



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: SHAH J.A (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI. 21 OF 1999**

**BETWEEN**

**SAMKEN LIMITED ABOERCROMBIE**

**KENT LIMITED.....APPLICANTS**

**AND**

**MERCEDES SANCHEZ RAU TUSSEL.....1ST RESPONDENT**

**MOHAMMED OSMAN MAALIM.....2ND RESPONDENT**

**(Being an application in the intended appeal against the judgment and Decree of the High Court of Kenya at Nairobi (Hon. Mr. Justice A.G. Ringera) delivered on 27.11.97**

**in**

**H.C.C.C. NO. 4232, 4233 AND 4234 OF 1992)**

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**RULING**

Two applicants, Samken Limited and Abercrombie & Kent Limited, have moved this Court by way of Notice of motion lodged in court on 26th January, 1999, seeking extension of time to lodge a record of appeal out of time.

It becomes necessary to go into the history of the matter. The applicants were defendants in the superior court. Their co-defendant was the second respondent here. The plaintiff in the superior court is the first respondent here.

On 27th November, 1997 the superior court (Ringera, J) entered judgment for the plaintiff against the defendants in a sum of Kshs.27,000,000/= approximately plus costs and ordered that the first and second applicants were to pay 30% thereof to the first respondent and that the second respondent was to pay 70% thereof to her.

All the defendants in the superior court were dissatisfied with the whole of the judgment and lodged, in time, notice of appeal against the judgment and decree. They also applied for, in time, copies of proceedings and judgment, to enable them to lodge their respective appeals.

The second respondent did not file his appeal in time. He applied for extension of time to lodge his record

of appeal out of time on grounds, inter alia, that in the see-saw between his lawyers and his insurer's lawyers the lodgment of the record of appeal was delayed until time ran out. This application for extension of such time came up for hearing before me, and, on 12th October, 1998 I extended the time as sought and I am told that the second respondent's record of appeal has been lodged in time as extended by me and that the first respondent did not seek to file a reference against my said ruling delivered on 12th October, 1998.

The first respondent has filed a notice of cross-appeal in Civil Appeal No. 247 of 1998 which is the appeal filed by the second respondent. In that Notice of cross-appeal the first respondent seeks variation of the superior court's judgment to the following extent:

1. That the liability of the respondents there be joint and several and not restricted to 70% and 30% as restricted by the superior court.
2. The damages assessed are too low.
3. That Abercrombie & Kent Limited was bound by the contract between it and the appellant and her children.
4. That the learned judge erred in not granting costs of air-lifts etc.

It can therefore be seen that the first respondent is challenging several aspects of the judgment of the superior court.

The applicants here (who are fourth and fifth respondents in C.A. NO. 247 of 1998) have also lodged a notice of crossappeal against both liability and damages, in that appeal.

Civil Appeal No.247 of 1998 is therefore the concern of all parties affected by the judgment of the superior court and it is always a matter of prudence that all issues between the same parties be resolved once and for all. That is to say, if the applicants here are already heavily involved in Civil Appeal No. 247 of 1998 I see no harm whatsoever if they are allowed to lodge their own record of appeal. There will be no prejudice to the first respondent.

But Mr. Oyatsi has strongly opposed this application on grounds following:

1. That there has been no explanation of delay on part of the applicants in having the decree of the superior court drawn up.

It was drawn up in June, 1998.

2. The applicants were put on guard by Mr. Oyatsi.

They were the applicant's advocates in the superior court and were involved in the application for extension of time lodged by the second respondent.

3. That the applicants have misled this court. That they have not been candid. It cannot be true that exhibits were not available.

4. The applicants concede that they took no action from October, 1998 to December, 1998 when they prepared the present application and it took them more than a month to lodge the same in this Court.

Mr. Kimani for the respondent states that whilst there was delay on their part between October, 1998 and January, 1999 they were engaged in obtaining copies of exhibits (running into about 1000 pages) for preparing the record of appeal; that they took steps to have the decree sealed after they were notified of the fact of the proceedings and judgment being ready; that exhibits became available in October, 1998; that the clerk to Ringera, J who was in charge of exhibits was switched over to Mwau Commission hearing and hence the extra delay; that whilst the second respondent's application was pending in this

Court they were not sure how they would go.

It is true that some facts were not brought to my notice earlier but I do not think that there was concealment thereof.

It appeared to be an inadvertent omission. The missing facts were brought out in any event. I have seen the record of appeal already filed by the second respondent. The number of exhibits is large.

Considering all facts and matters in the issue, and keeping in mind the fact that the applicants are already a party to an appeal filed in respect of the same suit, I see no harm in granting this application. It could be prudent if the Court were to hear both the appeals, the already filed one and the intended one together. It will save time and expense and the applicants would have their day in Court.

In the exceptional and peculiar circumstances of this case I am minded to overlook some inaction on the part of the applicants' counsel, in the interests of applicants themselves who face a huge judgment in respect of which the first respondent may not have access to Cap.405 procedure against the applicants' insurers.

I allow this application and order that the applicants do lodge their record of appeal within the next 30 days. The first respondent will have costs of this application which I assess at Shs.10,000/=. If this sum is not paid by the applicants to the first respondent within the next 30 days the first respondent may execute therefor. As regards the second respondent I make no order as to costs.

**Dated and delivered at Nairobi this 7th day of May, 1999.**

**A. B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**