



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: O'KUBASU, J.A)

CIVIL APPLICATION NO. NAI 336 OF 1999 (UR 133/99)

BETWEEN

CUT TOBACCO KENYA LIMITED APPLICANT

AND

BRITISH AMERICAN TOBACCO (KENYA) LIMITEDRESPONDENT

(Application for extension of time to file Record of Appeal out of time in the intended Appeal from the Ruling and Order of the High Court of Kenya (Milimani Commercial Courts) at Nairobi (Mr. Justice Onyango Otieno) dated 23rd June, 1999

in

H.C.C.C NO. 354 of 1999)

RULING

This is an application by way of Notice of Motion brought under Rule 4 of the Court of Appeal Rules in which the applicant is seeking the following orders:- "

- (a) Leave be granted to the applicant to file Notice of Appeal and Record of Appeal out of time.
- (b) Time be fixed for the filing of the said intended Appeal after the grant of such leave.
- (c) The costs of this application be Respondent's costs in any event".

The application is supported by the affidavit of Mr.M. Billing who is the advocate acting for the applicant.

When this application came up for hearing on 10th May, 2000 Mr. Billing informed the court that he was actually seeking extension of time in respect of filing the Record of Appeal as the Notice of Appeal had been filed in time. Mr. Ochieng for the respondent conceded that the Notice of Appeal had indeed been filed in time.

Mr. Billing in arguing this application sought to rely on his affidavit which, in his view, explains all the reasons in support of this application. He concluded his brief address by stating that all the documents necessary for filing the record of appeal were in his possession and hence he could file it within 21 days.

Mr. Ochieng opposed the application on the ground that the rules do not require that a copy of the ruling be signed by the judge before the same is incorporated in the record of appeal. Hence in his view there was no justification for extension of time.

He went on to argue that if he was wrong then it would mean that it was the High Court which had not produced the necessary documents and hence in that case the applicant would only have needed a certificate of delay. Mr. Ochieng asked me to dismiss this application.

In an application of this nature (extension of time in which to file the record of appeal) the court is being asked to exercise its discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in its favour. Although this is unfettered, discretion but like all judicial discretion, it must be exercised on reason not caprice; and the exercise must not be arbitrary or oppressive - see *Samken Ltd Abercrombie & Kenya Ltd and Mercedes Sanchez Pall Trissel Mohamed Osman Madin* - Civil Appeal No. Nai 21 of 1999 - (unreported).

What reasons have been given to explain the delay? Mr. Billing relied on his long affidavit and in his view that affidavit explains the reasons that led to the delay. The relevant paragraphs of that affidavit are as follows:- "9.THAT Guram & Company Advocates when preparing Record of Appeal discovered that copy of the Ruling by Justice Onyango Otieno dated 23rd June, 1999 was not signed by the Judge and on 18th October, 1999 Guram & Company Advocates wrote a letter to the Deputy Registrar drawing his kind attention to this issue and a reminder dated 3rd November, 1999. Copies attached and marked "MB 8" and "MB 9" respectively.

10.THAT Guram & Company Advocates have seriously been following up the ruling to be signed until on 24th November, 1999 when the Executive Officer of the court asked us to pay Shs.540/- which we paid vide Court's Receipt number L. 018781. Copy annexed and marked "MB 10".

11.THAT annexed and marked "MB 11" is the court's Ruling duly signed and certified by the court in which I personally collected from the court on 29th November, 1999. Also enclosed and marked "MB 12" is a court's Ruling dated 2nd August, 1999 and certified on 24th November, 1999.

12.THAT the mandatory sixty days to lodge the Record of Appeal since collection of certified copies of the proceedings and Ruling on 23rd August, 1999 ran out on 21st October, 1999.

13.THAT the applicant has made this application for leave of extension of time for filing Record of Appeal without any delay".

From the foregoing, it would appear that the delay was caused by the unavailability of the signed copy of the ruling of the learned judge of the superior court. But as pointed out by Mr. Ochieng for the respondent, the signed copy of the ruling was not necessary. In my view, Mr. Ochieng is right since Rule 85 of this Court's Rules does not refer to signed copy of the ruling but certified copy.

Mr. Billing conceded that he might have been mistaken in reading the rules. He pleaded that if there was a mistake on his part, this should not be visited on his client.

In this application, it is to be noted that Mr. Billing took over the conduct of the applicant's case from Messrs. Kilonzo & Company Advocates, hence this problem of attempting to obtain a signed copy of the judge's ruling.

Mr. Billing has now given his explanation. He made efforts to obtain a signed copy of the ruling, but as we have now established this was not necessary. The issue here now is whether this explanation is acceptable to the court. If the explanation is acceptable, the court would then exercise its discretion if favour of the applicant. As Lakha J.A said in *Peter Maina Munyua v. Damaris Njoroge* - Civil

Application No. NAI. 210 of 1999 (unreported). "When there is no explanation there can be no indulgence".

And 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".

In the present application, I find that bearing in mind the above and in view of the explanation given, there has been adequate and reasonable explanation for the delay. Hence, the applicant ought not be shut out from exercising its statutory right to be heard on appeal. Accordingly, I allow this application and the applicant is now granted leave to file the Record of Appeal out of time. It is now ordered that the Record of Appeal be filed within 21 days from the date of this ruling.

Costs of this motion shall be in the intended appeal. These shall be my orders.

Dated and delivered at Nairobi this 19th day of May, 2000.

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR