



**IN THE COURT OF APPEAL
AT KISUMU
(CORAM: O'KUBASU J.A (IN CHAMBERS))
CIVIL APPLICATION NO. 190 OF 2001 (102/2001 UR)**

BETWEEN

BANK OF BARODA KENYA LIMITED APPELLANT

AND

ATOOL PETHRAJ SHAH RESPONDENT

**(An application for extension of time for the
lodgement of a notice of appeal and a
memorandum and record of appeal from a
decision of the High Court of Kenya at
Kisumu (Hon. Justice B. K. Tanui) dated 4th
day of April, 2001**

in

H.C.C.C NO. 305 OF 1999)

R U L I N G

This is an application by way of notice of motion stated to have been brought under "The Court of Appeal Rules including Rules 4 and 47(1), Section 3 of the Appellate Jurisdiction Act and all other enabling provisions of the law". The applicant seeks that:-

"This honourable court be pleased to grant an extension of time for the lodgement of a notice of appeal from a decision of the High Court of Kenya at Kisumu (the Hon. Justice B.K. Tanui) given on the 4th day of April, 2001 in H.C.C.C No. 305 of 1999".

This application is brought on the following grounds:-

- i.The ruling of the superior court by which the decision of the 4th day of April, 2001 was made was delivered without notice to the applicant.**
- iiConsequently the applicant lodged no notice of appeal within the 14th day period prescribed by Rule 74 of the Court of Appeal Rules.**
- iii.The High Court of Kenya at Kisumu declined to extend time under Section 7 of the Appellate Jurisdiction Act (Cap.9).**
- iv. The applicant is aggrieved by the decision of the superior court made on the 4th April,**

2001 in Kisumu HCCC No. 305 of 1999 and is desirous of appealing therefrom.

v. Neither notice of appeal nor memorandum of appeal can be lodged without an extension of time".

When this application came up for hearing before me on 5th July, 2001 Mr. Okero for the applicant submitted that this Court had unfettered discretion to grant extension of time in cases where clear reasons are given. He went on to give the background to the application and how the judgment of the superior court was delivered in absence of the applicant's counsel. The judgment of the superior court was delivered on 4th April, 2001 and Mr. Okero came to know about it on 25th April, 2001. He filed an application for extension of time in the superior court on 26th April, 2001 but that application was dismissed on 24th May, 2001. Then this application was filed in this Court on 15th June, 2001. In Mr. Okero's view, this was a delay of only 22 days which was not inordinate. He relied on various authorities relevant to Rule 4 of this Court's Rules.

In opposing this application Mr. Wasuna for the respondent argued that there was no satisfactory explanation for various delays, for example the period between delivery of the ruling and when the applicant became aware and then the period between the time the applicant became aware and the filing of this application. Then Mr. Wasuna took issue with the fact that the applicant went to the superior court seeking extension of time. In Mr. Wasuna's view it is only this Court which can extend time and hence when the applicant's application for extension of time was dismissed by the superior court then its next step should have been to file an appeal against that order of dismissal. He argued that in case of stay of execution, the law gives concurrent jurisdiction to both superior court and this Court. But here, the applicant having lost the application for extension of time in the superior court can only appeal against that order of dismissal or refusal by the superior court. Mr. Wasuna relied on various authorities in support of his arguments.

Before me is an application under rule 4 of the Court of Appeal Rules (Rules) which provides:-

"The Court may on such terms as it thinks just by order extend the time limited by these Rules, or by any decision of the court or of a superior court for the doing of any act authorized or required by these Rules whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended".

Various authorities cited before me by counsel appearing for both parties show that an application under rule 4 of the Rules of the Court is being asked to exercise its unfettered discretion. In *Samken Limited, Abercrombie & Kent Limited v. Mercedes Sanchez Rau Tussel & Mohamed Osman Maalim* - Civil Application No. NAI 21 of 1999 (unreported) this Court 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".

And as if to give these guidelines in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*- Civil Application No. NAI 255 of 1997 (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:-

"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."

Hence this application should be considered in accordance with the guidelines set out above. The reasons for the delay have been stated by Mr. Okero in his submissions. There can be no dispute that the ruling of the superior court signed and dated 4th April 2001 was delivered in absence of the applicant and its counsel. The record shows that on 22nd March 2001, Mr Okero appeared for the applicant (Defendant) while Mr Odhiambo appeared for the respondent (plaintiff), when the court ordered that ruling would be delivered on 29th March, 2001. After that the record is silent when suddenly a ruling is delivered on 4th April 2001. Clearly, the applicant was not aware of this ruling and hence the explanation given by Mr. Okero must be accepted to the effect that he become aware of the ruling on 25th April, 2001.

After becoming aware of the ruling of the superior court it was upon the applicant to take the necessary steps by filing this application for extension of time in which to file the notice of appeal and memorandum and record of appeal. That is not what happened since the applicant chose to file an application in the superior court pursuant to section 7 of the Appellate Jurisdiction Act (Cap.9). That application was dismissed. This is where I find some difficulty in this application. Rule 41 of this Court's Rules provides:-

"The Court may in its discretion entertain on application for stay of execution or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court. "

In the present application, we find that an application for extension of time was made in the superior court which application was consequently dismissed. I think Mr. Wasuna was right when he submitted that the applicant should have appealed against that order of dismissal.

Having given a careful consideration to the facts of this application, and taking into account Rule 41 of this Court's Rules, it is my view that although I may be sympathetic to the applicant's position this is not a proper case in which I should exercise my discretion in applicant's favour. It is my view that the applicant ought to have appealed against the ruling of Tanui J delivered on 24th May, 2001. As that was not done then this application was filed after inordinate delay, which has not been sufficiently explained. The upshot of the foregoing is that this application is dismissed with costs.

Dated and delivered in Nairobi this 13th day of July, 2001.

E. O. O'KUBASU

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JUDGE OF APPEAL