

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO.NAL257 OF 1997 (KSM 26/97)
BETWEEN

ATENGA OGAMBA OMBATI OGAMBA.....APPLICANT
AND
OTUNDO MOCHACHE.....RESPONDENT

(Application for leave to file appeal out of time in an intended appeal from an order of the High Court of Kenya at Kisii (Mr. Justice Patel) dated 27th May, 1991

in

H.C.C.C. NO.191 OF 1988)

R U L I N G

Though the order sought to be appealed against was made on the 27th May, 1991 which is over seven years ago, there is really no such delay as would disentitle the present applicants to the exercise of my discretion in their favour.

It is an unchallenged fact that after the ruling a notice of appeal was filed two days out of time and that Gicheru JA. made an order on the 21st June, 1994 validating that notice.

Thereafter the previous applicants Atenga Ogamba and Ombati Ongamba both died and Mr Mugu says they died in 1996. The Present applicants Zakariah Ogamba and Joseph Ogamba Atenga made an application for substitution on the 24th January, 1997. That motion was granted by Tunoi JA. on the 13th March, 1997. The present motion was filed on the 6th March, 1997. Mr. Mugu says they did so because that was the next session for the court to sit in Kisumu. The motion was filed in wrong names, the dead parties being cited as the applicants, but it is clear the true applicants are the substituted parties and the mistake of counsel in citing the deceased parties ought not to deprive me of my discretion to do justice to the true parties before me. No objection was taken as to the competency of the motion. I do not think the two months delay is so inordinate that I ought to reject the motion.

Accordingly, I allow the motion and order that the record of appeal shall be filed within 21 (twenty-one) days of the date hereof. The costs of this motion shall be in the intended appeal. These shall be my orders.

Dated and delivered at Kisumu this 24th day of March, 1998.

R.C.S. OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR