to an application by the respondent's counsel:

“Since the defendant was properly served and in good time, I do find it does not wish to defend and I now order the case closed”.

The respondent's counsel then made submissions and in a reserved judgment delivered on 1st February, 1999, the Senior Resident Magistrate entered judgment against the appellant and its co-defendants in the sum of Shs 277,074/= with costs and interest. The entire decretal sum was deposited in full in court on 21st June, 1999 when Auctioneers moved in to execute the decree against the appellant. Peculiarly, the appellant has not moved the Court, to set aside or vary the *ex parte* judgment as is mandated by order

1XB rule 8 of the Civil Procedure Rules. On 14th June, 1999, the appellant sought leave to appeal out of time. In rejecting the application, the learned Commissioner of Assize castigated the appellant's counsel for indolence. He also found the said counsel guilty of laches which resulted in a delay of more than four months in lodging the application.

Consequently, the learned Commissioner of Assize declined to exercise his discretion in favour of the appellant. Mr Kimundi, for the appellant, has submitted in the main that the Hon Commissioner of Assize failed to exercise his discretion judiciously and had ignored wider interest of justice to have the case decided on its merits. As far as this Court is concerned, it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which the Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted. So is the question as to when and the circumstances in well settled. In *Mbogo and Another v Shah* [1968] EA 93 at p 95 the predecessor of this Court said:-

“.....I think it is well settled that this Court will not interfere which an appellate court should interfere in the exercise of the discretion of a judge 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

And Sir Charles Newbold, P, put it thus:

“..... a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice”

Applying these principles to the instant case the appellant took almost four months to file the present application after judgment was entered against it. It never gave a satisfactory explanation for the delay or the indolence and negligence of its counsel. In our view the delay involved is substantial and inordinate.

Moreover, the appellant does appear not to be worried by the regular judgment against it which is on record. Actually, the application before the Superior Court was not beneficial to the appellant in view of that judgment.

It seems to us, with respect, that the learned Commissioner of Assize exercised his discretion judicially and not arbitrarily or capriciously. Accordingly and for the above reasons we see no merit in this appeal. We order it dismissed with costs.

Dated and delivered at Nairobi this 16th day of May, 2003

P.K.TUNOI

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JUDGE OF APPEAL

A.B.SHAH

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR