Case Number:	Civil Appli 280 of 2007 (UR 171/2007)
Date Delivered:	28 Mar 2008
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	William Shirley Deverell
Citation:	Kenya Industrial Estates Ltd v Samuel Sang & another [2008] eKLR
Advocates:	-
Case Summary:	**[Ruling] Civil Practice and Procedure** - appeal - extension of time - application for extension of time to lodge and serve notice of appeal and record of appeal from a judgment of the High Court - application for stay of proceedings - first appeal having been withdrawn by consent as being incurably defective - applicant averring that the defects in the first appeal were due to the mistakes or negligence of its previous advocates - mistake of advocate - whether the power to stay execution in the High Court is a power which can be exercised by a single Judge of Appeal - principles guiding the court in an application for extension of time - Court of Appeal Rules rules 52
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	994 of 1998
Case Outcome:	Application Allowed
History County:	Nairobi
Representation By Advocates:	-

Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 280 OF 2007

KENYA INDUSTRIAL ESTATES LTD ……..……..……APPLICANT

AND

SAMUEL SANG ……..1ST RESPONDENT

HEMA INVESTMENTS LTD ……..……2ND RESPONDENT

(An application for extension of time to lodge and serve notice of appeal and record of appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice Alnashir Visram) dated 21st January, 2004

in

H.C.C.C. NO. 994 OF 1998)

****

R U L I N G

The application before me, sitting as a single Judge, is by Notice of Motion dated 13th November 2007 which was lodged on 15th November 2007. The application was certified as urgent and the Honourable Chief Justice ordered that it be heard before me on 3rd December 2007.

The applicant, Kenya Industrial Estates Ltd. was represented by Mr. Stephen K. Ngii while the 1st respondent Samuel Sang and the 2nd respondent Hema Investments Ltd. were both represented by Mr. Kenyatta Odiwuor.

The prayers sought in the Motion, in addition to that for a certificate of urgency, were for ***ORDERS THAT***:-

2. Pending the hearing and determination of this application there be a stay of proceeding in High Court Civil Case No. 994 of 1998.

3. The applicant be and is hereby granted leave to lodge and serve Notice of Appeal and Record of Appeal out of time in the intended Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Visram J.) dated 21st January 2004, in H.C.C.C. No. 994 OF 1998.

4. Costs of this application be provided for.

ON THE GROUNDS THAT

1. ***The applicant's first appeal viz. C.A. No 94 of 2004 was withdrawn by consent on 31/10/2007 as being incurably defective since the Record of Appeal lacked some primary***

documents, and the respondent has already applied for the release of a sum Kshs. 20,000,000/- which had been deposited with National Bank of Kenya as security for stay in the withdrawn appeal.

2. The defects in the first appeal were due to the mistakes and or negligence of the applicant's previous advocates.

3. The applicant is still desirous of pursuing an appeal against the judgment and decree aforesaid.

4. The subject judgment involves an award of a colossal amount of money (Kshs.10,580,000/=) which the applicant believes was arrived at erroneously.

5. The intended appeal is arguable and has overwhelming chances of success.

6. The ends of justice will be served if this application is allowed.

7. This application has been made without inordinate delay.

It is clear from the above that there were two main remedies sought by the applicant the first of which is for extension of time to file and serve a Notice of Appeal and Record of Appeal which I clearly have jurisdiction to hear as a single judge of appeal and am indeed required so to hear by ***rule 52*** of the Court of Appeal Rules (hereinafter *"**the Rules."**).* However ***rule 52 (2) (b)*** of ***the Rules*** provides inter alia that:-

*"**This rule shall not apply to .....an application for a stay of execution".***

Prayer 2 of the application before me does not use the words "stay of execution" — it seeks that " ***there be a stay of proceeding in High Court Civil Case No. 994 of 1998''.***

Mr. Ngii*,* learned counsel for the Applicant submitted that the relief sought in prayer 2 of the application before me was not for a stay of ***execution*** but was for stay of "***proceedings***" in the superior court. The relevant proceedings, according to ***Mr. Ngii*** were his application in the superior court ***for the release to the applicant of the decretal amount which had been deposited in a bank as security for stay of execution in High Court civil case No. 994 of 1998.*** His contention was that an application had been made in the superior court for stay of execution of the decree in HCCC No. 994 of 98 which was granted on the condition that the applicant does deposit ***Kshs. 20 million*****.** This deposit was required as part of the proceedings in the superior court but was not a ***"stay of execution"*** falling within ***rule 52 (2) (b). Mr. Ngii*** submitted that in these circumstances I do have jurisdiction, sitting as a single Judge, to make the order sought in prayer 2 of the application. ***Mr. Ngii*** had no authorities in support of this submission.

