IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 299 OF 2007

JOHN GAKURE & 148 OTHERS.....APPLICANTS

AND

DAWA PHARMACEUTICAL CO. LTD. & 7 OTHERS.....RESPONDENTS

(Application seeking for restoration of the application for extension of time to lodge and serve Record of

Appeal against the Ruling and order of the High Court of Kenya at Nairobi (Nyamu, J) dated 2nd March, 2007

In

H.C.C.C. No. 1612 of 2005)

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RULING

On the 13th December, 2008, a notice of motion under ***rule 4*** of the rules of this Court (the rules), dated 3rd December, 2007, was placed before me for hearing and determination. Before me on that day were five Advocates of the High Court, instructed and served with hearing notices to appear for various respondents in the matter. But none of the applicants or their counsel on record made any appearance and there was no explanation about their whereabouts despite proof that the hearing notice was served on counsel. On the urging of the respondents' Advocates, I made an order under ***rule 55 (1)*** of the rules dismissing the application with costs.

The counsel on record for the applicants are **M/s O.P. Ngoge & Associates**. It is not clear how many "*Associates*" work in that firm as only the name of "*P.O. Ngoge*" is listed on the letterheads, and he was the one seized of the matter. Ten days after dismissal of the application - on 23rd December, 2008 - Mr. Ngoge filed an application under ***rule 55 (3)*** and ***(4)*** of the rules seeking an order for setting aside my earlier order and reinstating the application dated 3rd December, 2007. ***Rule 55 (3)*** donates the power to issue the order sought and it is in terms a discretionary power. But it is not unfettered since the order will only issue:-

"--- if he (the party) ***can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing."***

Under ***rule 55 (4)***, the application must also be made within 30 days. So that, without due compliance with those terms there would be no basis for the exercise of any discretion under those rules. I am

nevertheless aware of the emerging philosophy recently (23rd July, 2009) introduced by Parliament through enactment of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act (Cap 9), Laws of Kenya. Those provisions state as follows:

"3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2)The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3)An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the process of the Court and orders of the Court.

3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) The just determination of the proceedings;

(b) The efficient use of the available judicial and administrative resources;

(c) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) The use of suitable technology."

The construction of those provisions has since been made in several decisions of this Court; for example, in **City Chemist (NBI) & Another vs. Oriental Commercial Bank Ltd**., Civil Application No. NAI 302/2008 (UR) where the Court stated:-

"The overriding objective thus confers on the court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. One view taken by this Court, differently constituted, is that:

"The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective….. and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases."

See ***Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates,*** *Civil Appl. NAI. 293/09.*

We think that view is a fair interpretation of the thinking of Parliament in enacting the legislative amendment which was largely borrowed from similar provisions in England. In that country, the concept of ***"overriding objective"*** *has now been in use since 1999 when the "Civil Procedure Rules" were promulgated to replace the "Rules of the Supreme Court." It was tailored to enabling the court to deal with cases justly which includes as far as practicable:*

"(a) ensuring that the parties are on an equal footing;

(b) saving expenses;

(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv)o the financial position of each party;

(e) ensuring that it is dealt with expeditiously and fairly; and

(f) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Thoseare not pious aspirations and the court has a dutyto give them operational effect. That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

In a subsequent decision by the Court, differently constituted, that decision was followed and the Court further stated:-

"That caution by the Court is well founded and in applying the overriding objective principle, the courts must bear the caution in mind. For instance, under rule 4 of the Court's rules a party who takes say six months before filing a notice of appeal and is asking the Court for enlargement of time to do so cannot simply tell the Court:-

I come relying on the overriding objective of litigation contained in sections 3A and 3B of the Appellate Jurisdiction Act. You must extend time for me so that my appeal which in my view is meritorious can be determined upon the merits.

Such a party would still have to explain to the Court why it took him six months to file the notice of appeal, whether the proposed appeal is meritorious and such like requirements. In such a case the overriding objective principle may well be invoked against such a party by telling him that it would be contrary to the principle to allow him to re- open the litigation after such a long time and for no good reason for the delay."

That was in the case of **Deepak Chamanlal Kamani & Another vs. Kenya Anti Corruption Commission & 3 Others**, Civil Appeal (Application) No. 152/09 (UR). I will be guided accordingly by the principles stated above.

The motion before me was filed within 30 days as provided under ***rule 55 (4).*** Mr. Peter O. Ngoge, however, who swore the affidavit in support of the motion, disclosed that he became aware of the dismissal the same day but chose to file it when he did because he was still within the period provided under the rules. That may well be so. But it may well reflect a lackadaisical approach to court matters and may, in an appropriate case, be taken against a party so conducting himself. I say nothing further on that. The deponent further swears that he had conduct of the matter and was aware of the hearing. He left his home (not disclosed) at 6.45 a.m. that morning and was heading towards his office in town to prepare for the matter when the vehicle he was driving developed mechanical problems along Thika road next to Utalii Drive at about 7.28 a.m. By the time he called a mechanic whom he left with the vehicle, took a matatu and drove through heavy traffic to the Globe Cinema, it was 9.15 a.m. He continued:-

"(7) THAT from Globe Cinema Roundabout I arrived at the Court premises at about 9:28 a.m. and

went straight to the Chambers of His Lordship the Honourable Mr. Justice Waki who informed me and which information I verily believed to be true that he was functus officio.

(8) THAT in the premises I am now praying that the applicants application dated 3rd December, 2007 be restored to hearing so that the same can be heard on merit.

(9) THAT failure on my part to attend court on time was due to the mechanical problems which developed on my said Motor Vehicle while I was on my way to Town coupled with Traffic Jam and was not of my own making or deliberate and the same should not be visited upon the applicants who sought to be heard on merit because the policy of this Honourable Court is not to shut out parties."

In sum, the foregoing was put forward as the "*sufficient cause*" referred to in ***Rule 55(3)***. Mr. Ngoge added in submissions at the hearing that he could not ask another lawyer to hold his brief since he was in a matatu and had no contacts of any lawyer. In his view, the claim of the applicants in the main suit is substantial as it is in excess of Kshs.22 million which one of the parties does not dispute. The opportunity to pursue that claim, he submitted, should not therefore be scuttled by technicalities.

The application was opposed by all counsel appearing for the respondents for reasons that the delay between the dismissal of the main application and the filing of the motion for setting aside was not explained; that the motion was in abuse of the court process; that no attempt was made to inform the court in time about the applicant's advocate's problems; that it would be futile to reinstate the original application for hearing because it is based on an incompetent notice of appeal and is itself not meritorious; and that the affidavit in support of the motion consisted of carefully calculated and misleading allegations that bear no truth.

I have considered the rival submissions on all sides and I think on the whole, that learned counsel for the applicants ought to have conducted himself more prudently to alert the court about his predicament if, as stated by him, the problems started as early as 7.00 a.m. It is also relevant that his court clerk was hovering around the court before the motion was called out for hearing but said nothing to the advocates appearing in the matter about the absence of his employer. Nevertheless, I give the benefit of doubt to counsel for the applicants and accept the predicament he swears he faced as sufficient cause for non-appearance. Whether or not the notice of appeal is competent and whether the main application is meritorious are issues that fall for consideration when the matter is listed for that purpose. For now, I need only consider whether I ought to set aside my earlier order as a consequence of which the main application will be reinstated for hearing. I think I have said enough to show that I am inclined to grant the prayers sought and I now do so. The applicants shall nevertheless bear the costs of this application and the costs incurred when the main application was dismissed on 13th December, 2008.

Those shall be my orders.

Dated and delivered at Nairobi this 22nd day of January, 2010

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.