



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI.291 OF 2000**

BETWEEN

MOHAMED OSMAN MAALIM APPLICANT

AND

EUROBANK LIMITED RESPONDENT

(An application for extension of time to file an intended appeal from a ruling of the High Court of Kenya at Nairobi (Lady Justice Gacheche)(Comm. of Assize) dated the 2nd March 2000

in

H.C.C.S. No.73 of 2000)

RULING

This is a motion under rule 4 of the Court of Appeal Rules for an extension of time within which to file and serve a record of appeal.

The decision against which an appeal is intended was given on 2nd March 2000, by Ms. W. Gacheche, a Commissioner of Assize. In that decision the superior court declined to grant the applicant a temporary injunction against the respondent. The respondent had lent the applicant money on the security of his two properties. The respondent sought to realize its securities alleging that the applicant had defaulted in the repayment of the loan. It was that intended action by the respondent which the applicant sought the aid of the superior court. The applicant promptly filed a notice of appeal, but has not to date filed a record of appeal. The time for doing so lapsed 60 days after the date the notice of appeal was filed.

Consequently an extension of the time for doing so is necessary in order for the applicant to file a competent appeal, and hence this application.

The applicant has sworn the affidavit in support of the application in which he deposes, inter alia, that after the superior court dismissed his application for a temporary injunction he moved this court under rule 5(2) of the aforesaid rules for similar relief, that he hoped the application would be heard on a priority basis but that the court declined to hear it urgently, that a determination of that application one way or the other was essential to enable him decide whether or not to file a record of appeal or to take any other step in the intended appeal; that had this court not granted him an injunction on 19th September, 2000, it was most likely that the respondent would have sold his securities and thus rendered whatever action he would have taken in the intended appeal useless; and that he considered it prudent to withhold any action in the matter until a decision is rendered. The respondent filed an affidavit in opposition of this motion, but Mr Ohaga for the respondent relying on the facts as presented

by the applicant, submitted, inter alia, that the applicant has not explained the delay in filing the record of appeal in view of the clear provisions of rule 81 of the rules of this court. In his view the rule has no provision to the effect that where an intending appellant is awaiting a decision in a relevant matter pending before this court he may withhold further action in his appeal or intended appeal pending a decision thereof.

Nor, according to him, is there in existence any legal principle to that effect. It was also his submission that the application as presented is cynical. He made particular reference to grounds 3 and 4 of the application which read as follows:

"3. That the Record of Appeal was not filed within time as no one could predict the outcome of the Civil Application No. NAI.83 of 2000

. 4. That further Counsel handling this matter subsequently to Mr Abdikadir was under the impression that an appeal was filed."

Besides he referred to paragraph 4 of the affidavit in support of the motion in which the applicant depones as follows:

"4. That I am informed by Mr Abdikadir, Advocate which information I verily believe (sic) to be true that he could not file the appeal as the application for injunction has not been determined."

and submitted that the paragraph when read together with the two grounds reproduced above show lack of bona fides in the application.

The power of the court under rule 4 aforesaid, is discretionary. It is trite that discretionary jurisdiction must be exercised on the basis of evidence and sound legal principles. The duty is on the applicant to place before the court material facts necessary for a decision in his favour. As rightly pointed out by Mr Ahmed Nasir for the applicant there are basically four principles which guide the court in an application under rule 4, above. Those are not necessarily the only principles to guide the courts. Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997 (unreported) does not purport to set out an exhaustive list of principles to guide the court in an application under that rule. It is trite law that each case has to be determined on the basis of its own peculiar facts and circumstances, and that is the overriding consideration in applications as the one before me.

The applicant has explained the delay between the date of the decision against which an appeal is intended and the date of the ruling of this Court in Civil Application NAI.83 of 2000. As rightly pointed out by Mr Ohaga rule 81 of our rules is categorical. A record of appeal should be filed within the time as prescribed under that rule namely 60 days. It is not qualified. The applicant appears to me to be contending that it would be illogical to file a record of appeal unless he was sure that his property would not be sold before his appeal was filed and heard. The respondent does not deny that it has taken steps to realize its securities and would have sold them had an injunction not been granted to restrain it from doing so. The threat was real and it would appear to me that the applicant was placed in a dilemma. If he filed a record of appeal and before his appeal could be heard the respondent succeeded in selling his property, it would not have mattered much even if he were to eventually succeed in his intended appeal. He would lose the property anyway as the process would most probably not be reversed. He chose not to file the record of appeal to await a decision in his application for injunction. That was a conscious decision. Whether or not such a decision per se is a valid ground for granting an extension of time is doubtful.

But this matter has to be looked at in light of the background facts and the conduct of the parties. The decision to be appealed from was given on 2nd March, 2000, and the applicant quickly moved to this court and applied for and was granted an injunction. The injunction application was filed on or about 21st March, 2000. The respondent did not have valid grounds for opposing that application and its counsel was therefore compelled to concede to orders being granted against it. Within a month, thereafter the applicant took out this motion. The delay of about one month in taking out this motion has not been explained. It is

long but not inordinate.

When all the foregoing facts and circumstances are taken into account it is my view that a case is made out in favour of my exercising my judicial discretion to extend the time as prayed. True, the applicant's grounds in support of this motion when looked at alongside with the applicant's averment in paragraph 4 of his affidavit in support of the motion appear to be contradictory and suggest that the application is lacking in bona fides, but the application has to be looked at as a whole. Once that is done, one will reach the conclusion that the apparent contradiction arises from a problem in drafting the motion.

In the result I exercise my discretion under rule 4 of the Court of Appeal rules and extend the time within which to file and serve a record of appeal for 30 days from the date of this ruling.

The applicant shall bear the costs of this application assessed at Kshs.8,000/= to be paid within 10 days, failing which execution may issue.

Dated and delivered at Nairobi this 16th day of March 2001

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR