



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: LAKHA, J.A. (IN CHAMBERS))  
CIVIL APPLICATION NO. NAI. 74 OF 1996

BETWEEN

B.R. AGGARWAL (Suing in his capacity as executor of Late Lekray Aggrwal .....  
APPLICANT

AND

MUNSHIRAM & COMPANY LTD. .... RESPONDENT

(Application for leave to institute appeal out of time from a  
judgment and decree of the High Court of Kenya at Nairobi  
(Justice Pall) dated 17th October, 1990

in

H.C.C.C. NO. 1804 OF 1985)

### R U L I N G

On February 15, 1996 this Court struck out the applicant's Civil Appeal No. 59 of 1991 as being incompetent since a copy of the decree included in the record was not certified. It was an appeal from the judgment of the superior court (Pall, J., as he then was) delivered on October 17, 1990. The time, however, to file a fresh record of appeal had expired. Hence the present application for enlargement of time to file the record of appeal.

Mr. Sehmi for the respondent, in a brief but attractive argument ably made, submitted that the application was incompetent since there was no application made for extending the time for filing a notice of appeal. As was said by Kwach, J.A. in **Kenya Cannery Ltd. vs. Titus Muiruri Doge**, Civil Application No. NAI. 200 of 1995:-

"So, if an appeal is struck out on the ground that the record of appeal does not contain any one of these documents, an appellant can only resuscitate the appeal by going back to the starting line for a fresh start.

And that must of necessity involve seeking leave to file a notice of appeal and an appeal out of time. On this motion the applicant is merely asking for extension of time to file an appeal which presupposes that it has already lodged a notice of appeal. There can be no appeal without a notice of appeal."

This point is now well settled. Indeed, Shah, J.A. in **Harrison Mbaria Mbogo vs. Mbutu Ngungi**, Civil Application No. NAI. 340 of 1996, stated:-

"I appreciate that upon an appeal being struck out the notice of appeal goes with the appeal."

I am, therefore, satisfied that notwithstanding Mr. Gautama's valiant attempt to save the day it would be an exercise in futility to grant the application in the absence of enlargement of time for the filing of a notice of appeal.

Mr. Gautama, however, has informally applied for an amendment of his application by having a prayer added for extension to file a notice of appeal. Not surprisingly, Mr. Sehmi opposed this mainly on the grounds that the application was being made late in the day, was an attempt to circumvent his objection and that the discretionary power of the Court to grant an amendment should not, in the circumstances of this case, be exercised in favour of the applicant.

I have carefully considered the rival contentions of the parties on this issue. The main principle is that an amendment should generally be granted but should not be allowed if it causes injustice to the other side. I fail to see what injustice could result to the respondent by allowing the proposed amendment. Abortive applications to date can be compensated in costs. The mere fact that the applicant may succeed on an amended application when he would have failed on the original application is not an "injustice" to the respondent. As to convenience, it seems to me that there would be no greater convenience to the respondent in dealing with a fresh application for an extension of time to file the notice of appeal. Broadly speaking, my view of the matter is that unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the court's discretion, the court should, insofar as it may be reasonable prefer in the wider sense of justice to have a dispute between the parties to be determined on its merits.

Accordingly, I am inclined to grant, as I hereby do, the amendment so that the application will have an additional prayer seeking for enlargement of time to file a notice of appeal. I have not considered it necessary to invite further arguments if such a prayer should be granted because having regard to the long line of cases of this court it is now well settled that when an appeal has been struck out for incompetence, there is nothing to stop an appellant asking the court to extend time under rule 4 of the Rules to enable the filing of a fresh notice of appeal and a fresh appeal. There is no dispute in the instant case that there was no delay in bringing this application after the appeal had been struck out as incompetent.

In the result and, in the exercise of my discretion, I order that the notice of appeal be filed within the next seven days and that the record of appeal within thirty days thereafter. I also order the costs of this application which I assess at K.Shs.5,000/= be paid by the applicant to the respondent within the next 14 days failing which execution may issue.

Dated and delivered at Nairobi this 2nd day of May, 1997.

**A.A. LAKHA**

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**JUDGE OF APPEAL**