



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 232 OF 1998

BETWEEN
MAU WEST LIMITED APPLICANT
AND
KENYA CO-OPERATIVE CREAMERIES LIMITED RESPONDENT

(An application for extension of time in an intended
appeal from a judgment of the High Court of Kenya at
Nairobi (Khamoni J) dated 10th March, 1998

in

H.C.C.C. NO. 1319 OF 1992)

RULING

This applicant intends to appeal against a part of the judgment of the superior court (Khamoni, J.). That judgment was delivered on 10th March, 1998 and on 13th March, 1998, the applicant lodged its notice of appeal. On 17th March, the applicant wrote a letter to the Deputy Registrar of the superior court, requesting that it (the applicant) be supplied with uncertified copy of the proceedings and a certified copy of the judgment. That letter was copied to M/s Kagucia & Company Advocates of Corner House, Nairobi, who were apparently acting for the respondent. The reason for copying the letter to the advocates for the respondent was obviously to enable the applicant to advantage of the proviso to **Rule 81 of the Court's Rules** which provides that where such a letter has been written to the Registrar of the superior court within thirty days of the date of the decision intended to be challenged and is copied to the opposite side, any time certified by the Registrar, as being necessary for preparing the proceedings shall not be taken into account when computing the period of sixty days within which a party is bound to lodge its appeal after filing the notice of appeal. I only need to add that no party needs a certified copy of the judgment to enable it mount a competent appeal; all that is required to be certified is the decree or order extracted from the judgment or ruling. The applicant did not lodge its record of appeal within sixty days from 13th March, 1998 when it lodged its notice of appeal; indeed upto now, it has not lodged its memorandum of appeal and the record of appeal. The applicant filed this notice of motion on 6th October, 1998 asking for an order that:-

"... THE TIME for filing the records of Appeal and the memorandum of Appeal in this Intended Appeal from the above mentioned Judgment of the High Court of Kenya at Nairobi in HCCC NO 1319 of 1992 BE EXTENDED to THIRTY days from the date of this Order upon such terms as this Honourable Court deems fit and just."

Put simply, the applicant is asking me to exercise my discretion under **Rule 4** and extend for it by thirty days the period within which to file its memorandum of appeal and the record of appeal.

It is true that the discretion given to a single Judge of the Court by **Rule 4** is wholly unfettered, but even so, when a judge is asked to exercise that discretion, some valid reason has to be given to the judge to support the exercise of the discretion. The reason given to me by this applicant is that the Deputy Registrar of the superior court supplied them with proceedings and judgment when the time for lodging an appeal had passed. The applicant's counsel, Mr Kamere, says in paragraph five of his affidavit in support of the motion that:

"THAT on 25th May, 1998 we received a letter from Court dated 15th May, 1998 indicating that the copies are ready for collection on payment of K.Shs.510/= being court charges and on 4th June, 1998 we paid the money in court. Annexed and marked "SK2" are the photostat copies of the official receipt and that letter from Court."

The record before me has a photostat copy of an official receipt marked "SK2" but I cannot see any date on it and the money paid against it is K.Shs.225/=, not K.Shs.510/=. There is no copy of a letter from the Deputy Registrar as stated by Mr Kamere in his affidavit. There is, however, another letter dated 12th June, 1998 from Mr Kamere to the Deputy Registrar. That letter says that the applicant had been supplied with the proceedings on 4th June, 1998 upon payment of K.Shs.510/= but that a copy of the judgment had not been supplied because "**the judgment went for certification**". I have said that no.

one needs a certified copy of the judgment to mount a competent appeal. So that from the material available to me, it seems clear that the proceedings and judgment in this case were ready by 25th May, 1998 when Mr Kamere received the Deputy Registrar's alleged letter of 15th May, 1998. The last letter by Mr Kamere to the Deputy Registrar seems to be the one of 23rd June, 1998. In that letter, they were again asking the Deputy Registrar to supply them:-

"with uncertified copy of the proceedings and a certified copy of the judgment. We undertake to pay your charges."

These are the documents the applicant has put before me in support of its motion. If the applicant had, by 4th June, 1998 paid for and been supplied with the proceedings, why was it still asking the Deputy Registrar to supply those very same documents by 23rd June, 1998? Paragraph 8 of Mr Kamere's affidavit states that:-

"THAT on 15th July, 1998, the proceedings were supplied to us and the Judgment was said to be not ready until 20.7.1998 when they were collected from Court."

This directly contradicts the contents of the letter of 23rd June, 1998 which states that: "..... on 4th June, 1998, we paid Shs.510/= and proceedings were supplied and **the Judgment went for certification**."

All this confusion could have been set at rest if the applicant had taken the trouble to obtain the Registrar's certificate of delay provided for under the proviso to Rule 81. I asked Mr Kamere why they did not obtain the certificate. He told me there was no reason. The result is the confusion I have talked about.

There is one further matter I must mention. Even assuming that the applicant was supplied with a copy of the judgment on 20th July, 1998, this motion was itself not brought to court until 6th October, 1998. That is a period of over two months. No attempt was made to explain that delay.

In all the circumstances, I am not inclined to exercise my discretion in favour of the applicant. I accordingly refuse the motion dated 7th September, 1998 and lodged in Court on 6th October, 1998 and order that it be and is hereby dismissed. The respondent never did anything as far as the motion is concerned and I make no order as to the costs thereof.

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

R. S. C. OMOLO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR