

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: GICHERU, AKIWUMI & SHAH, J.J.A.)
CIVIL APPLICATION NO. NAI. 311 OF 1999
BETWEEN

**SOUTH COAST FITNESS AND SPORTS CENTRE
LTD.APPLICANT**
AND
CLARKSON NOTCUTT LTD.RESPONDENT

**(An application for stay of proceedings in an intended
Appeal from a Judgment of the High Court of Kenya at
Mombasa (Justice Wambilyangah) dated 31st January,**

1994

in

H.C.C.C. NO. 167 OF 1988)

RULING OF THE COURT

The present application before us by the Applicant which was filed on 8th November, 1999, is for the striking out of the Notice of Appeal filed by the Respondent on the grounds that the Respondent has since then inordinately delayed the filing of its appeal within time. It is disclosed in the supporting affidavit that the Respondent being dissatisfied with the decision of Wambilyangah, J. given on 31st January, 1994, lodged its Notice of Appeal within time on 10th February, 1994. On the day before, the Respondent's advocate on record applied to the Deputy Registrar of the Mombasa High Court for copies of the High Court proceedings and judgment. On 10th February, 1994, a similar request was again made on behalf of the Respondent, to the Deputy Registrar. Then on 24th August, 1995, the Respondent obtained from this Court, a stay of execution on condition that the Respondent deposited in the Kenya Commercial Bank the sum of Kshs.4 million in the joint names of its advocate and that of the applicant. Thereafter, the Respondent on 25th March, 1996, obtained from the Deputy Registrar a record of the High Court proceedings which upon scrutiny, was found by Respondent's advocate to be deficient, inter alia, as it omitted some of the proceedings before the High Court. The Respondent's advocate then on 10th May, 1996, brought the defectiveness of the record of proceedings to the attention of the Deputy Registrar and requested urgent remedial action taken by him. So far so good. But by 8th November, 1999, some three years and six months later, the Respondent had taken no steps to obtain and file the corrected record of proceedings or to apply as it had previously done, for the enlargement of time to file its record of appeal.

All that the replying affidavit depones in respect of the inaction by the Respondent during the crucial three years and six months, that is to say, between 10th May, 1996, when the Respondent's advocate wrote to the Deputy Registrar complaining about the defects in record of proceedings supplied by the Deputy Registrar, and 8th November, 1999, when the present application was filed, is the following unhelpful paragraph:

"That I am informed by my advocate Mr. Ishan Kapila, which information I verily believe to be true, that he has taken all the steps available to him to obtain the proceedings of the hearing to enable him file the record of appeal and that he is now helpless and at the mercy of the Registry of the High Court in Mombasa. He further informed me that he has asked for the said proceedings to be supplied on a number of occasions."

It is not only, clear from this paragraph that the Respondent's advocate did not write a single letter requesting the corrected record of proceedings after his letter of 10th May, 1996, but also, that this deliberately vague paragraph which lacks any credibility, does not excuse the most inordinate delay that the Respondent has displayed in lodging its record of appeal.

This issue of inordinate delay in the lodging of a record of appeal was considered by this Court in the case of Kenya Commercial Finance Limited v Mulji Lalji Pindolia, Civil Application No. NAI. 178 of 1997 (unreported). We have found the following lengthy observation made by this Court in that case of much assistance in our determination of the present application before us:

"The respondent is 6 years out of time for filing the intended appeal from the judgment which was delivered on 4th July, 1991. Although the respondent has complied with rule 80, yet it was his duty to expeditiously obtain copies of proceedings. It is not enough for him to apply for the said copies of the proceedings, and then sit back and wait until the court makes them available. In the normal course it does not take six years for the Registry of the superior court to prepare and deliver the said copies. This inordinate delay is certainly going to cause serious prejudice to the applicant. As the things stand, apart from the two letters which counsel for the respondent had initially written to the High Court Registry requesting for the proceedings, he has neither written any reminder thereafter requesting the court to expedite the preparation and delivery of the said proceedings nor is there any evidence of diligent personal enquiries or other steps taken in order to expeditiously obtain the said proceedings. It is upto the respondent to satisfy us that despite his due diligence in the matter, the High Court had failed to provide the said proceedings to him and he, although still interested to file the intended appeal, is unable to do so for no fault of his own. We are far from satisfied that the respondent has shown proper diligence that this court has come to expect of those who seriously pursue their right to appeal. There is a certain limit upto when a successful party can be expected to wait and be deprived of the immediate fruits of the judgment in his favour."

Although this observation relates to a delay of six years, it in our view, applies with equal force to the period of three years and six months when the Respondent sat back and made no effort through written reminders, credible diligent personal enquiries or other steps to expeditiously obtain the record of appeal. It would be grossly unjust to allow this litigation to continue to hang over the head of the Applicant any longer.

For all the reasons set out hereinbefore, the present application succeeds and the Respondent's Notice of Appeal lodged in the High Court at Mombasa on 10th February, 1994 is hereby struck out, with costs for the Applicant. It is so ordered.

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

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.