



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O'KUBASU, KEIWUA JJ.A)

CIVIL APPLICATION NO. NAI 350 OF 2000

BETWEEN

RUAHA CONCRETE COMPANY LIMITED APPLICANT

AND

MIDDLE EAST BANK KENYA LIMITED RESPONDENT

(Being an application for extension of time to file

Notice of Appeal and Record of Appeal out of time in

an intended Appeal from the ruling and decree of the

High Court of Kenya at Milimani, Nairobi of Mr. P.

J. S. Hewett, Commissioner of Assize, as he then

was, given on the 27th day of January, 2000)

in

H.C.C.C 636 of 1999)

RULING OF THE COURT

This is a reference to the Court from the decision of the learned single Judge of this Court (Gicheru J.A as he then was) delivered on 24th May, 2002. The learned single Judge exercised his discretion under rule 4 of this Court's Rules by extending the time in which a notice of appeal and record of appeal were to be filed. In doing so the learned single Judge expressed himself thus:

" ... I cannot say that the applicant's intended appeal is frivolous and since in the circumstances of this application I do not consider as inordinate the 16 days delay in lodging this application, I would exercise my discretion under rule 4 of the Rules in favour of the applicant. In the result the applicant's application is granted so that the time for lodging the notice of appeal is extended by 7 days from today's date and the time for lodging the record of appeal is extended by 15 days from the date of lodging the notice of appeal. The costs occasioned by this application assessed at kshs.5,000/- are awarded to the respondent and are

payable within the next 30 days from the date hereof failing which execution to issue".

When this matter came up for hearing before us on 5th May, 2003 counsel for the respondent Mr. Esmail submitted that he made the reference on the following principal grounds:-

- 1) The learned single Judge erred in principle in accepting that the pleadings need not be placed before the court in order to ascertain whether or not the proposed appeal is frivolous.
- 2) There was a misdirection when the learned single Judge held that the material placed before him was sufficient to ascertain that the appeal was not frivolous.
- 3) That there was a misdirection when the learned single Judge held that it was not necessary for the applicant to give any explanation for the delay in making the application.
- 4) There was misdirection in that the appeal had been struck off for two reasons and the entire application was on one reason alone without dealing with the second issue.

Having so submitted, Mr. Esmail then took us through the proceedings and the judgment of the superior court in a bid to show that the application for extension of time ought not to have been granted. He referred us to relevant authorities on the matters at hand.

A brief background to this reference is that the applicant/appellant Ruaha Concrete Company Limited, filed an appeal in this Court being Civil Appeal No. 53 of 2000, which appeal was struck out on 13th November, 2000. In striking out the appeal this Court stated:

"As the record of appeal does not contain a certified copy of the decree appealed from and several pages of the record are illegible this appeal is incompetent and is hereby struck out with costs to the respondent. The respondent will also have the costs of the Notice of Motion".

It was after the above order that the applicant had to start the appeal process afresh now that its appeal had been struck out. It had therefore to file an application under rule 4 of this Court's Rules (the Rules) seeking an extension of time in which to file a notice of appeal and lodge the record of appeal.

In Ratman V. Cumarasamy [1964] 3 All E.R 933 Lord Guest delivering the opinion of the Privy Council at page 935 said"

"The rules of Court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation".

The above passage has been quoted with approval by this court in Grindlays Bank International (K) Limited vs. George Barbour - Civil Application number NAI 257 of 1995 (unreported) and Trade Bank Limited (in Liquidation) vs. L. Z. Engineering Construction Limited and Another - Civil Application No. NAI 282 of 1998 (unreported).

Having so stated we may now go back to the principal grounds set out by Mr. Esmail in his opening remarks. As regards the first ground we are unable to accept the argument that the learned single Judge erred for allegedly accepting that the pleadings need not be placed before the court in order to ascertain whether or not the proposed appeal was frivolous. We find nothing to that effect in the ruling of the learned single Judge.

The second ground was to the effect that there was a misdirection when the learned single Judge held that the material placed before him was sufficient to ascertain that the appeal was not frivolous. But in his ruling the learned single Judge said:-

"The record of this application, inter alia, contains the proceedings in the superior court and the ruling out of which the decree intended to be appealed from arises. It also contains a memorandum of appeal which was struck out as is indicated above".

From the foregoing it would appear that the learned single Judge had material before him to determine in his unfettered discretion whether the intended appeal was frivolous or not.

The third ground cannot be correct since the learned single Judge never held that it was not necessary for the applicant to give any explanation for the delay. There was explanation in the affidavit of Mr. Owino. The delay was not inordinate and indeed the learned single Judge specifically held:-

"I do not consider as inordinate the 16 days delay in lodging this application".

Before we come to the last ground, we wish to pose for a moment and consider how the discretion of a single Judge is to be exercised under rule 4 of the Rules.

In Leo Sila Mutiso v. Rose Hellen Wangari Mwangi - Civil Application No. NAI 251 of 1997 (unreported) this Court stated:-

"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 this 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".

And as if to emphasize the foregoing this Court in its later decision in Samken Limited and Another v. Mercedes Sanchez Reu Tussel & Another - Civil Application No. NAI 21 of 1990 stated inter alia:-

"We said at the beginning of this ruling that rule 4 under which the applicants went before the single Judge gives an unfettered discretion to the single Judge in deciding whether or not to grant the extension sought. Though the discretion is unfettered, like all judicial discretion it must be exercised on reason not caprice and the exercise must not be arbitrary or oppressive.

Accordingly, the courts have over the years put down guidelines on how the exercise of a discretion ought to be done".

We now come to the fourth and last ground of Mr. Esmail's submissions. If we understood him correctly his complaint was that the appeal had been struck out for two reasons viz, the record of appeal did not contain a certified copy of the decree appealed from and, secondly, several pages of the record were illegible. It was Mr. Esmail's contention that the issue of illegibility was not considered by the learned single Judge and hence this was a misdirection. On our part we see no substance in that contention. As we have stated, when the appeal was struck out the appellant had to start the process afresh. Since the appellant had its appeal struck out and was ordered to pay the costs thereof, we think that the appellant had been sufficiently punished for being in breach of the rules.

We have carefully considered the submissions of counsel appearing for both parties and having regard to the authorities cited we would only say that Mr. Esmail presented his argument with considerable force and at times he appeared as if he was arguing the intended appeal.

We must remind ourselves that this was a reference to full court. We have already referred to the discretion of a single Judge under rule 4 of the Rules. The guidelines stated in various authorities have also been highlighted. In the end, we have come to the conclusion that we discern no misdirection on the part of the learned single Judge in the manner he exercised his unfettered discretion.

The upshot of all the foregoing is that this reference is dismissed with costs.

Dated and delivered at Nairobi this 9th day of May, 2003.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR