REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU
(CORAM: SHAH, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 50 OF 1998
BETWEEN

1. JONATHAN O. OYALO WABALA)

2. NYANGWESO MUSUMBA)....................................APPLICANTS

AND

CORNELIUS OTAYA OKUMU..................................RESPONDENT

(An application for extension of time within which to serve notice of appeal in an intended appeal from the judgement of the High Court of Kenya at Kakamega (Hon. Mr. Justice B.K. Tanui) dated 31st July, 1996

in

H.C.C.C. NO. 82 OF 1992)

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R U L I N G

The applicants, Jonathan O. Oyalo Wabala and Nyangweso Musumba were dissatisfied with the judgment of Mr. Justice B.K. Tanui delivered at Kakamega on 31st July, 1996 in H.C. Civil Appeal No. 82 of 1992. They, through their advocates, Manwari & Company lodged a notice of appeal in the superior court on 14th August, 1996 which was on the last day of time given under Rules of this Court (Rule 74 (2)).

Rule 76(1) mandates that a copy of such notice of appeal must be served on all persons directly affected by the appeal within seven days of the lodging thereof.

The notice of appeal was not signed by the Deputy Registrar of the High Court at Kakamega until 26th August, 1996. Mr. Manwari had instructed his court clerk to attend to the service of the notice of appeal who was informed that the same was not yet signed by the Deputy Registrar. Mr. Manwari depones to the fact that thereafter he "lost track of the progress of the matter" and that it was not until the day he was preparing the record of appeal that he discovered that there had been no service of the notice of appeal on the advocates for the respondent. Hence it was not actually served until 22nd July, 1997 some eleven months out of time and wIi thwoaust inlefaovrem.e d that even the record of appeal itself has been lodged presumably otherwise in time and served on the advocates for the respondent. That appeal would in the absence of an essential step (of service of notice of appeal) not having been taken would be incompetent.

The present application is for extension of time ex post facto so that the time sought to be extended is upto 23rd July, 1997.

Before I come to the merits of the application I must deal with an objection taken by Mr. Shitsama for the respondent to the effect that as a similar application for extension of time made before the superior court was dismissed by that court the applicants can only come to this court by way of appeal and not by way of an application under rule 4, invoking this court's original jurisdiction.

The application for extension of time under section 7 of the Appellate Jurisdiction Act was heard by the superior court on 20th January, 1998 and dismissed on 29th January, 1998 and M/s Manwari & Company lodged a notice of appeal against that decision dismissing the application for extension of time.

Such notice of appeal was served on Mr. Shitsama's office on 10th February, 1998.

This application was filed on 5th February, 1998, that is on the very day, new rule 41 had come into existence. This rule as it is now reads:

> ***"41. The court may in its discretion entertain an application for stay of execution or extension of time for doing of any act authorized or required by these Rules, notwithstanding the fact that no such application has been made in the first instance to the superior court."***

This rule caters for the eventuality that the litigant has the option either to apply for extension of time or stay of execution in either the superior court or this court at his own option, subject to this Court's discretion to hear the application notwithstanding that no application was first filed in the superior court. But what is the position when the litigant opts to go the superior court first? Does he appeal against the refusal to grant extension of time or does he come to this court invoking its relevant original jurisdiction? I think the tenor of the new rule is such as to enable a party to come to this court under rule 4 (as read with rule 41) if he does not succeed in the first instance in the superior court and I rule that I have the jurisdiction to hear and determine the application before me.

The applicant's counsel erred in two respects. First in thinking that he ought to serve on the respondent's counsel a copy of the notice of appeal signed by the Deputy Registrar and second in thereafter not serving copy of the notice of appeal until he was preparing the record of appeal. Are these errors excusable?

I said in the case of Michael Njoroge "B" and Others vs. Vincent Kimani Chege, Civil application No. NAI 217 of 1997 (unreported):

"It fell to Mr. Kahuthu's lot to explain why he or the firm of M/s J.K. Kibicho & Company did not realize their mistake during the said four year period. He explained it as being an oversight. This oversight is not an uncommon one. After filing of an appeal, an advocate who has many other matters to deal with thinks of the appeal nearer the time when the appeal is to come up for hearing. I think what happened was an oversight.

The next question that arises is: what of the litigant? Should he suffer because of his advocate's oversight? Rules of procedure are said to be good servants but bad masters. I am not saying that rules can be flouted with impunity. All rules have their specific purpose(s) but I would not want a rule of procedure to drive a litigant out of the judgment seat if other rule(s) allow such a litigant to come back to this Court.

I bear in mind that this is the last Court for any litigant in this Republic of ours and the tendency of this Court ought to be to give a chance to the litigant to be heard on merits so far as possible.

I am of course mindful of the fact that our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance. I refer to the decisions in MACFOY VS. UNITED AFRICA COMPANY LTD [1962] AC 152 AND PANTIN VS WOOD (1962) 1QB 594.

It is, for me, a matter of regret that judicial standards amongst some of our advocates are less high than those of others. That ought not to be the case. I see no reason why advocates should not be any less vigilant and conscientious. But the stand adopted by this Court on the issue of compliance with rules has put advocates on guard and for that reason I am beginning to see less mistakes or oversights on the part of advocates. This is encouraging.

Professional standards must be maintained at their highest. But when a lawyer errs, and the error is remediable, his client ought to be given a chance to be heard"

I am not unmindful of the fact that the applicants, who are innocent parties in so far as the procedural errors made by their counsel are concerned, ought to be given a chance to have their say in the final court of this land. The respondent's counsel urged before me that the applicants ought to have continued to chase their counsel to find out what was happening. How were they to know that a duly filed notice of appeal was not served? Our unsophisticated people would not know that an essential step has not been taken even if they peruse the counsel's file of the case. I do not think that argument holds water.

Considering all the circumstances I allow this application and order that the notice of appeal served on 23rd July, 1997 be deemed to be duly served so that the appeal already instituted is deemed to be otherwise properly filed.A certified copy of this ruling may be lodged by way of a supplementary record of appeal in that appeal.

The respondent however will have costs of this application which I assess at shs.5,000/= which sum the applicants will pay to the respondent within the next 30 days failing which execution may issue.

Dated and delivered at Nairobi this 23rd day of April, 1998.

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR