



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO. 10 OF 1998

CATHERINE KARUNGARI KARL.....APPELLANT

AND

GUENTER OTTO KARL.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at
Nairobi (Justice Hayanga) dated 19th September, 1997
in
H.C.DIVORCE CAUSE NO. 21 OF 1997)

R U L I N G

The background to the present application is set out in the unchallenged affidavit of the applicant sworn on the 3rd day of April, 1998. This affidavit is in support of the applicant's notice of motion seeking the extension of time for the filing of the applicant's notice of appeal and record of appeal in Civil Appeal No. 10 of 1998 between the applicant Catherine Karungari Karl as appellant and Guenter Otto Karl as respondent, against the Ruling of Hayanga, J. dated the 19th day of September, 1997, on the ground that the applicant's advocate had inadvertently omitted to seek leave to file the notice of appeal before filing the record of appeal in that appeal.

According to the applicant's affidavit, her earlier appeal, Civil Appeal No. 277 of 1997, against the said Ruling of Hayanga, J. having been struck out by the Court of Appeal on the 24th day of December, 1997, she had been compelled to file the Civil Appeal No. 10 of 1998. When this appeal came up for hearing before the Court of Appeal, on the 13th day of March, 1998, hearing of the appeal was adjourned so that an application by the respondent to have the appeal struck out *inter alia*, on the ground that no notice of appeal had been given, should be first determined. It was this order which prompted the present application brought under Rule 4 of the Rules of this Court, by the applicant, to regularize her appeal.

This may well take the wind out of the sails of the respondent in connection with the point that no notice of appeal had been given by the applicant, but this cannot prevent the applicant from bringing her present application.

The assertion by the applicant that the failure of her advocate to file a notice of appeal was through the inadvertence of her advocate has not been denied. But is it a mistake that is excusable? I would say that the existing uncertainty of the law on this issue supports this view. In the recent Ruling of Shah, J.A. in Gabriel Kigi and Others v Kimotho Mwaura Lisura Farm (Kim Estate), Civil Application No. NAI.197 of 1997, (unreported), he had this to say:

"I would treat the filing of a notice of appeal and record of appeal, after the appeal has been struck out by this Court on a different footing from filing, out of time, for the first time, a notice of appeal. Once an appeal stands struck out, in my humble view, the same can be refiled, either per its original record supplemented by inclusion of a copy of the formal order and of new or further grounds of appeal. To enable the filing of a re-done record of appeal a fresh one would need, ex abundantia cautela the filing of a notice of appeal, although in my view filing a fresh notice of appeal is superfluous as the original notice of appeal as filed in the superior court is still in the record. What has gone out with a struck out notice of appeal is the duplicate notice of appeal which forms part of the record."

Furthermore, the present application has not been challenged on the ground that it has not been brought timeously. Indeed, the application has not been opposed on its merits. Counsel for the respondent has only contented himself with arguing preliminary technical objections to the present application. These are that the present application was premature since the respondent had applied to strike out as being incompetent, the applicant's appeal, Civil Appeal No. 10 of 1998 which was yet to be determined, and that if the present application were granted it would give rise to the existence of two records of appeal. In support of the last proposition, Counsel for the respondent cited the case of Ngarani Iramba, Musa Ngarani v M'Muga Mabui, Humphrey Nyaga, Civil Appeal No. NAI 132 of 1995 (unreported) to the effect that even though a notice of appeal may not be extinct, a second record of appeal may not be filed whilst a former one still exists. This is correct if there is an existing record other than that filed on the 5th day of February, 1998, in the Civil Appeal No. 10 of 1998. The true position is that the Civil Appeal No. 277 of 1997 having been struck out, there is no other record of appeal in existence other than that filed in Civil Appeal No. 10 of 1998 the status of which, the applicant seeks to have regularized. Ngarani Iramba, is not relevant to the present application. In that case there was still in existence an incompetent appeal, Civil Appeal No. 138 of 1993, which had not been struck out whilst leave to file a fresh record of appeal was being sought. I have unfettered discretion under Rule 4 of the Rules of this Court to extend time limited by the Rules as I think just and having regard to what I have said hereinbefore, the peculiar circumstances of the present application, to be on the safe side, and the fact that the existing record of appeal can be deemed to have been properly filed without resorting to the filing of another record of appeal, the order that commends itself to me is that the applicant shall file the notice of appeal within seven days from today and which shall be deemed to have been filed prior to the date when the record of appeal in Civil Appeal No. 10 of 1998 was filed and which shall also be deemed to be the record of appeal filed in that appeal.

Costs shall be in the intended appeal

Dated and delivered at Nairobi this 8th day of May, 1998.

A. M. AKIWUMI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.