



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: O'KUBASU JJ.A)

CIVIL APPLICATION NO.NAI.109 OF 2000

BETWEEN

NIAZSONS (K) LIMITEDAPPLICANT

AND

CHINA ROAD & BRIDGE CORPORATION (KENYA).....RESPONDENT

(Being an application for extension of time to file notice of appeal and record of appeal out of time and to obtain leave to appeal out of time from the Ruling/Order of the High Court of Kenya at Nairobi (Hon. Mr. Justice Onyango Otieno) dated 15th April, 1999

in

H.C.C.C. NO. 126 OF 1999)

RULING

This is an application by way of Notice of Motion brought under Rules 4, 39 and 42 of the Court of Appeal Rules. The applicant is seeking the following orders:-

- "1.That this Honourable Court be pleased to grant leave to file notice of appeal out of time.
- 2.That this Honourable Court be pleased to grant leave to the Applicant to file the record of appeal out of time.
- 3.That this Honourable Court be pleased to grant leave to file an application out of time for leave to appeal from the Ruling/Order of the Superior Court abovementioned and dated 15th April, 1999. 4.That time be fixed for filing of each of the above; and
- 5.That costs of this application be costs in the intended appeal".

The background to this application is that the applicant's earlier appeal was struck out as it was incompetent since no leave had been sought. In its ruling of 31st March, 2000 this Court stated inter alia:-

"In our judgment there is no right of appeal. The appellant however does have a right of

appeal to this Court with leave of the superior court or failing that of this Court. It is not in dispute that no such leave has been sought or obtained with the result that we have no jurisdiction to make any order in the matter.

..... it is trite that there can be no estoppel against the statute. Nor can jurisdiction be conferred by estoppel consent acquiescence or default!

For these reasons we are constrained to hold that this appeal is incompetent for want of leave. Accordingly, it is struck out but with no order as to costs"

It is as a result of the above order that the applicant filed the present application. As there was no right of appeal, the applicant had to seek leave of the superior court or failing that of this Court.

As already stated this application is brought under Rules 4, 39 and 42 of this Court's Rules. Here the applicant is seeking the usual extension of time in which to lodge an appeal (under Rule 4) and leave to file the appeal since there is no automatic right of appeal in the circumstances of this case. What is the cause for this delay? Mr. Billing submitted that he was of mistaken belief that he had right of appeal. Hence when he came to this Court under that mistaken belief the appeal which he had filed in time was struck out for want of leave. Hence this application.

Mr. Miller was of the view that the prayers being sought in this application are incapable of being granted since the applicant must seek leave from the superior court before coming to this Court. According to Mr. Miller leave to appeal cannot be granted in view of Legal Notice No. 36 of 2000 which has set time limit of 14 days. What can be said about this Legal Notice is that the same came into effect as from 5th May, 2000 and as the present application was filed prior to that date (5th May, 2000) then that Legal Notice does not apply to this application. We must consider the application in the light of the existing legal position prior to 5th May, 2000. Since Order XLII of the Civil Procedure Rules did not prescribe the period in which application for leave had to be made, we must then fall back to Section 58 of Interpretation and General Provisions Act (Cap.2 Laws of Kenya) which provides:-

"Where no time is prescribed or allowed within which anything shall be done such thing shall be done without unreasonable delay and as often as due occasion arises".

Hence in the instant case, the applicant had to file the application for leave "without unreasonable delay".

In his supporting affidavit, Mr. Billing depones inter alia:-

"7.The Applicant appealed to this Court.

8.The said Appeal (Civil Appeal No. 187 of 1999) was on the 31st March, 2000 struck out as incompetent because no leave to appeal had been obtained. I annexe marked as "RB" a true certified copy of the Ruling of this Court.

9.I laboured under mistaken belief that an Appeal to this Court from the decision of the Superior Court lay as of right and that no leave was required. The Respondent's advocate also believed the same.

No objection as to the competence of the Appeal was taken by the Respondent until after the full hearing of the Appeal when the Court of its own motion raised the point.

10.There has been no delay in bringing this application since the date when the Appeal was struck out.

11.It is just that the Court in the exercise of its discretion should grant the extensions hereby sought".

We now know that the earlier appeal was struck out on 31st March, 2000. This application was filed in this Court on 12th April, 2000. Taking into account the time required for preparation of the record which is rather bulky it cannot be said that there was inordinate delay. As soon as it dawned on Mr.

Billing that he required leave to appeal he immediately started preparing the necessary document and hence this application before me.

There was an important issue raised by Mr. Miller in that the applicant ought to have sought leave from the superior court before coming to this Court. He relied on the decision of this Court in Gary Cullen and Peggy Winfred Burkitt v. Commissioner of Lands & Another - Civil application No. NAI. 283 of 1999 (unreported) in which it was stated:-

"The applicant requires either the leave of the judge or failing that the leave of this Court to enable them mount a successful appeal. Such leave not having been obtained we have no jurisdiction to make any orders in the matter and we order that the applicant's motion be and is hereby struck out with no order as to costs".

After the applicant's appeal was struck out for want of leave, the applicant had to seek that leave either from the Superior Court or this Court. That had to be done without unreasonable delay. That is why this application is before this Court. Leave can be sought from this Court. It has not been shown that this Court has no jurisdiction to entertain application for leave. That would appear to be the correct procedural position prior to coming into effect of Legal Notice No. 36 of 2000 which has amended Order XLII of the Civil Procedure Rules. Hence, it is my humble opinion that the applicant is entitled to apply for leave from this Court so as to be allowed to file the intended appeal. Since the application for leave was filed without unreasonable delay, I find that the applicant is entitled to prayer 3 of the Notice of Motion.

As regards extension of time in which to file Notice of Appeal and lodge Record of Appeal under Rule 4 of the Rules of this Court, there are numerous decisions of this Court to the effect that this Court has unfettered discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion ought to 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 of that discretion must not be arbitrary or oppressive.

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, it has been shown that the applicant demonstrated his intention to appeal when the earlier appeal (which was struck out for want of leave) was filed. Then as soon as that appeal was struck out on 31st March, 2000, this application was filed within a fortnight.

So there was no delay. The reason for this delay has been explained. The applicant's counsel laboured under mistaken belief that appeal lay to this Court as of right. As soon as that mistake was discovered, this application was filed. The intended appeal is stated to raise substantial points of law but I would refrain expressing in views on that point.

In view of the foregoing, I am satisfied that this is a fit case in which I should exercise my unfettered discretion in favour of the applicant. Hence the application is granted in that the applicant is granted 14 days in which to file the Notice of Appeal and is granted a further 21 days from date of filing such Notice of Appeal in which to file Record of Appeal. For avoidance of doubt, the applicant is granted leave to file appeal to this Court.

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

Dated and delivered at Nairobi this 9th day of June, 2000.

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR