



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: SHAH J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 59 OF 1997

BETWEEN

BLUESHIELD INSURANCE CO. LTD.....APPLICANT

AND

RAYMOND BUURI M'RIMBERIA.....RESPONDENT

(Application for extension of time to file Notice of
Appeal and Record of Appeal out of time in an
intended appeal from Ruling & decree of the High
Court of Kenya at Nairobi (Mr. Justice Ole Keiwua)
dated 20th July, 1995

in
H.C.C.C. NO. 2118 OF 1994)

RULING

On 19th March, 1997, this Court struck out the appeal filed by the applicant, being Civil Appeal No. 14 of 1996, on the ground that the same was filed out of time, without leave of the court having been obtained, for extension of time. Mrs. Kiarie who appeared for the applicant confessed that it was an error on her part, a mistake, which led to the filing of the appeal out of time.

Mrs. Wahome who appears for the respondent accepts that Mrs. Kiarie's error in misreading or misconstruing of Rule 81 of the Rules of this Court led to the filing, of the struck out appeal, out of time.

This application was filed on 24th March, 1997 only some two working days after the appeal was struck out. The applicant has therefore moved the court very expeditiously and the error or misreading or misconstruing the effect of Rule 81, as regards time which had already run, before the copies of the proceedings and judgment were applied for, is an error which is excusable. It is also such an error on part of counsel, which ought not to be laid at the door of this client.

Mrs. Wahome insisted on arguing that the appeal intended to be filed would be an exercise in futility as it had no chances of success. This is a grey area. Normally a single judge of this Court does not have to go into merits or demerits of the intended appeal. See Attorney General vs Theuri (1982-88) 1 KAR 929 at page 933 where Kneller J A (as he then was) pointed out as follows:

"He did not take the merits of the intended appeal into consideration because there had been so special emphasis on it though he thought the situation seems arguable. In this he was correct, according to recent decision of Sir John Donaldson MR in Palata Investments Limited vs. Burt and Sinfield Ltd. 1 WLR 942."

Here as both counsel have insisted on arguing the merits and demerits (respectively) of the appeal I will simply point out what I consider are matters arguable, at least, to have enabled the judge in the superior court (Ole Keiwua J.) to say that there were triable issues.

1. There is no requirement in Cap 405, that a passenger must be compulsorily insured, when the passenger is travelling in a vehicle insured for commercial use only.
2. The passenger so injured, or the estate of a deceased passenger, as the case may be, gets no right to sue the insurer eventually, under section 10 of Cap 405, as the liability in question is not to be required to be in law covered by section 5 of Cap 405.
3. Even if the insurer took what was perhaps an unwarranted step to avoid the policy of insurance (which case may not have been finalized) such step may not amount to turning of the commercial vehicle policy into a passenger service vehicle as a contract of insurance stands or falls by what it states.
4. There was enough material pleaded in the defence (H.C.C.C. 2118 of 1994) to show triable issues.

Considering all these matters I exercise my undoubted discretion to enlarge the time for filing the notice of appeal by ordering that the notice of appeal filed on 20th March, 1997 be deemed to be filed in time, as now extended by me, and that the record of appeal be filed within the next 21 days which record shall include the copy of notice of appeal filed on 20th March, 1997 and a copy of this Ruling.

The costs of this application will abide by the result of the intended appeal.

Dated and delivered at Nairobi this 6th day of May, 1997 A.B. SHAH

.....

JUDGE OF APPEAL