



IN THE COURT OF APPEAL

AT NAKURU

(Coram: O’Kubasu JA)

CIVIL APPLICATION NO NAI 312 OF 2000

PAN AFRICAN PAPER MILLS (EA) LIMITED... ..APPLICANT

VERSUS

TRUPHENA V OLAKA..... RESPONDENT

(Application to file and serve a Record of Appeal out of time in an intended

appeal from a Judgment of the High Court of Kenya at Eldoret

(Lady Justice Roselyne Nambuye) dated 9th day of October, 1996

in HCCC No 140 of 1988)

RULING

This is an application by way of Notice of Motion brought under rule 4 of the Court of Appeal Rules (the Rules) in which the applicant (Pan African Paper Mills (EA) Limited) is seeking an order that the applicant be granted leave to file and serve a Notice and Record of Appeal out of time.

This application is brought on the following grounds:-

“(a) THAT the appeal filed earlier at Nakuru sub registry on 15th November, 1999 as *Pan African Paper Mills (EA) Limited Vs Truphena V Olaka* Court herefrom was struck out on 28th September, 2000 for being incompetent.

(b) THAT the applicant is still desirous of pursuing an appeal from the judgment above quoted delivered on 9th October, 1996.

(c) THAT the applicant herein has manifested good faith and has acted diligently on its part in seeking typed copies of the proceedings and urgently applying to this Court to be given leave to start a fresh appeal against the judgment above quoted.

(d) THAT delay in filing the appeal in time was not intended to put an error by the applicants advocates that the applicants themselves could not have envisaged.

(e) THAT this appeal is sure to succeed.”

Mr Nyagaka for the applicant submitted that the delay in filing the appeal was due to the fact that it took a long time to obtain copies of typed proceedings and that when the appeal was filed, it was struck out, and hence the advocate for applicant had to seek instructions which instructions, were given after one month, hence this application.

In opposing this application Mr Onyinkwa for the respondent pointed out that the judgment to be appealed from was delivered on 9th October, 1996 and the appeal filed on 15th November, 1999 which was a delay of over three years. The appeal was therefore struck out for being out of time. Mr Onyinkwa also drew this Court's attention to the fact that there was a letter dated 28th October, 2000 in which it was stated that the case had been concluded and yet in an affidavit sworn on 31st October 2000 the advocate for the applicant is seeking leave to appeal. It has also been pointed out that the decretal amount has been paid out to the respondent. In an application of this nature the Court is being asked to exercise its unfettered discretion which is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice – see *Shah v Mbogo and Another* [1967] EA 116.

In this application the position is that the judgment of the superior court was delivered on 9th October, 1996. The applicant took about three years before filing the appeal which appeal was struck out as the Record of Appeal did not contain a certified copy of the decree and also because the appeal was actually incompetent as it was filed out of time. That order of this Court (striking out the appeal) was made on 28th September, 2000, and this application for extension of time was filed on 2nd November, 2000.

How is this discretion to be exercised under rule 4? In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 255 of 1997 (unreported) this Court observed:-

“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

After considering other decided cases this Court then went on to say:-

“..... Whilst this discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.”

From the affidavits filed herein and submissions by counsel appearing, it is clear that the applicant was late by three years and it has now come up with this application seeking extension of time. Again from the judgment sought to be appealed from it would appear that liability was admitted since the applicant offered to pay the respondent only that the offer was rejected as being too low. Then there is this letter dated 28th October, 2000 written by advocates for both parties and addressed to the Manager of KCB Ltd in which it was stated:-

“We would like to advise you to pay the deposit in the above account to Onyinkwa & Co Advocates as the case in respect of which the amount was deposited is concluded.”

From the above there can be no doubt that the dispute between the parties herein had been concluded. Let us remind ourselves that the judgment of the superior court was delivered on 9th October, 1996 and so by 28th October, 2000 the advocate for the applicant (the defendant in the superior court) was stating that the case had been concluded. Is it not surprising that the same advocate should swear an affidavit on 31st October, 2000 in support of an application for extensions of time? In my view the applicant's advocate was not candid in this matter. The dispute has been settled and the decretal amount paid out to the respondent. The applicant went to sleep after the judgment of the superior court. In my view, it would be an exercise in futility to allow the applicant's application. I decline to exercise my discretion in

applicant's favour. Accordingly, the application is dismissed with costs.

Dated and delivered at Nakuru this 23rd February 23, 2001

E.O. O'KUBASU

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JUDGE OF APPEAL