



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI**

**CIVIL APPLICATION NO. NAI. 324 OF 1998**

**BETWEEN**

**SUN & FUN LIMITED  
MAYUNGU RESTAURANT.....APPLICANTS  
AND  
SAMUEL KANOGO RITHO  
BALINDI DHOW LIMITED.....RESPONDENT**

**(Appeal from a judgment, decree, order or as the case may  
be of the High Court of Kenya at Nairobi (Mr.  
Justice Hayanga) dated 22/5/97**

**in**

**H.C.C.C. NO. 4403 OF 1994)**

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**R U L I N G**

The first respondent filed, in the superior court at Nairobi, on or about 15th December, 1994 a suit against **Malindi Dhow Limited, Sun and Fun Limited and Mayungu Restaurant Limited**, claiming reliefs as follows:-

**1THAT** all the three defendants and their servants and/or agents be declared trespassers in the suit premises L.R.

Kilifi/Chembe/Kibabamushe/414.

**2.THAT** an order be made that the three defendants do jointly and severally pay the plaintiff the mesne profits from 1/7/1994 until when they shall vacate the land quantum to be determined by this Honourable Court.

**3.THAT** an order to evict the defendant/servants and/or agents be made and to be executed by Court bailiff with the assistance of O.C.S. Malindi Police Station.

**4.THAT** the defendants jointly and severally do pay mesne profits to the new tenant Godfrey Karume to cover the losses he has incurred from 1/7/1994 quantum to be assessed by the Court.

**5.**Interest at bank over-draft rate at 26% per annum be awarded on the amount awarded in paragraph 2 and 4 above until when paid in full.

6.Costs and interest at Court rates.

7.Permanent injunction do issue against the three defendants to restrain them from trespassing in the suit land.

Interlocutory judgment was entered against **Sun & Fun Limited and Mayungu Restaurant Limited** on 16th March, 1995.

These companies are the applicants before me in this application. I will henceforth refer to them as the applicants. The applicants applied, by way of a chamber summons lodged in the superior court, to have the said interlocutory judgment set aside or alternatively reviewed.

They also sought stay of execution thereof and stay of proceedings as well, in the same application. That application was heard by Hayanga, J who dismissed it on 22nd May, 1996, formal order in respect whereof was extracted on 27th TMhaey , ap1p9l96i.c ant's then counsel Mr. Muoko says that he did not receive the notice of delivery of ruling (delivered on 22nd May, 1996) until 27th May, 1996 whereupon (he says) he prepared a notice of appeal and filed it in the superior court. He says in paragraph 9 of his affidavit sworn in support of the application.

"9. **THAT** upon learning of the ruling by Justice Hayanga, I prepared a notice of Appeal which I filed at the High Court and I was informed that the Appeal (sic) would be transmitted to the Deputy Registrar for his signature before we could be given copies to serve. This can be confirmed by one Mr. : (sic) who is a clerk to Justice Oguk."

This is a curiously worded paragraph. A notice of appeal is lodged in the registry of the superior court on payment of a fee, for which a receipt is issued and the notice of appeal is stamped. Copies (requisite) are returned to the party lodging the same who ought to serve a copy thereof (whether or not signed by the Registrar of the superior court) on the affected parties within seven days. How the clerk to Justice Oguk would know about such filling is not understood by me. A clerk attending a judge does not know anything about what is lodged in the registry. It must also be noted that a copy of the notice of appeal has to be served on all parties affected by the decision within seven days of lodgment. If Mr. Muoko was serious about lodgment of the notice of appeal he ought to have followed it up but it appears he did nothing.

There is yet another curiously worded paragraph in Mr. Muoko's affidavit. That is paragraph 11. It says:

"That due to some disagreement with one of the former directors of the 2nd and 3rd Defendant/Applicants because of the delay in the delivery of the ruling in the application to set aside, which took nine(9) months, I was unable to proceed any further with the case until Messrs Khaminwa & Khaminwa took over the matter."

The nature of the disagreement is not shown. How such disagreement could have delayed the process of lodgment of the notice of appeal or the record of appeal is not shown.

Not having 'found' the notice of appeal Mr. Muoko filed a fresh notice of appeal, without leave, on 7th October, 1998 some two and half years out of time.

I keep in mind that Hayanga, J dismissed the applicants' application on 22nd May, 1996. Prior thereto the first applicant had filed a suit in Principal Magistrate's Court at Malindi (Civil Suit No. 194 B of 1994) saying that it was unable to pay the agreed rent of Shs.15,000/= due to "some financial problems". In an affidavit sworn (no date of swearing is shown) in that suit one Danji Naran Patel a director of the first applicant says that as a result of his company's inability to pay the rent distress was levied and that the premises in question were leased to another tenant.

On or about 25th August, 1994 the first applicant had filed a suit against Mr. Nabutete, Mr. Godfrey

Karume and Mr. Joe Mwangi complaining that Mr. Nabutete had instructed Mr. Joe Mwangi to re-enter the suit premises and put Mr. Godfrey Karume in possession thereof. That was civil case No. 512 of 1994, in the High Court at Mombasa. In that suit on 9th February, 1995 Wambilyangah, J ordered that the first applicant's tenancy in respect of suit premises stood determined on 18th June, 1994 and that it illegally entered the same on 1st July, 1994 and 23rd August, 1994. He ordered the eviction of the first applicant from the suit premises.

However, on 7th April, 1995 same judge ordered Mr. S.K. Ritho to restore to the first applicant the possession of the suit premises.

On 18th July, 1995 this Court dealt with an application for stay of execution of the orders of Wambilyangah, J made on 7th April, 1995 when the application was marked withdrawn with no order as to costs.

On 21st November, 1996 the first applicant and one Filipino Nacito filed a suit in the High Court at Mombasa, through the firm of M/S Khaminwa & Khaminwa. That was Civil Suit No. 596 of 1996 seeking orders against Mr. Ritho and Malindi Dhow Limited as follows.

"(a)Declaration that the terms of the new tenancy should be negotiated between the parties.

(b)That pending the conclusion of such negotiations the plaintiffs may continue being into the tenancy premises under the existing terms.

(c)That judgment may be entered against the Defendants jointly and severally for special and general damages for all losses incurred by the Plaintiffs including loss of business, loss of profits and loss of goods and their use.

(d)A full account of rents paid be rendered by the Defendants.

(e)Costs of this suit and interest.

Mr. Justice Waki ruled that H.C.C.C. No 596 was res judicata vis-a-vis H.C.C.C. No. 4403 of 1994 and struck out the suit on 20th February, 1997.

M/S Khaminwa & Khaminwa then lodged in this Court an application under rule 5(2)(b) of the Rules of this Court seeking orders to restrain Mr. Ritho and Malindi Dhow Limited from evicting the first applicant and Mr. Nicito from the suit premises.

That application (**Civil Application No. Nai. 41 of 1997**) was dismissed on 23rd January, 1998 as the same, **according to Mrs. Khaminwa**, was overtaken by events.

On 30th April, 1997, the superior court (Kuloba, J) entered final judgment in H.C.C.C. No. 4403 of 1994 ordering payment of mesne profits, eviction of the applicants from the suit premises and costs.

By an application dated 6th May, 1997 filed under Order **IXB** rule 8 of the Civil Procedure Rules the applicants sought orders, from the superior court, seeking setting aside of the decree issued on 30th April, 1997 and stay of execution. Kuloba, J refused to grant the orders sought and dismissed the application with costs.

On 10th November, 1997, Kuloba, J in a considered ruling delivered in H.C.C.C. No. 4403 of 1994 dismissed an application for stay of execution pending the hearing and determination of an intended appeal.

I have attempted to set out the history of the long and chequered litigations between the parties to show that the applicants were at all material times aware of their rights but kept on taking wrong steps so much so that it is now over three years since the order for possession was made in favour of the

respondents. The applicants have not satisfied me at all that the delay in taking the present step (application for extension of time to lodge a notice of appeal already lodged) is not of their own making. If I were to allow this application it would be a travesty of justice. Whilst Dr. Khaminwa says that I should allow this application in the interests of justice I must not overlook the fact that the respondents are entitled to the fruits of their judgment. It is a cardinal principle of law as well as good sense that useless litigation must come to an end. I am not prepared to assist the indolent applicants by acceding to their application.

This application is dismissed with costs. The applicants will pay costs of both the respondents.

**Dated and delivered at Nairobi this 19th day of August, 1999,**

**A.B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**