REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: AKIWUMI, SHAH & BOSIRE JJ.A)

CIVIL APPLICATION NO.NAI.339 OF 1999

BETWEEN

KISYA INVESTMENTS LTD ....APPLICANT

AND

ATTORNEY GENERAL

R.L. ODUPOY ....RESPONDENTS

RULING OF THE COURT

The applicant, Kisya Investments Ltd, as the holder of a decree in Nairobi High Court Civil Case No.2832 of 1990, has applied that the notice of appeal dated 7th July, 1998, which was filed in that suit on 9th July, 1998, by the Attorney General and R.L. Odupoy, who were defendants in that suit, and who are the respondents, here, be struck out. The notice of appeal in question declared the respondents' intention of appealing against the decision of O'Kubasu J. (as he then was), delivered on 25th June, 1998, in which he granted leave to the applicant to amend the decree in the above suit with regard to the interest rate on the principal sum and costs, and the manner of its computation.The original decree had shown that interest on the principal sum would be calculated at the rate of 18% per annum. The total amount awarded as per the decree was Kshs.31,222,071.35, with interest of Kshs.25,818,22.60, worked out as earlier on stated. The total came to Kshs.57,040,293.95, which the respondents say they have paid in full to the applicant. In his application for an order amending the decree the applicant contended that, on the basis of interest being compounded monthly with monthly rests, the total amount on the decree should have been kshs.82,227,112.90, instead of Kshs.57,040,293.95. O'Kubasu, J. agreed with the applicant and so ruled. It is that decision, as earlier on stated, which was the subject matter of the aforementioned notice of appeal.

The respondents contend that the applicant based his computation on what, prima facie, is a forged plaint. Their Counsel, Mrs Madahana, a Principal Litigation Counsel in the AG's Chambers, in her affidavit dated 27th January, 2000, deposes that the original plaint which had been served on the respondents had been supplanted with the alleged forged one which is differently worded regarding the manner of computing the interest payable. She annexed to her affidavit what she says are the original and forged plaints. On a casual examination of the two documents, they bear what, prima facie, appear to be similar signatures. The applicant has not, as yet, disowned the alleged forged plaint, and this not being the appeal the respondents had intended to file we abstain from making any further comments on the matter. Suffice it to state that the foregoing are the brief background facts of the matter before us.

The applicant has proffered two grounds in support of its application, the first one being that the notice of appeal is null and void because it was filed out of time and before the respondents obtained the mandatory requisite leave for lodging the intended appeal. This ground is clearly untenable in view of the clear provisions of rule 74(4) of the Court of Appeal Rules. The rule enacts that such leave is not essential before an intending appellant can file a notice of appeal. The second ground for this application is that the respondents have been dilatory in taking the essential step of lodging a record of appeal within the time prescribed in the rules of this court for doing so.

The respondents' notice of appeal was filed on 9th July, 1998, about fourteen days after the decision intended to be appealed against, but contrary to the contention by the applicant that it was filed late, the same was filed timeously. The computation of the time within which to file a notice of appeal excludes the date of the decision against which an appeal is intended. The letter bespeaking copies of the proceedings and the ruling given on 25th June, 1998, is dated 30th June 1998, and was duly copied to the firm of advocates on record for the applicant.

The respondents say that there was delay on the part of the registry of the superior court to furnish them with the copies they had requested for inspite of repeated verbal requests at the registry to do so. Their counsel addressed a written reminder to them dated 22nd April 1999, which makes reference to a letter dated 14th July, 1998, and not the letter of 30th June, 1998. It would then appear to us that there was an earlier written reminder dated 14th July, 1998. But the applicant contends that the respondents sat back after lodging the notice of appeal; that it, on 11th November, 1998, caused a letter of the same date to be addressed to the first respondent advising him that copies of proceedings and ruling he had requested for were ready for collection from the High Court Civil Registry, and it had paid the copying charges.

Mrs Madahana denies having received that letter and wonders why the applicant could take such trouble. She surmises that the letter might not have been sent as alleged.

The respondents' case is that their relentless efforts to secure copies of proceedings were rendered fruitless by the frequent movement of the court file, because of the numerous applications the applicant has been filing and prosecuting before the superior court. That may well be so, but our view is that the respondents did not do enough to secure from the lower court the necessary copies of proceedings and ruling for purposes of their intended appeal.The decision intended to be appealed against was, as earlier on stated, delivered on 25th June, 1998; and a period well over eighteen months has passed since then. We have not been shown the several applications which the applicant has been filing and prosecuting which would have interfered with the preparation of the copies of proceedings and ruling they had requested for. It is particularly disturbing that the respondents wrote only one or at most two reminders to the court registry on the matter, clearly showing that they were dilatory in their behaviour.

The foregoing notwithstanding certain issues have been raised by the respondents which show that some irregularity might have been committed in the court below which may need to be canvassed on appeal. We were told that inspite of the fact that the respondents have so far paid over to the applicant Kshs.57 million, there is still over Kshs.200 million being claimed from them by it. It should be recalled that the decretal sum was only about Kshs.32 million odd. How the figure rose to such a colossal sum of over kshs.200 million is at present difficult to comprehend. It is noteworthy that if payment of the money is to be made, public funds would be involved. In view of that and the general circumstances of this matter we are disinclined to allow the application. We however order that the respondents lodge and serve their record of appeal within 30 days from the date hereof, failing which their notice of appeal dated 7th July, 1998, will stand struck out.

The applicant shall have the costs of this application in any event.

Dated and delivered at Nairobi this 11th day of February, 2000.

A.M. AKIWUMI

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

S.E.O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR