REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 412 of 1996

ANDREW DAVID MULEI ……………………………………………APPLICANT

AND

DAVID MUTISYA MUASA …………………..………………….. RESPONDENT

(Being an Application for extension of time to file a Notice of Appeal and Record of Appeal out of time from the Judgment of the High Court of Kenya at Machakos (Hon. Mr. Justice Osiemo) dated 20th September, 1995

In

H.C.C.C. NO. 1 OF 1994)

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RULING

On 16th day of November, 1995 the applicant, lodged, in this court a Civil Appeal No 199 of 1995 which came up for hearing on 17th day of December, 1996 when it was struck out as being incompetent for want of inclusion of the exhibits in the record of appeal. That appeal was filed by the applicant's then advocate Mr Makundi.

Mr Mutua the present advocate of the applicant was briefed to take over the conduct of that appeal on 12th February, 1996. Mr Mutua says that he became aware of the lack of exhibits in his own copy of the record of appeal but thought ("wishful" thinking) that the other records of appeal may contain the exhibits.

On 23rd day of December, 1996, some six days after the said appeal was struck out this application was filed. So there is no delay in filing this application. The applicant has moved with good speed to put his house in order. He now seeks leave to file his notice of appeal and record of appeal out of time so that he could argue out the intended appeal on merits.

Mr Mutua's earlier referred to "wishful" thinking was misplaced. A counsel cannot take for granted that the other records of appeal will not be the same as his. It was his duty to check if the other records were proper or not. I am not convinced that Mr Mutua is being very candid on this particular aspect. My

impression is that he did not become aware of the defect in the record until when he was preparing the appeal for arguments. Had he simply said so he need not have gone to the extent of saying that he assumed that the other records were in order.

Mr Mbiti has criticised Mr Mutua on his “wishful thinking” saying that one look at the index of the struck out appeal would have put Mr Mutua on the right track and on that score Mr Mbiti is right.

There is therefore this lack of candour on the part of Mr Mutua. The question that arises therefore is: Do I overlook this and grant the discretionary remedy that the applicant seeks? The applicant himself is of course not probably aware of what is going on. He has from what I conceive, an arguable appeal and he is unable to put forward his arguments on merits (albeit through his counsel) for want of compliance by counsel on procedural aspects of compiling a record of appeal. It is not his (the applicant’s) fault that Mr Makundi (his previous advocate) did not include the exhibits in the record of appeal. It is not his fault that Mr Mutua may have invented that quite unwarranted and made up excuse, that is to say that, Mr Mutua assumed that the other records of appeal had the exhibits. The point is that there was no need on the part of Mr Mutua to come up with an excuse which does not stand scrutiny.

As Omolo JA pointed out in the case of John Kago Ndungu v James Karimi Wambugu (Civil Application No 209 of 1996, (unreported) nothing could have been done whilst an incompetent appeal was pending. Omolo JA said:

“Whilst that appeal was pending, there was nothing the applicant could have done. He could not have filed a supplementary record of appeal because the court’s rules do not permit that where decrees or orders are concerned. He could not have withdrawn the appeal either because the court has ruled that where an appeal is incurably defective, then there is nothing to withdraw.”

What applies to a defective decree being in the record of appeal also applies to there being no exhibits in the record of appeal and I am of the view that whilst the incompetent appeal was still pending the applicant could not have done much. It is only after the appeal is struck out that the appellant can move to put his house in order. This he has attempted to do with good enough speed.

What Omolo JA said, and with respect I agree, answers Mr Mbithi’s argument that Mr Mutua could have filed a supplementary record of appeal to include the exhibits. Rule 85 2(A) does not cater for his eventuality.

Mr Mbiti took issue with the manner in which Mr Mutua’s notice of motion was drawn. The notice of motion sets out in substance the grounds upon which the applicant relies and the affidavit in support thereof expounds the same. I do not think the application is incompetent.

In paragraph 7 of his affidavit Mr Mbithi takes issue on Mr Mutua’s right to file afresh a second notice of appeal when a valid notice of appeal was earlier filed. The answer to this is simple. When an appeal is struck out, notice of appeal from which the appeal takes its existence, goes out with the appeal. It does not exist any more. The applicant has correctly, therefore, sought leave to file fresh notice of appeal and then record of appeal out of time. Mr Mbithi has attempted to differentiate between an appeal and a record of appeal and says that the record of appeal was not struck out; only the appeal was struck out. This is an argument in vacuum. Once the appeal is struck out, the record of appeal goes. There is nothing left. There can be no valid objection such as taken by Mr Mbithi.

Mr Mbithi also urges that rule 4 can be of help to Mr Mutua only when no appeal has been filed within time. That is not correct. There are umpteen authorities of this court to say that once an appeal is struck out rule 4 enables the applicant to seek such extension of time as is sought here. These observations also apply to paragraph 7(e) of Mr Mbithi’s affidavit.

The applicant, as the intended appellant, in my view, deserves the exercise of my discretion, and despite my reservation on Mr Mutua’s unwarranted excuse, I allow this application and order that the applicant be at liberty to file a fresh notice of appeal within seven (7) days of to-day and the record of appeal within

twenty-one (21) days thereafter.

The costs of this application will be costs in the intended appeal. A certified copy of this ruling will be included in the new record of appeal.

Dated and delivered at Nairobi this 10th day of June, 1997.

A.B. SHAH

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JUDGE OF APPEAL