



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. NAI. 235 OF 1998 (94/98 UR)
CORAM: SHAH, J.A (IN CHAMBERS)
BETWEEN

TAHIR SHEIKH SAID TRANSPORTERS (K) LIMITED.....APPLICANT
AND
CHARLES MUGAMBO.....RESPONDENT

**(Appeal from the judgment and Decree of the High Court of
Kenya at Eldoret(Lady Justice R. Nambuye) dated 22nd
December, 1994**

**in
C.C. NO. R147 OF 1987**

RULING

I have before me, an application, brought under rules 1(2), 4, 74 and 81(1) of the rules of this court (the rules), for extension of time to lodge a notice of appeal and record of appeal out of time. The application comes as a result of the appeal filed by the applicant having been struck out on 24th September, 1998. That was Civil Appeal No.177 of 1997 lodged at Nakuru.

The reasons for striking out of the said appeal were, I am told, that the decree in question differed in respect of actual date and that numbering of some pages (at 10th lines) in the record was not done and also as the second defendant was not served with the notice of appeal. I am told it was also suggested to counsel in passing that order 3 of the Civil Procedure Rules was not complied with, that is to say, M/S Pandya and Talati had not filed notice of change of advocates.

When this application came up for hearing before me counsel for the respondent took four preliminary objections to the competency of the application itself. These are:-

1.The notice of motion was not substantially in conformity with form A (in the Rule Book) in that the words "And for an order that the costs of and incidental to this application abide the result of the appeal" were omitted; that is to say the prayer for costs was omitted.

2.Rule 13(5) of the rules was not complied with in that instead of marking out lines as 10, 20, 30 etc,the same lines were marked in 10's only.

3.The application was filed at the Central Registry of the court when it ought to have been filed at Nakuru sub-registry.

4.The application should have been filed in the superior court in terms of section 7 of the Appellate Jurisdiction Act.

When the amended rule 41 of the Rules was pointed out to counsel and when he was informed of the

result of the Reference to full court in respect of the decision of the single judge in the Afro Meat case, he abandoned that objection. Counsel was told that the Central Registry accepted this application at Nairobi and that a single judge of this court had already certified the application as urgent and that the learned Chief Justice had directed hearing before me, he abandoned the objection.

I had dismissed all four preliminary objections by counsel and I stated that I will incorporate my reasons for the same during the course of this ruling. I do so now in respect of objections 1, and 2.

Rule 42(2) does say that a notice of motion shall be substantially in the Form A in the first schedule to the Rules and it is a fact that the prayer for costs as set out in Form A is not included in the notice of motion. However, an order is sought as follows:-

"(iii) Such orders as to costs be made as may appear to be just."

I think the objection taken is unmeritorious. Counsel conceded that he fully understood the application. Use of different wording, but to some effect, cannot invalidate an application and I hold that there is substantial compliance with form A. Counsel would do better to remember what a bench of 5 judges of this court said in the case of Echaria v. Echaria, Civil Appeal No.247 of 1997 (unreported). Chesoni Chief Justice, Gicheru, Omolo, Shah & Bosire JJ.A said:

"We agree that the Notice of motion is defective but the defect is curable,---"

Also in the case of Unga limited vs. Amos Kinuthis & another, Civil Application No.Nai 175 of 1997 (unreported) this court (a three judge bench)said:

"It must be born in mind that in the National Bank case (Civil Appeal No.211 of 1996,

unreported) the issue arose out of a High Court form not being followed. It also must be borne in mind that in the Echaria case, the effect of section 72 of the Interpretation and General Provision Act, Cap 2, was not considered. Deviation from forms is not fatal if he deviation does not affect the substance of the form, or which is not calculated to mislead."

"This court, either in The National Bank case or the Echaria case was not referred to the case of Castellino vs. Rodrigues [1972] E.A. 223 wherein the predecessor of this court held that irregularities of form may be ignored or cured by amendment."

Having said that the first objection is unmeritorious I come to the second objection. Lines are marked as 10, 10, 10 and not, say, 10, 20, 30. I see no prejudice and the counsel confirm that he has not been prejudiced. I think the objection borders on to ridicule than substance. We have not fallen so low as to dismiss or strike out an application because of such a reason.

I think all objections by counsel were taken with no real merit.

I came now to the merits of the application itself. The application was filed some 16 days after appeal was struck out. Hence it was filed expeditiously.

Mr. Mogaka's objection on merits was that Mr. Pandya was careless and carelessness does not merit exercise of court's discretion in extending time. Was Mr. Pandya careless? The decree in the struck out appeal was drawn by court at Eldoret.

Court's errors cannot be placed at the door of counsel. It does happen that decrees do not bear correct dates and that in the hurry to meet the deadlines of lodging appeals such an error could be overlooked. It is human to err. It can also happen that numbering of lines of certain pages may be overlooked. The crucial mistake was in not serving the notice of appeal on the second defendant. The explanation for this

is that as the first defendant had taken on itself 100% liability for the suit accident it was thought that service on the second defendant was not necessary. One could well think so and be wise after the event and that is what had happened. But the cardinal principle in my mind is that the litigant is not aware of these technical rules of procedure. He does not know what is happening. He leaves the matter to his advocates and advocates do err. It is for this reason that this court has been given almost unfettered powers, subject only to justice to both sides, to extend time for doing of any act authorized or required by the Rules whether before or after the doing of the act.

I think this is a proper matter for exercise of my discretion to extend the time as sought. I allow the application and order that the notice of appeal be filed at the Nakuru sub-registry within the next 14 days and record of appeal be lodged at the said sub-registry within 30 days thereafter. The applicant will however, pay to the respondent, the costs of this application, which I assess at Kshs.6,000/= within the next 30 days failing which execution may issue.

Dated and delivered at Nairobi this 21st day of October,

1998.

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.