Mr. Ngii further submitted that ***section 3 (2)*** of the Appellate Jurisdiction Act supported his submissions. It provides as follows:-

"(2) For all purposes of and incidental to the hearing and determination of an appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power authority and jurisdiction vested in the High Court."

With respect to ***Mr. Ngii***, I do not find any assistance in the above sub section of the Appellate Jurisdiction Act since it does not make any provision governing the matters which can or cannot be dealt with by a single Judge of Appeal.

Mr. Ngii's argument appears to me to be that because the High Court does have jurisdiction to stay proceedings in the High Court, the Court of Appeal is empowered by ***section 3(2)*** of the Appellate Jurisdiction Act to do the same. However the issue raised before me is not whether the Court of Appeal has jurisdiction to stay execution in the superior court which this Court clearly has under ***rule 5(2) (b)*** of ***the Rules*** but it is as to whether the undoubted power to stay execution in the superior court is a power which can be exercised by a ***single*** Judge of appeal.

Rule 52 of the ***Rules*** provides in so far as is relevant to the application before me:-

52. (1) Every application, other than an application included in sub-rule (2) shall be heard before a single Judge:

Provided that any such application may be adjourned by the Judge for determination by the Court.

(2) This rule shall not apply—

(a).... to an application to for leave to appeal; or

(b).....to an application for a stay of execution;

I do not consider that I, as a single Judge of Appeal, have jurisdiction under ***rule 52*** of the Court of Appeal Rules to hear the application for a stay of execution of proceedings in the superior court which application is hereby dismissed with costs.

I shall therefore now consider my ruling on the applicant's application for an extension of time to file and serve a Notice of Appeal and Record of Appeal out of time in the intended Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Visram J.) dated 21st January 2004 in H.C.C.C. No. 994 of 1998.

The principles applicable to applications for extension of time under ***rule 4*** of the Court of Appeal ***Rules*** have been well set out in the often quoted case of ***Leo Sila Mutiso v. Rose Helen Wangari Mwangi –Civil Application No NAI 251 of 1997*** (unreported) delivered on 5th November 1999 in a Ruling of the Court (Gicheru, Lakha, and Bosire JJA) in which this Court reiterated that:-

"Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy."

"*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 case before me the judgment in the superior court sought to be appealed by the applicant was delivered by Visram J. on ***21st January 2004*** and the current application by motion for extension of time was filed on ***13th November 2007*** approximately ***three and three quarter years*** later. However, much of this not inconsiderable delay was due to the fact that the applicant had been obliged to withdraw an earlier appeal lodged on ***17th May 2004*****,** being ***Civil Appeal 94*** *of* ***2004*** approximately 4 months after delivery of the judgment.

The circumstances giving rise to the need to withdraw ***Civil Appeal 94*** were explained in the affidavit of Stella Wavinia Mbuli who is the Legal Officer of the applicant in paragraphs 4 to 13 of her affidavit in support of the current application sworn on 13th November 2007 which paragraphs are as follows:-

"4. That the case was tried and finally determined on the 21st January 2004 when the Court gave judgment in favour of the Respondents and awarded general damages to the tune of Kshs.10,850,000/- plus costs.

"5. That the applicant being dissatisfied with the decision of the High Court aforesaid lodged an appeal in this court on 17th May 2004, being Civil Appeal No. 94 of 2004.

"6. That in the course of preparations for the hearing of the appeal, our advocates initially acting for us M/s Wanjao & Wanjau Advocates discovered that the record of appeal did not contain some pleadings and other vital documents filed in the High Court and or relied on evidence (sic) during trial.

"7 That in order to cure the defects in the Record of Appeal, on 7th May 2007 the Applicant filed a Notice of Motion dated 23/4/2007 for leave to file a Supplementary Record of Appeal which application was heard and a ruling thereon delivered on 8/6/2007.

"8 That in their ruling delivered on 8th June 2007, the Court of Appeal found that the documents that had been omitted from the Record of Appeal were primary documents which could not be introduced through a Supplementary Record of Appeal hence they dismissed the application. Annexed hereto and marked 'SWM - 2A' is a copy of the ruling.

"9 That after the said ruling it became evidently clear that the appeal was incurably defective and could not be prosecuted successfully.

"10 That upon this realization, the Board of Directors of the applicant Company met in or about July 2007 to chart the way forward on this matter.

"11 That the Board resolved to give the conduct of this matter to new advocates M/S Hayanga & Company Advocates and drop M/s Wanjao & Wanjau Advocates whom the Board felt were largely to blame for the misfortunes that had befallen the applicant concerning the matter. The new Advocates filed Notice of Change of Advocates.

"12 That our substantive instructions to the new advocates were to withdraw the incompetent appeal whether by consent or through formal application and thereafter apply for leave to lodge a fresh appeal out of time.

"13 That on the 15/8/2007, our advocates on record initiated negotiations with the respondent's advocates for the withdraw (sic) of the incompetent appeal which negotiations bore fruits on the 31/10/2007 when a consent letter was filed in court."

I have come to the conclusion that the reasons for the substantial delay have been adequately explained. I will next consider the degree of prejudice, if any, will be suffered by the first and second respondents if the extension of time sought by the applicant is granted.

In his oral submissions before me Mr. ***Kenyatta Odiwuor*** submitted that the respondents Samuel Sang and Hema Investments Ltd. will suffer prejudice in that they will be deprived of the fruits of the judgment dated ***21st January 2004*** of ***Visram J***. in the superior court in ***H.C.C.C. No. 994 of 1998*.**

In that judgment ***Visram J.*** awarded to the plaintiffs Samuel Sang and Hema Investments a total of ***Kshs. 10,850,000/-*** as against the respondent Kenya Industrial Estates Ltd.

However the fruits of judgment will not be permanently lost to the respondents herein, Samuel Sang and Hema Investments Ltd., if the application for extension of time is granted to the applicant, Kenya Industrial Estates Ltd., unless the applicant succeeds in the intended appeal.

In this connection it should also be noted that there have been two orders made in the superior court.

On 17th January 2005 ***Ransley J***. heard an application dated 30th September 2004 filed by Kenya Industrial Estates Ltd. as applicants in High Court Civil Suit No 994 of 1998 against Samuel Sang and Hema Investments Ltd. and made the following order:-

"THAT stay of execution be and is hereby granted on condition that the decretal amount of Kshs.20 million is paid into an interest bearing account in the names of the parties' Advocates within 60 days from today (17th January 2005) failing which execution will issue."

This order was varied by a further order made by ***Mr. Justice Kubo*** on 21st March 2005 reading as follows:-

"1. That the court order dated 17th January, 2005 be and is hereby varied to provide for the deposit of the entire decretal sum in an interest earning account in the name of the defendant with three signatories, one from the defendant, and the other two from the advocates firms on record instead of the money being deposited in an interest earning account in the joint names of the advocates on record.

2. That the enlargement of time of depositing the money be 10 days.

3. That the execution of judgment dated 21st January be and is hereby stayed for 10 days."

The length of delay sought to be excused is substantial. The decision to be appealed was that of Mr. Justice Visram J. dated 21st January, 2004. The Notice of Appeal should have been filed in accordance with ***rule 74*** of the Rules not later than 14 days later which time would have expired on about 4th February, 2004. The substantive appeal consisting of the Memorandum of Appeal and the Record of Appeal should have been lodged in accordance with ***rule 81*** of the Rules within 60 days after the 4th February, 2004 which takes us to about 5th April, 2004.

The present application seeking an extension of time to lodge and serve Notice of Appeal and Record of Appeal was lodged on 15th November, 2007 more than three years and seven months after the Record of Appeal should have been lodged.

The reasons for the delay were a number of errors by the advocates originally acting for the

applicant as described above in paragraphs 4 to 13 of the affidavit of Stella Wavinia Mbuli dated 13th November, 2007 cited above.

I am mindful of the numerous decisions of this Court stressing that lengthy delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time. A memorable pronouncement in that regard was made by Madan J.A., Obiter in ***Murai vs. Wainaina (No.4)*** [1982] KLR 33 where he said:-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is also done in the interests of justice."

Having considered all of the above I am satisfied that this a proper case for the exercise of my discretion to grant an extension of time to the applicant within which to lodge and serve Notice of Appeal and Record of Appeal out of time in the intended Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Visram J.) dated 21st January 2004.

This being so I order that a fresh Notice of Appeal be filed and served within 14 days of the delivery of this my ruling and the Record of Appeal be lodged within 30 days of the service of the fresh Notice of Appeal.

In the circumstances of this case I considered that the costs of the respondent herein of the application shall be paid by the applicant which costs if not agreed shall be taxed by the Deputy Registrar of this Court. It is hereby so ordered.

Dated and delivered at Nairobi this 28th day of March, 2008.

W. S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR