



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: SHAH, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 298 OF 1997 (124/97 UR)

BETWEEN

SOCIETE DE TRANSPORTS

INTERNATIONAL AU RWANDA.....APPLICANT

AND

H. H. ABDI.....RESPONDENT

**(Application for extension of time to file and serve
Notice of Appeal and Record of Appeal out of time in
an intended Ruling & Order of the High Court of
Kenya at Nairobi (Mr. Justice Mbiti) dated 17th
February, 1993**

in

H.C. MISC. CIVIL. APPLC. NO. 911 OF 1991)

R U L I N G

I have before me an application dated 18th November, 1997 whereby the applicant seeks leave to file, out of time, and therefore serve out of time, a notice of appeal and the consequent record of appeal, on the respondent.

The application has been opposed strenuously by Dr. Khaminwa for the respondent and it is therefore incumbent upon me to set out the history of this litigation.

On 22nd day of February, 1993 the superior court (Mbiti, J.) by a ruling dated 17th February, 1993, ruled that a judgment of a Rwandese court, registered in the superior court at Nairobi under the Foreign Judgments (Reciprocal enforcement) Act of Kenya was not properly registered de jure and consequently set aside such registration. Although the ruling is dated 17th February, 1993 it was delivered on 22nd February, 1993. Such dating creates complications and I hope in future the superior court will only indicate the date the judgments/rulings are delivered and not when those are typed. The applicant filed a notice of appeal manifesting its intention to appeal against that ruling, on the 16th or 17th day of March, 1993. The uncertainty as regards the date of filing that notice of appeal is of no consequence now. That notice of appeal was filed out of time without leave.

The applicant then applied for leave for extension of time so as to treat the said notice of appeal as having been filed in time. That application came up for hearing before a single judge of this Court (Muli, J.A.), who on 2nd June, 1993 granted the extension sought and ordered further that the intended appeal be filed within 60 days from the date on which that notice of appeal was filed. That order meant that the record of appeal ought to have been filed on (about) 18th May, 1993. As the order of Muli J.A was made on 2nd June, 1993 the date for filing the record of appeal was already past.

I am told that the applicant's counsel, in those circumstances, took it to mean that the applicant had 60 days to file the record of appeal from the date the applicant's counsel received copies of proceedings and ruling which she (Mrs. Rawal) had applied for on 17th March, 1993. She obtained the said copies on 15th February, 1994 and filed the record of appeal on 17th February, 1994. That was Civil Appeal No. 34 of 1994. Perhaps it would have been prudent to ask the learned judge (Muli, J.A) to re-word his order. But that is all, now, in hindsight.

Civil Appeal No. 34 of 1994 came up for hearing first on 17th July, 1997 when the court drew the attention of the applicant's counsel to the fact that order of Muli J.A extending time to file the notice and the record of appeal was not in the record. The court acceded to the applicant's counsel's informal application for leave to bring on record the order extending time and granted leave to file a supplementary record of appeal to cure the defect. That supplementary record of appeal was filed on, I am told by both counsel, 24th July, 1997.

When the appeal came up for hearing on the 13th day of November, 1997, this time with the supplementary record, the court struck the same out as the appeal was not filed in time as extended by Muli J.A; it was not possible so to do in any event.

This application now before me was filed on 19th November, 1997. As I have pointed out, it was not possible to comply with the order of Muli J.A. as the time he prescribed was already over when he made the order. The issue before me, primarily, therefore is: was Mrs. Rawal's understanding of the time as extended an excusable mistake or error on part of the counsel? As the copies of proceedings and ruling were applied for on 17th March, 1997 (Ruling of Mbiti, J having been delivered on 22nd day of February, 1997) the applicant had the benefit of the proviso to rule 81(1) of the Rules of this Court. Mrs. Rawal thought so and I do not think she was wrong in such a belief, if the notice of appeal had been lodged in time.

Moreover the notice of appeal, came to be, as lodged in time, after the extension of time granted by Muli J.A. As the order of Muli J.A was not capable of compliance and as there was a genuine error on part of Mrs. Rawal, and as (I do believe) a counsel could well so genuinely err, I consider that the error was excusable.

But Dr. Khaminwa took exception to the several errors made by counsel and argued that the applicant was not deserving of the exercise of this court's discretion, which discretion a single judge of this court has, subject only to consideration of requirement of justice to both sides. Dr. Khaminwa stated that the applicant had been tardy and I can summarize his arguments to say that the applicant had firstly filed the original notice of appeal out of time; that the applicant had filed the appeal without including the order for extension of time granted by Muli J.A.; that the applicant had not complied with the order of Muli J.A; that all told the applicant had been dilatory and that as such the applicant deserved no further remedy.

But the time for filing of the original notice of appeal was duly extended by Muli J.A. The court also granted leave to file a supplementary record of appeal which record was filed expeditiously. Even this application was filed within two days after the appeal was struck out. I see no tardiness on the part of the applicant. Counsel erred genuinely as I have pointed out.

The authorities cited by Dr. Khaminwa turned on the initial delays in filing of notice of appeal which is simple document requiring no special skill to draw up. Dr. Khaminwa placed great reliance on a ruling of a single judge of this court (Platt, J.A) in the case of **George Rading vs. The Kenya power &**

Lighting Co. Ltd., Civil Application No. NAI 36 of 1986 (unreported). In that case the decision of the superior court was given on 15th March, 1985. The application for extension of time to file the notice of appeal was filed on 10th March, 1986, almost a year later. In that case the excuse by Counsel for not filing the notice of appeal in time was that as no leave to appeal was obtained, no notice of appeal could be filed. Even assuming Counsel was right on that score, counsel disobeyed orders of the superior court (Porter, J) in lodging the notice of appeal and then also in lodging record of appeal. There was disobedience of court order. That seemed to me the factor that weighed more on Platt J.A's mind.

In this case there is no disobedience of court order. There is a genuine misunderstanding or misapprehension of the Order of Muli, J.A. There was no delay in filing this application.

Considering all aspects of the matter before me I grant the application and order that a notice of appeal be filed within the next seven (7) days and that the record of appeal be filed within 21 days after the lodging of the notice of appeal. Costs of this application will be costs in the intended appeal

Dated and delivered at Nairobi this 5th day of February, 1997.

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR