

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 122 OF 1998 (UR.51/98)

BETWEEN

1. MWANIKI NJOROGE KAMAU

2. JOSIAH KIMEMIA.....APPLICANTS

AND

LEE SHEH PONG.....RESPONDENT

(Application for extension of time to file notice of appeal out of time in the intended appeal from a judgment of the High Court of Kenya at Nakuru (Ondeyo, J.) dated 19th May, 1997

in

H.C.C.C. NO. 455 OF 1996)

RULING:

In this application the applicants have sought extension of time within which to lodge and serve the Notice of Appeal. They also seek extension of time within which to serve the latter applying for a copy of the proceedings in the superior court upon the respondent.

The applicants' original Notice of Appeal was, according to counsel for the applicants, struck out by this Court on 27th April, 1998 for the reason that it was lodged one day outside the prescribed period. That delay, according to counsel, was due to the failure by the registrar of the superior court to endorse and indicate the date of lodgement of the said Notice of Appeal. Also, according to counsel, the letter applying for a copy of the proceedings in the superior court dated 21st May, 1997 and copied to counsel for the respondent was inadvertently not served upon the latter counsel. It is on account of these lapses which, according to counsel for the applicants, are not to be blamed on the applicants that the latter now seek the two extensions of time referred to above.

The position taken by counsel for the respondent at the hearing of this application on 25th June, 1998 was that there is no material before this Court to explain the delays in respect of which extensions of time are sought. In any event, according to counsel, it is evident from the material before this Court that the matter relating to the applicants intended appeal has not been handled with any amount of diligence. Hence, his opposition to the applicants' application.

The delay of one day in lodging the Notice of Appeal may not be faulted on counsel for the applicants in view of nonendorsement and dating of the said Notice of Appeal by the registrar of the superior court at the time of its lodgement.

But the lapse of nearly one month in making the present application on 26th May, 1998 after the original Notice of Appeal was struck out by this Court on 27th April, 1997 is without explanation indicative of absence of diligence complained of by counsel for the respondent. Indeed, failure to serve counsel for the respondent with a copy of the letter applying for a copy of the proceedings in the superior court may have been as a result of absence of diligence on the part of counsel for the applicants other than

the alleged inadvertence. Nevertheless, if counsel for the applicants was not to blame for the one day delay in lodging the applicants' Notice of Appeal and on that account the extension of time sought in that regard was granted, such extension would be worthless if the time for service of a copy of the letter applying for a copy of the proceedings in the superior court was not extended. Caught between the two horns I would in the result exercise my discretion under rule 4 of the Court of Appeal Rules in favour of the applicants. Consequently, I grant the applicants' application so that the time for lodging the Notice of Appeal and for serving upon the respondent a copy of the letter applying for a copy of the proceedings in the superior court is extended by 7 days from today's date.

The costs occasioned by this application assessed at K.Shs. 3,000/- shall be paid to the respondent by the applicants within the next 15 days from today failing which execution to issue.

Dated and delivered at Nairobi this 1st day of July, 1998.

J.E. GICHERU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR