



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 289 OF 1997 (122/97UR)

MACCU MOTORS LIMITEDAPPLICANT

AND

1. BIKABHAI MATHURBHAI PATEL

2. FRANK KAMUNDI MWONGERA

3. CYPRIAN IBURI NGARURO

4. THE COMMISSIONER OF LANDSRESPONDENTS

(Application for leave to file and serve Notice and Record of appeal out of time in an intended appeal from a Ruling & Order of the High Court of Kenya at Meru (Justice Etyang) dated

23rd October, 1996

in

H.C.C.C. NO. 99 OF 1996)

R U L I N G

There is before me a motion on notice under rule 4 of the **Rules of this Court** (the Rules) seeking an extension of time to file and serve a notice and a record of appeal from the ruling of the superior court (Etyang, J.) given on 23 October, 1996. An appeal from that decision being **Civil Appeal No. 287 of 1996** was, on 30 October, 1997 struck out for being incompetent as the certified copy of the order appealed from did not comply with the provisions of Order XX rule 7(1) of the Civil Procedure Rules. On 6 November, 1997 the applicant filed the present notice of motion.

It was contended on behalf of the first, second and third respondents (with Mr. Bandula for the fourth respondent associating himself) that the extension sought should not be granted as no appeal lay from the decision of the superior court. In support of this submission, reliance was placed on the decision of this

Court in **HENRY KIMANI GUMBA & ANOTHER VS. ZAKARIA MUIGAI GAKIBE CIVIL APPEAL NO. 199 OF 1996** (unreported) where, in a suit for specific performance of an alleged contract to purchase land, an application for extension of time within which an application for consent of the Land Control Board could be made was granted under the provisions of section 8 of the **Land Control Act, CAP. 302**. It was held that such an extension was not a "decree" within the meaning of section 2 of the Civil Procedure Act. Nor was the order sought to be appealed from an order made "under these rules" meaning the Civil Procedure Rules. It was made under another Act and, therefore, it required leave under section 75 of the Act. In my view, that decision is clearly distinguishable from the facts obtaining in the present case. Here, an application for an injunction had been made to the learned Judge and he held "the application for injunction based on an incompetent suit is equally incompetent and is dismissed." The Judge, therefore, specifically dismissed the application for an injunction which had been made to him, under Order XXXIX of the Civil Procedure Rules. Such an order is clearly appealable as of right, without leave, under Order XLII, rule 1(1) which gives a right of appeal from 31 such types of orders set out in paragraphs (a) to (ee) inclusive of sub-rule (1). In addition, the order of the Judge struck out the suit as it offended the provisions of section 13A of the **Governments Proceedings Act CAP. 14** and section 143 of the **Registered Land Act CAP. 300**. The only specific provision under which a suit may be struck out is Order VI rule 13(1) and an order under that provision is also equally appealable as of right under Order XLII rule 1.

I am, therefore, satisfied that an appeal does lie in the instant case without leave from the decision of the Judge which is sought to be appealed against.

I now turn to consider whether I should exercise my discretion, under rule 4 of the Rules, to grant the application. The starting point is, as it must be, rule 4 itself which confers the widest measure of discretion and makes no distinction between the various classes of cases. But like all discretion, it must be exercised judicially. The rule itself therefore specifies that the Court may make an order for extension of time on such terms as it thinks just. To me, that is an important provision. At the heart, therefore, of this discretionary exercise is the need to do justice. Justice has to be done both to the plaintiff, to the defendant and, of course, and especially in this day and age, to the whole process of the administration of justice in these courts. But it may not be out of place to cite a passage in the speech of the well-known case of **EVANS VS. BARTLAM [1936] 2 ALL ER 646 at 650**, and to remind everybody of the words of Lord Atkin:

"The principle obviously is that, unless and until the court

has pronounced a judgment upon the merits or by consent,

it is to have the power to revoke the expression of its

coercive power where that has been obtained only by a

failure to follow any of the rules of procedure."

Here, I am satisfied that there has been no inordinate delay in making the present application. I am also satisfied that the appeal was struck out because of a bona fide mistake on the part of the advocate which should not preclude his client from seeking to obtain a decision of its dispute on the merits. I have heard nothing to persuade me that this is not a fit or a proper case for the exercise of my discretion. If anything, having given this matter my careful consideration and having regard to all the circumstances of the case, I am satisfied that this is a fit and a proper case for the exercise of my discretion.

Accordingly, I order that the applicant shall file, within seven days from today, a notice of appeal and serve the same within seven days therefrom and that the record of appeal shall be filed within thirty days thereafter. The costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 31st day of May, 1999.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR