



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 136 OF 2008

BETWEEN

AISHABAHI ALI MOHAMEDAPPLICANT

AND

MARITIME FREIGHT CO. LTDRESPONDENT

(An application for extension of time to file the notice of appeal out of time in an intended appeal from the Judgment of the

High Court of Kenya at Mombasa (Sergon, J) dated 18th February, 2008

in

H. C. C. A. No. 92 of 2003)

RULING

If I may, let me begin by noting that this was among the first applications to be heard by tele-presence, with counsel in Mombasa arguing their respective cases before a Judge sitting in Nairobi. This particular application was heard on the day of the official inauguration of the tele-presence, and was beamed live to a large group of distinguished guests, both here and in Mombasa, including the Hon. the Chief Justice, Judges of the Court of Appeal and High Court, representatives of the Law Society of Kenya and development partners. I wish to express my gratitude to counsel in Mombasa for their patience and co-operation on this occasion.

Before me was an application under **Rule 4** of the Court of Appeal Rules (the Rules) for extension of time within which to file and serve the notice of appeal.

The applicant intends to appeal against the judgment of the superior court (Sergon, J) dated 18th February, 2008 whereby the superior court, sitting as a first appellate court, disallowed the applicant's claim of Kshs.225,000/= in respect of rent arrears arising out of a tenancy agreement over premises owned by the applicant (and rented by the respondent) and known as Plot No. 267/1 Taveta Road, Shimanzi, in Mombasa (the suit premises).

When the lease to the suit premises came to an end, the respondent (tenant), with the approval of the applicant (landlord), continued to "hold-over" the premises, and the issue before the superior court was the amount of rent payable during the five-month "holding-over" period. That is presumably the issue in an intended appeal to this Court. As I stated before, the superior court's judgment was delivered on 18th February, 2008, and the record shows that a notice of appeal was indeed filed, albeit late, on 27th March, 2008 by the applicant's previous advocates, A. A. Amadi & Company. That notice of appeal is still on record. I will return to this issue, and its ramifications and effect, later in this Ruling.

The application before me, as I said earlier, is brought under **rule 4** of the Court's Rules. The law as regards such an application is now well settled. The court in considering such an application exercises unfettered discretion but as with all such judicial discretion, the Court has to exercise it upon reason and not capriciously or at whim. There are now principles or guidelines set out in several decisions to help the court exercise its discretion. Of course, these guidelines are not exhaustive, as to do so would limit or impede the Court's discretion. The discretion is essentially unfettered. One such case which sets out the principles that the Court should consider is **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated:

"It is now 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".

It is with the above in mind that I now proceed to consider the application before me. The applicant depones, among other things, that she was unaware of the delivery of the Judgment as her advocate, who had, by then, relocated to Nairobi, had failed to inform her of the same. When she found out, she instructed another advocate in Messrs Amadi's firm to file the notice of appeal. However, this was not done and she finally instructed the current advocate, Mr. Hayanga, to file the notice of appeal. In his deposition before this Court, Mr. Hayanga states that he was instructed on or about 8th April, 2008, and thereafter had considerable difficulty locating the court file; that he was unable to obtain any records from the applicant's previous advocate; that he himself had to travel to Nairobi between 17th April, 2008 and 12th May, 2008 to attend to his sick wife; and that the delay was not intentional.

In his submissions before me, Mr. Hayanga, learned counsel for the applicant, argued that the delay of 55 days in filing this application was not inordinate, and not intentional, and that the intended appeal raised an important point of law relating to the definition of a tenancy by holding-over.

In his reply, Mr. S. Khagram, learned counsel for the respondent, submitted that the delay of 55 days in filing this application for extension of time was inordinate and not well explained; that the intended appeal was not meritorious, in that it was based on facts and not law; and that the application was incompetently before this Court on the grounds that a notice of appeal had indeed been filed, and the same had not been withdrawn or struck out. He relied on the cases of **Mwangi vs Kenya Airways Limited**

(2003) LLR 486 and *Pullin Harakchad Shah vs Southern Credit Banking Corporation Limited (2008) e KLR*. In his replying affidavit, the respondent also raised the issue that “the Applicant’s present advocates are improperly on record in this matter” but did not elaborate on the same, or argue the point. I assume it was abandoned.

Having heard counsel, and having read all the supporting material on record, and keeping in mind the principles set out in the *Leo Sila Mutiso case (supra)* I am of the view that in the circumstances of this case, a delay of 55 days is not inordinate. It is well explained, and is based on the relocation of the applicant’s former advocate to Nairobi; the failure by five other advocates in the same firm to carry out the applicant’s instructions, following the relocation of Mrs. Amadi, who had the principal conduct of the file; the failure to locate either the court file, or the applicant’s previous advocate’s file in time; and finally Mr. Hayanga’s own travel to Nairobi to attend to his wife’s ill-health. None of these reasons have been challenged, and appear reasonable to me.

With regard to whether this appeal is arguable, I am prepared to accept that it is not frivolous, that it raises at least one point of law, and that the applicant ought to have her day in court. I do not see what serious prejudice this would cause the respondent.

Finally, with regard to the argument challenging the competency of this application on the ground that there is a notice of appeal pending on record, I have the following to say. It is not in dispute that the applicant’s previous advocate did in fact file a notice of appeal dated 12th March, 2008 which even though filed late, is still on record. Can the applicant now apply for extension of time to file another notice of appeal? Will that not result in two notices of appeal on record?

In the case of *Ocean Freight Shipping Company Limited vs. Oakdale Commodities Limited – Civil Application No. Nai. 198 of 1995*, a full bench of this court was faced with a decision of Shah J.A as a single judge on the same issue. It stated as follows:

“The applicant made its motion asking that it be allowed to file its notice of appeal out of time. The motion, as is the practice of the Court, was heard by a single judge (Shah, J.A). The learned single judge took the view that since the applicant had already filed a notice of appeal which was still on record, to extend the time to file a notice of appeal would be in effect to allow the applicant to file two notices of appeal. The learned Judge thought rightly, in our view, that what the applicant ought to have asked him to do was to extend time by such a period as would validate the notice of appeal lodged on the 21st August, 1992. The applicant did not do so and the learned single Judge thought that:

‘So effectively I am asked to disregard the notice of appeal filed on 21st August, 1992, and allow the filing of another notice of appeal out of time and then validate ex post facto, the appeal already filed without there being an extension of time to validate the notice of appeal filed on 21st August, 1992. I cannot do so. The applicant is taking too many short cuts.’”

The full bench agreed with those sentiments. In 1999, Omolo J.A, in the case of *Dolphin Palms Limited vs. Al-Nasibh Trading Co. Ltd. and two others – Civil Application No. 112 of 1999* was more specific on the issue. He stated as follows:

“Mrs. Gudka, for the applicant, sought to persuade me that I have jurisdiction to allow the applicant file a notice of appeal out of time. Of course I have jurisdiction to extend time within which a notice of appeal is to be filed. But as Mr. Khatib, for the first respondent, correctly pointed out, there is in fact a valid notice of appeal which was lodged on time against the decision in so far as that decision affects the first respondent. As at now, there is really no notice of appeal at all as regards the third respondent and prayer one in the notice of motion is not that I should enlarge time within which the applicant can file and serve a notice of appeal against the decision as it affects the third respondent. The prayer is that I should extend time to enable the applicant to file a notice of appeal. There is in fact a notice of appeal on record. Whether or not that notice is valid one cannot be a decision to be made by a single judge; that is a province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single judge of this Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 5 (2) (b), an application to strike out a notice of appeal can only be heard and determined by the Court not by a single judge.

By deeming a notice of appeal to have been withdrawn, the single judge may well be usurping the powers reserved for the Court.”

In *Pullin Harakchand Shah vs Southern Credit Banking Corporation (2008) e KLR* Onyango Otieno, JA, also faced with the same situation, agreed with the sentiments expressed by the full Court in the *Ocean Freight case (supra)* and the comments of Omolo, JA in the *Dolphin Palms case (supra)* and said as follows:

“I do agree with the full Court and Omolo J.A. The notice of appeal filed on 20th July, 2007 is validly on record and to order another one to be filed out of time would mean two notices of appeal in support of one appeal. Further, it is not mine as a single judge to declare the notice of appeal filed on 20th July, 2007 as withdrawn. That is, as Omolo J.A rightly stated in the Dolphin case (supra), the work of a full bench and not a single judge. The best I can do, and I do, since the notice was properly filed, is to extend time such that it is validated for purposes of the record of appeal which was not filed within the time required after it was filed.”

I also agree with the sentiments expressed in the above cases, and not unlike Onyango Otieno, JA, I, too, am inclined to extend the time for filing the notice dated 12th March, 2008 and lodged on 27th March, 2008, upto the date it was so lodged, and to order that it is deemed to have been properly filed. Indeed, one of the prayers in the application before me seeks, in the alternative, “that the copy of notice filed herein be regarded as duly filed.”

Accordingly, and for reasons outlined above, and in keeping with the spirit of **section 159 (1) (d)** of the new Constitution of Kenya, and **sections 3 A and 3 B** of the Appellate Jurisdiction Act, I allow the application dated 23rd May, 2008 and order that the notice of appeal dated 12th March, 2008 and lodged in Court on 27th March, 2008 be and is hereby deemed to have been properly filed. Costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi via tele-presence this 22nd day of October, 2010.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR