

REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 119 OF 1996

BETWEEN

KENYA CANNERS LIMITED APPLICANT

AND

TITUS MUIRURI DOGE RESPONDENT

(Application for extension of time to file Notice of Appeal
and Record of Appeal out of time in an intended appeal
from the Judgment and Decree of the High Court of Kenya
at Nairobi (A.B. Shah, Commissioner) dated 28th October,
1988

in

H.C.C.C. NO. 1832 OF 1980)

R U L I N G

Objection has been taken by Mr. Muthoga on behalf of the respondent by way of a preliminary objection, notice whereof was duly given, that the application is misconceived, incompetent and an abuse of the process of the Court and ought to be struck out on the ground that the application had already been heard and determined by a single Judge of this Court in Civil Application No. NAI.200 of 1995 (the former application) and no application was made to the Court to vary, discharge or reverse the decision of the single Judge pursuant to rule 54 of the Rules of this Court.

By the former application, the applicant had applied for an extension of time to file an appeal and for an order with the record of appeal used in the previous appeal (Civil Appeal No. 12 of 1989) be the record in the intended appeal. As is readily clear the former application is not the same as the present one. The former application was for an extension of time to file the record of appeal whereas the present application is for an extension of time to file a notice of appeal and, if granted, to file the record of appeal out of time.

It was determined, however, to refuse the former application which is not the same issue as is now present before me.

Mr. Le Pelley for the respondent conceded and, in my opinion rightly, that the single Judge was correct in law in refusing to grant his application in the former application. Accordingly, there was no basis for applying to the full court under rule 54 as was complained. This is sufficient to dispose of the preliminary objection.

It is true, however, that the single Judge in the former application did say:-

"From what I have said, it will be immediately apparent that this application must fail, if for no other reason but for the fact that the orders sought cannot be granted because they simply do not make sense. But there is one further reason why the application must fail. The judgment in question was given nearly 8 years ago. The applicant has been given every opportunity to file an appeal but has failed to do so because of an apparent inability on the

part of its Advocates to apply the rules correctly. Even this third time round they have got them all wrong. The respondent cannot be expected to wait indefinitely while the Advocates for the applicant are trying to make up their mind what the relevant rules mean. They are entitled to do that but certainly not at the expense of the respondent."

This was a reason which was not necessary for the decision of that application. In my view, the observations made in the passage hereinbefore set out were obiter. The principle of res judicata therefore does not apply. Nor does that principle apply to a reason for the decision. This is stated in Sarkar's Law of Civil Procedure, 8th Edition, at p. 88 as follows:-

"The previous decision on a matter in issue above is res judicata: the reasons for the decision are not res judicata."

Accordingly and, for the reasons above stated, the preliminary objection fails and I reject it with an order for costs thereof to be paid to the respondent in any event. I direct that the application be set down for hearing on an early a date to be taken at the Registry convenient to counsel and myself.

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

A.A. LAKHA

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JUDGE OF APPEAL