



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(Coram: Omolo, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 109 OF 1998
BETWEEN

ROSE NYABOKE OTONDI.....APPLICANT

AND

TOM MURUNGA.....RESPONDENT

(In the matter of an application to strike out the Notice of Appeal and the Record of Appeal from the Judgment and Order of the High Court of Kenya at Kisumu, (Wambilyangah, J.) dated 15th April, 1997

in

H.C.C.C. NO. 65 OF 1995)

RULING:

Tom Murunga, the applicant herein, asks me under rule 4 of the court's rules for two orders, namely:-

- (1)that the court be pleased to grant to him leave to file its notice of appeal out of time; and***
- (2)that the court be pleased to grant to him leave to file his record of appeal out of time.***

The background facts of this matter would appear to be that on the 29th May, 1995 the respondent to the motion Rose Nyaboke Otondi sued the applicant over a traffic accident in which her husband was killed. It was alleged that having been served with summons to enter appearance, the applicant neither entered an appearance nor did he file a defence. The case then proceeded ex parte and on the 24th October, 1996 the High Court at Kisumu entered judgment for the respondent awarding her damages. The applicant thereafter filed an application to set aside that judgment but by a ruling delivered on the 26th March, 1997, the superior court refused to set aside its judgment though the learned judge set aside that portion of the judgment in which he had awarded to the respondent damages under the Law Reform Act. It is the ruling of 26th March, 1996 that the applicant proposes to appeal from. The applicant has attached to his present motion a ruling dated the 26th March, 1997, but I note from that ruling that while the respondent is shown as the plaintiff at the head of the ruling, the defendant there is shown as one Abdul Rahim Raskal. I do not know how that came to be. Following the ruling of 26th March, 1997, the applicant filed a notice of appeal on the 8th April, 1997. That notice of appeal was obviously filed within the required time. On the 16th December, 1997 the applicant had filed another motion similar to the present one, i.e. Kisumu Civil Application No. 120 of 1997, but when the said motion came up for hearing before a single Judge of this Court (Gicheru, J.A.) the motion was withdrawn on the ground that it

was scanty and left the court with little to enable it to appropriately adjudicate on the motion. That withdrawal was on the 23rd March, 1998 and the present motion was lodged on the 9th April, 1998.

The applicant's reason for seeking an extension of time within which to lodge the record of appeal is that on the 5th March, 1997 he had filed in this court, another motion No. 20 of 1997 by which he had sought from the court an order of stay of the superior court's judgment and orders. According to the applicant the motion filed on the 5th March, 1997 had been wrongly marked on its cover as "A Record of Appeal" and it would appear Mr. Kasamani for the applicant was saying that because of the mistake in marking the motion as "a record of appeal" he was misled into believing that an appeal had been filed and hence the failure to file one in time. I must myself point out that Mr. Kasamani appears to be conducting the applicant's matter in a rather muddle-headed way. For instance, even in the present motion, the applicant is still asking me for leave to file the notice of appeal out of time.

However, it is clear that a notice of appeal was validly filed on the 3rd April, 1997. In paragraphs 3, 4 and 5 of the affidavit in support of the motion before me, Mr. Kasamani swears as follows:-

"3. That I filed an application for leave to file a Notice of Appeal and Record of Appeal on the 16th of December, 1997 in the Registry at Kisumu, vide Kisumu CA no. 120 of 1997 (Annexure CCK/1).

4. That the said application came up for hearing on the 25th March, 1998 but I had to withdraw it as the supporting Affidavit though curable was lacking in details.

5. That as a result my record of appeal was struck out. (Annexed a copy of the order to strike out appeal marked CCK/2)."

I do not know which record of appeal was struck out as is alleged in paragraph five above but annexure CCK/2 referred to therein is the order of Gicheru, JA allowing the applicant to withdraw his notice of motion seeking the extension of time to file a notice of appeal and a record of appeal out of time.

The order of Gicheru, J.A. did not strike out any record of appeal; no record of appeal had been filed and so none could have been struck out, assuming for the moment that a single Judge of the Court has power to strike out a record of appeal when dealing with a motion for the extension of time. Nor did the order of 23rd March, 1998 purport to strike out the notice of appeal which had been filed on the 8th April, 1998. That notice of appeal is still valid and I was not shown any order of the court striking it out. Mr. Ombija for the respondent contended before me that the notice of appeal was itself incurably defective. Even if that were to be so, it is really not a matter for my consideration in this motion. As a single judge I cannot strike out a notice of appeal and if in the end the court were to find, on a proper application by the respondent, that the notice of appeal filed on the 8th April, 1997 is incurably defective, the court will then strike it out. But as at now, there is no occasion for me to extend the time for lodging a notice of appeal because one was lodged on the 8th April, 1997 and is still on record. Prayer number one in the applicant's notice of motion must accordingly fail.

That now brings me to the prayer for extending time to lodge the record of appeal. One thing is quite clear, and that is that since he became aware of the judgment of the 24th May, 1996, he has always been keen to challenge it. He filed a motion to set aside the judgment on 27th February, 1997 and that motion was heard on 6th March, 1997, and the ruling given on 26th March, 1997. The notice of appeal was thereafter filed within time. It is clear the failure to file the record of appeal was entirely the fault of Mr. Kasamani and he says he made a mistake in thinking that a record of appeal had in fact been filed - due to the mistake on the motion for stay which was wrongly labelled as a record of appeal. I think this is the kind of a mistake on the part of counsel which is excusable and can attract the court's exercise of discretion in favour of the defaulting counsel. Mr. Ombija also contended that the record of appeal to be filed would be defective for the reason that the record of appeal will not include a memorandum of appeal - see paragraphs 11 and 12 of the replying affidavit. Those, however, are not matters with which I am required to deal at this stage. If the record of appeal that may be eventually lodged were to be thought to

be defective in the manner alleged, I am sure Mr. Ombija will know how to handle that aspect of the matter. On the issue of enlarging time to enable the applicant lodge his record of appeal out of time, I am satisfied, there is sufficient material on the record to enable me exercise my discretion in favour of the applicant. I accordingly make the following orders:-

1. There is no reason for me to extend the time within which to file a notice of appeal and as far as that prayer is concerned, I reject the appellant's motion.

2. The applicant is given leave to file a record of appeal out of time and such record must be filed within twenty-one days of the date of this ruling.

3. The applicant shall pay to the respondent the costs of this motion in any event.

Dated and delivered at Nairobi this 17th day of July, 1998.

R.S.C. OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR