



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, JA (In Chambers))

CIVIL APPLICATION NO NAI 36 OF 1986

(In the matter of an intended appeal)

BETWEEN

GEORGE HECTO ODERA RADING' APPLICANT

AND

THE KENYA POWER & LIGHTNING COMPANY LIMITED RESPONDENT

(Application for extension of time of file the Notice of Appeal out of time in an intended appeal from a judgment and order of the High Court of Kenya at Nairobi (Porter, J) dated March 15, 1985)

In

HC Civil Case No 217 of 1984)

RULING

The applicant, Rading' sought leave to file his notice of appeal out of time and similarly that a record of his appeal to be lodged out of time. This application was filed on March 10, 1986. Mr Rading' intends to appeal against the decision of the High Court on March 15, 1985 where by a part judgment was entered against the applicant in the sum of Kshs 33,930.25. The respondent / plaintiff, the Kenya Power and Lighting Company had claimed Kshs 90,990.90. The applicant counter-claimed Kshs 7,877.75 but the High Court held that the applicant's letter of July 4, 1983 was a clear admission of indebtedness in the sum of Kshs 33,930.25. It was on the basis of this letter that the notice of motion of October 5, 1984 was taken under order X11 rule 6 of the Civil Procedure Rules for part judgment to be entered in the sum admitted. The applicant's letter states-

“ I would therefore estimate my indebtedness to the company as follows.”

After that he sets out his calculations ending in the total due to the company being Kshs 33,930.25. He closes his letter with the suggestion of paying this sum immediately in monthly instalments.

When the ruling on part judgment had been given, the applicant applied for leave to appeal on the grounds that the defendant / applicant would most likely give instructions to appeal. The court then held that leave to appeal could be considered when the defendant's advocates had instructions in the matter. It was therefore not possible so it was thought, for notice of appeal to be filed until leave to appeal had been granted.

Mrs Khaminwa has stated in her further affidavit (filed on November 17, 1986) that instructions to appeal were given. Copies of proceedings and ruling had been delivered to her chambers on July 29, 1985. The applicant then filed his application for leave to appeal on September 2, 1985. It was heard and leave was granted on October 11, 1985. It was further ordered that the notice of appeal should be filed within 14 days. It is agreed that the notice of appeal was filed a few days later on October 28, 1985. I am not really sure that the High Court had power to order that the notice of appeal should be filed within 14 days. When the High Court acts under order XLII of the Civil Procedure Rules (cap 21), it merely grants leave to appeal under rule 1(2), (3) and (4) of that order. Once leave has been granted, the Court of Appeal Rules apply and rule 74 (2) (cap 9) thereof provides that notice of appeal shall be lodged within 14 days of the date of the decision appealed from. Then rule 74(4) provides as follows:-

“When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”

Hence although Mrs Kaminwa considered that Mr Gathuku could not lodge the notice of appeal until leave to appeal had been granted, that can only be understood to be a misunderstanding of rule 74(4). It was a further misunderstanding of the rules with regard to lodging notice of appeal that the learned judge allowed 14 days within which to lodge the notice of appeal. It must follow that the notice of appeal should have been lodged by March 29, 1985. As I understand it therefore, my task is to determine whether time can be extended from that date to October 28, 1985.

Then on the second part of the application, supposing that the notice of appeal is deemed to be lodged within extended time on October 28, 1985 the record of appeal should have been lodged within 60 days, allowing for Christmas vacation to be deducted under rule 3(e) of the Court of Appeal Rules. Mr Nyamu has calculated that the period would end on January 13, 1986. I would agree that a further 7 days was to be added to the end of Christmas vacation period which occurred on January 6, 1986. The record of appeal was filed out of time on February 14, 1986 and the application to extend time was brought as I have said, on March 10, 1986.

In answer to the application, Mr Nyamu objected to any extension on either leg of the application. If, for the sake of argument, the time expired on October 24, 1985, the notice of appeal has been lodged on October 28, 1985 without explanation. I presume that the period must have ended on October 25, 1985. But it appears that Mr Nyamu is right that there is no explanation for the delay. Next Mr Nyamu relies strongly on the fact that there is no explanation for the delay between January 13, 1986 and March 10, 1986. That must be understood as meaning that although the record of appeal had been filed on February 14, 1986, it was out of time and an extension was not sought for yet another month. Again Mrs Khaminwa is unable to give any satisfactory explanation of the delay after January 13, 1986.

On the first leg, there is no doubt that Kaminwa and Khaminwa were under a misapprehension as to the time within which notice of appeal should be lodged, while leave to appeal was being sought in accordance with rule 74(4) of the Court of Appeal Rules. Mrs Khaminwa thought that notice of appeal could not be lodged until leave was granted. But it is perhaps understandable that it was thought better to obtain leave in the sense that there can be no appeal if leave is required. But it seems to me that in this matter no leave was required. Order XII rule 6 provides.

“A party may at any stage of a suit, where admission of facts has been made either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may, upon such application make such order, or give such judgment as the court may think just.”

It follows therefore that a part judgment had been given and the issues relating to Kshs 33,930.25 had been finally determined. That part judgment was not an order falling within order XLII of the Civil Procedure Rules. What was left to be decided was the issue whether the total claim of the company could be reduced because it ought to be considered on the basis of 3 years instead of 5 ½ years. In the result,

either from the point of view of the nature of the judgment which requires no leave to appeal or from the point of view of rule 74(4) of the Court of Appeal Rules, whereby notice of appeal should be lodged without obtaining leave to appeal, the period between March 29, 1985 and October 28, 1985 was an unnecessary delay.

On the second leg, following upon the observation above, the proper timetable should have been, notice of appeal lodged by March 29, 1985, and record of appeal within 60 days thereafter, i.e. May 28, 1985. The time for getting copies of judgment would in this case be excluded under rule 81(1) and (2) of the Court of Appeal Rules, as Mr Nyamu admitted. That would bring the last day for lodging the record to the end of September 1985, because the copies took from March 19, 1985 to July 25, 1985. So one would add on roughly four months and six days from May 28, 1985. The last day would seem to be September 30, 1985. The period to account for stretched between this date and February 14, 1986 or March 10, 1986.

It is known of course that Mr Gathuku was labouring under the illusion that he needed leave to appeal which leave was only granted on October 11, 1986. Then there was the battle for the stay of execution pending the appeal which occupied the parties in December. Then there was the relief of the Christmas vacation. After that I am told it was pressure of office work which prevented the appeal being lodged, and another month to apply for extension of time for the same reason.

Mrs Khaminwa submitted that the respondent company had known all along that there would be an appeal, and was not prejudiced. Her points are:-

1. The applicant applied for leave to appeal on March 15, and he was allowed to apply whenever instructions were given, although that does not seem to be the purport of Porter, J's direction.
2. She brought her application for leave towards the end of the long vacation, and it was granted as soon as it could be heard. The respondent knew there would be an appeal.
3. In December a stay was granted pending the appeal.
4. Mr Nyamu complains of the periods, October 24, and October 28, 1985 for the notice of appeal, and January 13, 1986 to March 10, 1986 for the record of appeal. These are all short periods, and well within the court's discretion to cure. The client should not be penalised for the delay in the office of the advocate. Moreover, the final stage of the judgment has not been reached. There is still a further hearing.

Mr Nyamu takes these points:-

- (a) the judge's order was not meant to give Mrs Khaminwa time to take instructions at leisure. It was not understood that Khaminwa and Khaminwa had unlimited time within which to apply for leave.
- (b) This is a part judgment of a liquidated claim, and final as far as its terms go. The rest of the hearing will lie outside this part judgment. Although it is a part judgment, it is on the admissions of the applicant. That added to its final nature.
- (c) The respondent has set execution in motion, although it was not granted by the Deputy Registrar, because leave was granted. The respondent has thus been prejudiced.
- (d) The delay is inexcusable and has not been explained. On the contrary extra time has been taken at every stage without any reason being provided.

It will be seen that this is one of those closely contested matters which unnecessarily taxes the ingenuity of the court to provide a reasoned ruling. Having attempted to weigh both sides I find as follows. I agree that there have been delays, but the large delay which comes about from a proper timetable set out above, was not relied on by the respondent. At no stage did he challenge the purported need for leave to appeal;

neither on the date of judgment nor on October 11, 1985. I did not understand the respondent to rely clearly upon rule 74(4) of the Court of Appeal Rules in principle. He seems rather to have submitted that if the court should hold that time began on October 11, 1985, then even on that basis, the applicant was out of time on both limbs of the application. As the situation was not clearly analysed by the respondent, I shall leave the matter to be decided as if both parties thought that leave to appeal was necessary.

On this basis, the applicant was three or four days late in lodging notice of appeal. The applicant was one month late in lodging the record. Another month was taken to apply. It seems to me that the advocate has been dilatory by and large and I fear presumed too much upon Porter, J's direction. He did not mean that the applicant could wait for copies to decide whether or not to appeal. He meant that the applicant could apply within a reasonably short time, because of the limited nature of the proceedings, based on an admission. Why would copies be necessary? The question then is whether the client should suffer on the one hand, or whether the plaintiff, judgment holder, should be prejudiced by a further delay on the other hand. I find that as the advocate disobeyed the court order and showed no reasons for the delay after January 13, 1986, that the respondent will suffer unnecessary prejudice in this particular case. The applicant asks for an indulgence; but this applicant has never done anything right either in law or practice. I think therefore that the scales tilt towards not exercising my discretion under section 4 of the Court of Appeal Rules. Accordingly I decline to extend time to lodge Notice of Appeal or record of appeal and I dismiss the application with costs.

Of course the applicant may refer the matter to the full bench.

Dated and delivered at Nairobi this 22nd day of December, 1986.

HG PLATT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR