



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT KISUMU**

CIVIL APPLICATION NO. NAI 248 OF 1995

MATAYO OWAKO OYIERA APPLICANT

VERSUS

HELDA AKOO OKOTH RESPONDENT

(Application for extension of time to file appeal from a
judgment of the High Court of Kenya at Kakamega (Osiero
J) dated 11th June, 1993

in

H.C.C.C. NO. 310 OF 1988 (OS))

RULING OF THE COURT

After hearing an application under rule 4 of the Rules of this Court for extension of time to file a notice of appeal and an appeal, the learned single judge, Kwach, JA, declined to grant the extension. The applicant was dissatisfied with the decision and hence the reference before us. His submission is that he has an automatic right of appeal against the decision intended to be appealed against.

From what we can glean from the applicant's affidavit in support of the application for extension of time, he was the unsuccessful party in Kakamega High Court Civil Case No. 310 of 1988 (OS). He was aggrieved and appealed against that decision. However, his appeal, viz Civil Appeal No. 40 of 1994, was struck out on 13th June, 1995 because the record of appeal did not include a certified copy of the decree appealed against as is mandatorily required by rule 85 (1) (h) of the Rules of this Court. It, therefore, meant that the applicant had to restart the appeal process; hence this application.

It is quite clear from the ruling of the Superior Court respecting which an appeal is intended that the dispute between the parties concerned land. The dispute was by consent of the parties referred to arbitration under O.XLV of the Civil Procedure Rules. An award was filed in court which award was later made a judgment of that court. The award and the resultant judgment were unfavourable to the applicant, but he did not take any steps to appeal against it. The ruling against which an appeal is intended was given pursuant to an application by the applicant for an order reviewing the arbitration award on the ground that the elders who arbitrated in the matter lacked the power to entertain the dispute. From the available evidence it is not clear under what provisions of the law the application was made. However, in his ruling, Kwach JA, appears to have treated it as having been made under O.XLV but not under rule 13 and 15 of the Civil Procedure Rules which provide for powers to modify or correct awards, and also grounds for setting aside an arbitration award respectively. He then concluded in his ruling in the following manner:-

"The dispute which gave rise to the judgment against which the applicant wishes to appeal

was referred to arbitration and an award was filed according to which judgment was subsequently entered, following the dismissal of the application by the applicant to set it (the award) aside. In these circumstances the law says the applicant has no right of appeal. I can see no point in exercising my discretion in favour of the applicant.

The application is dismissed with no order as to costs."

The learned single Judge does not state in his ruling why he thought the applicant had no right of appeal. However, upon a careful reading of the provisions of O.XLV, it appears apparent that he acted on the basis on the provisions of rule 17 (2) thereof. The sub-rule denies a litigant a right of appeal against a judgment entered under that rule. In the present application the applicant is not seeking an order extending time within which to file a notice of appeal and an appeal out of time against the judgment which was entered against him under rule 17, above, but against an order refusing him review of that judgment. In the circumstances the single Judge was in error when he held that the applicant had no right of appeal. Notwithstanding that we do not know under what provisions of the law the applicant's application for review was brought, under either O.XLII rule 1 (1) (aa) or rule 3, the applicant would have a right of appeal.

In the circumstances, the learned single Judge should have exercised his unfettered discretion under rule 4, above, in favour of the applicant. In the result, we allow the reference and extend the time within which the applicant shall file a notice of appeal by 10 days from the date hereof. He shall file the record of appeal within 30 days hereafter. The costs of the reference shall be in the intended appeal.

Dated and delivered at Kisumu this 12th day of March, 1997.

A. M. AKIWUMI

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

S. E. O. BOSIRE

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR