

REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(Coram: Gicheru, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 74 OF 1997 (UR. 33/97)

BETWEEN

WRECK MOTORS ENTERPRISES.....APPLICANT

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

SATPAL SINGH BHATTI.....2ND RESPONDENT

CITY COUNCIL OF NAIROBI.....3RD RESPONDENT

CHEMOMO ENTERPRISES.....4TH RESPONDENT

(An application for extension of time to file and serve
Notice of Appeal and for extension of time to file and
serve a Record of Appeal in an intended appeal from the
ruling and order of the High Court of Kenya at Nairobi
(Shah, J.) dated 22nd day of June, 1994

in

H.C. MISC. CIVIL APPL. NO. 457 OF 1994)

RULING

One whole page of the ruling of the superior court out of which the order appealed from issued was omitted in the record of the applicant's original **Civil Appeal NO. 269 of 1996** thereby rendering the said ruling incomprehensible to this Court. By reason of the provisions of rule **85(2A)** of the Rules of this Court, the omitted page could not be brought on the record of the said appeal with the result that that appeal was incurably defective and therefore incompetent. On account of this, that appeal was on 10th April, 1997 struck out by this Court with no order as to costs. While striking out that appeal, this Court observed that the applicant's memorandum of appeal indicated that the ruling of the superior court referred to above was dated 22nd June, 1996 instead of the correct date of the said ruling, namely; 22nd June, 1994. The certificate of delay also erroneously indicated that the application for certified copies of the proceedings and ruling of the superior court was made on 9th February, 1994 instead of 22nd June, 1994 as is shown on the letter of counsel for the applicant applying for the said proceedings and ruling which was received in the superior court Central Registry on 23rd June, 1994 and had been copied to counsel for the respondents. These two errors were, however, not fatal to the applicant's original appeal as the same could be rectified on appropriate application for leave of the Court to make the necessary amendments being made and granted.

By a Notice of Motion lodged in this Court on 14th April, 1997, the applicant has sought extension of time within which to lodge and serve the Notice of Appeal and the record of appeal. According to counsel for the applicant, the errors and the omission of the one page of the ruling referred to above were inadvertent and save for the said slips, the record of the applicant's original appeal was otherwise in order in all other respects.

The subject-matter of the applicant's original appeal, as it is in its intended appeal, was the disputed allotment of plot NO. 42/28/93/29 situated in Nairobi South "B" within the City of Nairobi to the 4th respondent. Before the ruling out of which the order appealed from in the applicant's now struck out original appeal issued and in respect of which it now intends to appeal against, there was pending in the superior court a Chamber Summons taken out by the applicant under **Order XVIII, rules 2 and 8** of the Civil Procedure Rules and dated 9th May, 1994 seeking leave of that court to cross-examine the 1st and 4th respondents on their respective affidavits in relation to the disputed allotment of the plot in question. That Chamber Summons had not been dealt with by the superior court when in its ruling dated 22nd June, 1994 it finally determined the matter in controversy between the applicant and the respondents. On account of this, when this application came up for hearing on 23rd April, 1997, counsel for the applicant submitted that the applicant's intended appeal is not frivolous. The contention of counsel for the respondents was principally that the approval by H.E. the President to the allotment of the plot in question to the 4th respondent was first in time to that of the applicant in respect of the same plot as is evident from the annexures SSB.2 and 3 to the 2nd respondent's replying affidavit. For this reason therefore, the applicant had no locus standi in the matter in controversy in the superior court as it had no sufficient interest in the aforesaid plot. To counsel for the respondents, the applicant's intended appeal was for this reason frivolous and the extension of time sought ought not to be granted purely for the sake of it.

Although the applicant's lapses in the preparation of its original record of appeal as are referred to earlier in this ruling are inexcusable, if the matter in controversy between the applicant and the respondents in the superior court was finally disposed of before dealing with the applicant's Chamber Summons dated 9th May, 1994, then, the applicant may have been denied its undoubted right to be heard in that Chamber Summons before the final disposal of the dispute before the superior court. Considering that one of the applicant's grounds of appeal in its now struck out original **Civil Appeal NO. 269 of 1996** was that the superior court ignored this Chamber Summons, it is doubtful that the applicant's intended appeal is frivolous. In the circumstances, and in view of the promptitude with which the applicant has made this application, I in the exercise of my discretion under **rule 4** of the Rules of this Court grant the applicant's application and order that the time to file and serve its Notice of Appeal be and is hereby extended to 5th May, 1997 and the time for filing and serving the record of its intended appeal be and is hereby extended by 15 days from the date of lodging the Notice of Appeal within the extended time. The costs occasioned by this application are awarded to the respondents in any event.

Dated and delivered at Nairobi this 28th day of April, 1997.

J.E. GICHERU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR