



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SHAH J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 17 OF 1997

MACHAKOS DISTRICT CO-OPERATIVE

UNION LIMITED.....APPLICANT

AND

PHILIP NZUKI.....RESPONDENT

(Application for extension of time to file notice of
Appeal and Record of Appeal out of time in an
intended appeal from a judgment of the High Court of
Kenya at Machakos (Mr. Justice Osiemo) dated 20th
September, 1994

in

H.C.C.C. NO. 5 OF 1994)

RULING

Civil Appeal No. 182 of 1994 which was filed by the applicant (as appellant) on 17th November, 1994 was struck out on 9th December, 1996 as the record thereof did not have a certified copy of the decree appealed against. There was an error, or mistake on part of the applicant's then advocates, Messrs. Mulwa & Mulwa in not including, in the record of appeal, a certified copy of the decree appealed against.

M/s. A.H. Malik & Co. who were briefed to conduct the hearing of the appeal in conjunction with M/s. Mulwa & Mulwa then sought, from M/s. Mulwa & Mulwa, a certified copy of the decree which was received by them on 13th January, 1997.

On 30th January, 1997 this application was filed, by which, the applicant seeks orders for extension of time to file notice of appeal and record of appeal out of time.

The time taken in filing this application, after the appeal was struck out, is not so inordinately long as to enable me to say that the applicant is undeserving of the exercise of the undoubted discretion that I have under Rule 4 of the Rules of this Court.

Mrs. Mwangangi for the respondent opposes this application on several grounds. The first ground (no marking of every 10th line in the application) was not argued by her. Whilst it is necessary to comply

with the requirements of rule 13(5) of the rules of this court I do not think the error is fatal to the application. In any event Mrs. Mwangangi did not ask me to consider this point.

The crux of the objection by Mrs. Mwangangi is that although the present advocates were instructed to lead M/s. Mulwa & Mulwa as early as 25th April, 1995 they did not rectify the error, that is, non-compliance with Rule 85(1)(h) of the Rules of this Court. The new advocates according to Mr. Lakicha's affidavit, did not notice the error until when preparing the Appeal for hearing. In any event the application for striking out of the appeal was not filed until 18th November, 1996. I do not think the advocates could have taken any remedial measures such as withdrawing the appeal as to apply for extension of time later, as an incompetent appeal cannot be withdrawn.

Mr. Mwangangi says that the present advocates obtained a certified copy of the decree only after the appeal was struck out and cannot therefore qualify for exercise of my discretion to enlarge the time for filing a fresh notice of appeal.

I agree what Bosire Ag. J.A. said recently in the case of Jedida Alumasa & 3 others vs S.S. Kesitany, Civil Application No. NAI 337 of 1996. He said:

"It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate

procedures, provided he can be able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal. That is what the applicants did in this matter. Their appeal was struck out on 11th October, 1996, and on 8th November, 1996, they brought this application. The delay in bringing the application cannot, in the circumstances of this case, be regarded as inordinate."

Mrs. Mwangangi also says that the present advocates ought to have moved the court for leave to include a certified copy of the decree by way of a supplementary record of appeal before Civil Appeal No. 184 of 1994 was struck out instead of trying to obtain leave to file a fresh notice of appeal out of time. The advocates could not have done so. Rule 85 (2A) of the Rules of this Court does not allow a certified copy of the decree appealed against to be put in by way of a supplementary record.

Mrs. Mwangangi also argued that there is no point in appealing as the decretal sum has been paid. With respect, payment of decretal sum does not take away a right of appeal.

Considering all circumstances of this matter, I order that the notice of appeal sought to be filed be filed within the next seven days and that the record of appeal be filed within 21 days thereafter. 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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR