



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: PALL, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 16 OF 1998
BETWEEN

HON. JOHN NJOROGE MICHUKI

ROSE WARUINO MUTHEMBAAPPLICANTS
AND
KENTAZUGA HARDWARE LIMITEDRESPONDENT

**(Application for extension of time to file Notice of
Appeal and Record of Appeal out of time in an
intended appeal from a Ruling of the High Court of
Kenya at Nairobi (Justice Hayanga) dated 24th
February, 1997
in
H.C.WINDING UP CAUSE NO. 17 OF 1996)**

R U L I N G

By this application brought under rule 4 of the Court of Appeal Rules, the applicants have applied for extension of time to file and serve both the notice and record of appeal.

The applicants original appeal being Civil Appeal No. NAI 243 of 1997 was struck out by this Court on 20th January, 1998 as its record did not contain the application out of which this order sought to be appealed from had arisen.

On 26th January, 1998 that is on the sixth day of the appeal having been struck out the applicant brought this application which is now before me. By no means, therefore, can the applicants be accused for lack of alacrity.

Counsel for the applicants has accepted full responsibility for the failure to include the said application in the record of appeal. He accepted that it was an inadvertent lapse on his part. His clients are not supposed to know the technicalities and intricacies of legal procedure.

However, Mr. Kiage for the respondent, has submitted that the present notice of motion is incompetent because it fails to disclose the grounds of the application which is a mandatory requirement of rule 42(1) of the Rules of this Court. He cited this Court's judgment in Civil Appeal No. NAI 211 of 1996 (unreported) in which it was held that omission to disclose the grounds of the application in the body of the notice of motion itself was a fatal mistake. However, he conceded, as he had to, that notwithstanding that observation, the Court heard the appeal on merit and disregarded the said procedural omission. It is obvious that the Court did not regard that omission as a fundamental defect. It is only when there is a fundamental defect in procedure incurable by any amendment or other available legal process that the court ought not to exercise its discretion to disregard it. Shah, J.A. in Civil Application No. NAI 122 of

1997 in similar circumstances said:-

"Want of compliance with procedural rules (unless fundamental and going to the jurisdiction of the Court) cannot call for striking out an application of the kind before me."

Mr. Kiage also argued that as there was no intended memorandum of appeal annexed to the application, the Court has no material before it to enable it to exercise its discretion one way or the other. He also emphasized that the petition for winding up the respondent is still in tact and that it is only that some offending paragraphs of the petition have been struck out. He relied on a ruling of Omolo, J.A. in Civil Application No. NAI 76 of 1994 where he said:-

"I am unable to tell one way or the other whether the grounds are substantial, because I do not have before me the High Court proceedings."

The case before Omolo, J.A. was a pretty hopeless one.

There, the litigation started in the year 1968 and judgment was delivered on 18th October, 1979. About six years after the judgment, the applicant filed Civil Appeal No. NAI 79 of 1985 from that judgment. The applicant's appeal came for hearing before the Court on 25th October, 1989 when it was struck out as its record did not contain the very judgment appealed from.

Undaunted by that lapse, the applicant started the process afresh. He applied for extension of time to file a fresh record of appeal by Civil Application No. NAI 10 of 1990. On 18th March, 1992 the applicant at his request was given leave to withdraw the said application. He was given leave to apply afresh for leave to file notice of appeal out of time. At the same time, the Court specifically ordered that the proposed application must include the record of the previous proceedings of this Court whereby the applicant said Appeal No. 79 of 1985 was struck out. After an unexplained lapse of two years, the applicant filed fresh application for that leave but, in defiance of the order of this Court, failed to annex the said proceedings to his application. Omolo, J.A. refused to exercise his discretion as the applicant had failed to comply with the said order of 18th March, 1992. The application was dismissed by Omolo, J.A. on 16th November, 1994.

Under r.4 of the Rules of this Court, the Court now has an unfettered discretion to extend time limited by the Rules on such terms as it thinks just. The court's discretion to allow extension of time is no longer subject to an applicant showing sufficient reason for that extension.

Anyway, the present trend of this Court is that a single Judge hearing an application under rule 52(1) of the Rules of this Court is precluded from expressing his view on the merits of an intended appeal, (Kwach, J.A. in Civil Application No. NAI 218 of 1996). Also Gicheru, J.A. in Civil Application No. NAI 274 of 1996 said: "whether or not the applicant's intended appeal is likely to succeed, is unless it is demonstrated to be patently frivolous, irrelevant for the purpose of the application for extension of time under rule 4 of the Rules of this Court." In my view when an appeal is struck out as being incompetent, the appellant has a right to apply for extension of time to file the notice and or record of appeal under rule 4 of the Rules of the Court and this order should be liberally granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court or the Court is otherwise satisfied beyond peradventure, that his intended appeal is not an arguable appeal. On a reference to full Court in Civil Application No. NAI 356 of 1996, the Court of Appeal has recently observed:-

"Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context, this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was

prejudiced by it."

True the applicants have failed to show to the court the grounds on which they intend to challenge the ruling of the superior court. However, as I have already said, the applicants had earlier on filed their appeal which was struck out. In the interest of substantial justice and fairplay I have availed myself of the record of that incompetent appeal.

Leading ground of appeal in that appeal was that the trial judge had made his decision to strike out paragraphs 26, 27, 28, 32 & 33 of the petition to wind up the respondent company on evidence which was insufficient to justify that finding. In his ruling, the learned trial judge concluded that looking at the petition he was satisfied that the petition had stated matters in the aforesaid paragraphs that are scandalous and vexatious. He has not alluded to any material on which he had based his conclusion. So on the face of his ruling it appears that the applicants seem to have an arguable point. They may or may not succeed in their proposed appeal. That is entirely a different matter. As it is, I do not see any force in the respondent's objection.

I, therefore, grant the motion and order that the time for lodging fresh notice of appeal be and is hereby extended to 16th April, 1998 and the applicant may lodge the appeal and the record of appeal within three weeks from the date the notice of appeal is lodged. Costs of this notice of motion are awarded to the respondent in any event.

Dated and delivered at Nairobi this 9th day of April,

1998.

G.S. PALL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR