

IN THE COURT OF APPEAL
AT NAIROBI
CORAM: SHAH J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 166 OF 1998
BETWEEN

PAUL KAMAU MIANO.....APPLICANT

AND

WAINAINA NJUBIRI & CO.....RESPONDENT

**(An application for enlargement of time for the lodging
and service of Notice of Appeal, from the judgment
and Order the High Court of Kenya at Nairobi(Mr.
Justice Hanyanga) dated 26/5/97
in
H.C.C.C. NO. 5603 OF 1993**

RULING

I have, before me, an application brought under rules 4 and 42 of this court, whereby the applicant seeks orders for extension of time to lodge a Notice of Appeal and record of appeal. The intended appeal is against the judgment and the ensuing decree of the superior court (Hayanga, J). The learned judge decreed that the applicant was a trespasser on plot No. T262 at Kagwe Market, a 50` x 100` plot, and ordered him to vacate the same. The judgment was delivered on 26th May, 1997. At the time the hearing in the superior court started (on 26/5/97) the applicant (defendant) and his counsel were not present. When the first witness for the plaintiff firm (respondent here) had given evidence Mr. Gikonyo walked in holding brief for Mr. Mwiti and sought an adjournment of the hearing on the ground that Mr. Mwiti was unable to attend court as he had been injured in an accident some days earlier.

The applicant himself was not present on that day. The learned judge did not like the could-not-care-less attitude of Mr. Gikonyo and Mr. Mwiti and proceeded to give judgment on the basis of uncontroverted evidence before him.

On 22nd July, 1997 Mr. Mwiti filed an application in the superior court seeking orders to set aside the `orders' made on 26/5/97 also at the same time seeking a stay of execution of the decree. Mr. Mwiti's explanation for his non-attendance on 26/5/97 was that the hearing dates were not entered in his diary by his clerk. The dates were fixed by consent. That application was heard by Hanyanga, J who dismissed the same for non-compliance by the applicant of an earlier order made by JuOmna , 7J/.4/98 M/s Kahari & Kiai advocates came on record as acting for the applicant. They filed a notice of motion on 16/4/98 seeking review, variation and/or setting aside of the order made on 25/3/98 by Hayanga, J. That application was dismissed by Kuloba, J on the 23rd April, 1998 on the premise that there was no good reason why that court should sit on appeal against its own order under pretence of review.

Thereafter the applicant filed the present application. I drew counsel's attention to the fact that a proper appeal could have been against the refusal to set aside the judgment entered on 26/5/97 and not the judgment itself as it would serve no purpose. He did not take the hint.

The situation on the ground, I was informed, is that the decree of the superior court stands executed. The applicant was never a registered partner of the respondent firm which firm is the lease - holder of council land. He had claimed that he had privately purchased the `shares` of some of the partners and that is how he was on suit land.

The conduct of the applicant in the superior court is such that he is not deserving of the indulgence he seeks in this court. He denies knowing of the hearing date, that is, 26/5/97, yet he went to Mr. Mwiti's office to tell him of the hearing itself. This was stated by Mr. Mwiti. His present counsel Mr. Kahari did not attend to argue this application but instead sent Mr. Mburu who knew very little of what had gone on in the superior court.

I decline to exercise my undoubted discretion and dismiss this application with costs.

Dated and delivered at Nairobi this 20th day of November, 1998

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.