



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 138 OF 1998

BETWEEN

MAC'S PHARMACEUTICALS LIMITEDAPPLICANT

AND

HECO UBERSEEHANDEL LIMITED.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Shields, J.) dated 20th August, 1992

in

H.C.C.C. No 581 of 1988)

RULING:

In this application, the applicant has in the main sought extension of time to file a fresh notice and record of appeal against the decree of the superior court in Civil Case No. 581 of 1988 given on 20th August, 1992 and that it be granted leave to exclude from the said record of appeal Exhibit "A" tendered in evidence in the superior court by the applicant. This latter relief which appears to be made under rule 85(3) of the Court of Appeal Rules can only be granted by a judge or registrar of the superior court on the application of the party concerned. The provisions of the aforesaid rule are explicit on this and requires no further elaboration.

As regards the extension of time within which to lodge the notice and record of appeal, it must be observed that after the decree intended to be appealed from was given on 20th August, 1992, the applicant lodged a notice of appeal on 1st September, 1992. There is no indication that that notice of appeal was either struck out or deemed to have been withdrawn. Hence, the necessity of lodging a fresh notice of appeal appears to be misplaced.

Concerning the extension of time within which to lodge the record of appeal, a copy of the certificate of delay annexed to the affidavit in support of the applicant's application indicate that certified copies of the proceedings and judgment out of which the decree intended to be appealed from arises were collected by the applicant from the superior court on 25th September, 1997. According to counsel for the applicant, on collection of the said proceedings and judgment he could not lodge the appeal as he was of the view that

the judgment was not dated although the date when it was delivered was indicated in the proceedings and he thought that it offended the provisions of Order XX rule 3(1) of the Civil Procedure Rules which would have rendered such an appeal incompetent. By a ruling of this Court in an application in Magana Holdings v. Lillian Njeri Mungai and another, Civil Appeal No. 143 of 1996 (unreported) dated 5th June, 1998, counsel for the applicant became wiser and four days later, on 9th June, 1998, he made the present application to this Court.

On receipt of the proceedings and judgment on 25th September, 1997, the applicant had upto 24th November, 1997 to file its record of appeal. Hence, on the date of lodging this application, the applicant was late in lodging its appeal by over six months. This, according to counsel for the respondent herein, was dilatory and inexcusable notwithstanding the submission of counsel for the applicant that his error of judgment in this matter should not be visited upon the applicant.

Order XX rule 3 (1) of the Civil Procedure Rules provides that:

“3.(1) A judgment pronounced by a judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it,”

The proceedings of 20th August, 1992 in the superior court Civil Case No. 581 of 1988 reads as follows:

“20/VIII/1992

Coram: Shields, J.

Abuga for the plaintiff.

Chaudhry with Chabeda for the defendants.

Judgment delivered and signed in open court in the presence of above.”

The foregoing was certainly in reference to the judgment out of which the decree intended to be appealed from arises. I am not however, at this stage required to make any pronouncement as to whether or not this was in compliance with Order XX rule 3 (1), supra. Suffice it to say that for the applicant to have taken over a period of eight months from the date of collection of the proceedings and judgment as is referred to above to decide whether or not the said judgment was dated in compliance with the order aforesaid was not only dilatory but smacks of sluggishness on its part. This dissuades me from exercising my discretion under rule 4 of the Court of Appeal Rules. In the result, the applicant’s application is dismissed with costs to the respondent.

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

J.E. GICHERU

Judge of appeal

I certify that this is a copy of the original

DEPUTY REGISTRAR