



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 372 of 1996

DAVID KONGO APPLICANT

AND

NJOROGE NJUGUNA RESPONDENT

(An application for extension of time to file an Appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Nyarangi) dated 18th October, 1979

In

H.C.C.C. NO. 575 OF 1968)

RULING OF THE COURT

The reference before us which has been brought under rule 54 of our Rules, is from the ruling dated 25th February, 1997, of Tunoi, JA sitting as a single Judge of this court, striking out the applicant's application for extension of time to file an appeal. Tunoi, JA had held that "as far as the issue of extension of time to lodge appeal out of time is concerned", he was bound by an earlier ruling in a reference to the full bench of this court dated 2nd October, 1996, which upheld the ruling of Omolo, JA sitting as a single Judge in an application before him by the same applicant for extension of time to file the same appeal. For this reason Tunoi, JA, concluded that as a single Judge of this Court, he had no jurisdiction to "sit in judgment of the decisions of Omolo, JA and of the full bench". He then struck out the application with costs for the respondent.

But what was the decision of Omolo, JA which was upheld by the full court? It was that the application then before him for extension of time to file the appeal, be struck out on the ground that the application was incompetent as it did not fulfil a precondition previously ordered by the court for the filing of the application. In other words, that there was really no application before him which he could hear. Before coming to his decision to strike out the application, however, Omolo, JA had expressed the view, which was obiter, that if he had been properly seized with the application, which he knew he was not, he would have dismissed it on merits, which we may add, he could not do under the circumstances. On the reference to the full court from his decision, the full court held that since the precondition laid down for the filing of the application had not been complied with, that omission rendered the application incompetent and Omolo, JA was quite right in striking it out for that reason. The full court, without in any way, making it the ratio decidendi of their decision, and it seems that, it too, could not help it, went on also to comment that if only the application had been competent, Omolo, JA would have dismissed it on

merits rather than strike it out for want of competency.

It is clear that the only decision that Omolo, JA and the full court made, and for that matter, could have made, was to strike out the application as being incompetent because of the failure to comply with an ordered precondition, and not to dismiss it on merits, since there was no competent application to be heard in the first place. In these circumstances, there would be nothing to prevent the applicant upon complying with the ordered precondition, to apply again before a single Judge of this court, as he did before Tunoi, JA for his application this time, indeed the first time, to be heard on merits. It would appear from the submissions made before the learned single Judge that this position was not made very clear.

In the result, the reference before us succeeds and the ruling of Tunoi, JA of 25th February, 1997, is hereby set aside together with the costs awarded thereunder and the applicant's application before him is to proceed to hearing before another single judge of this Court. The costs occasioned by this reference shall be in that application.

Dated and delivered at Nairobi this 4th June, 1997.

JE GICHERU

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JUDGE OF APPEAL

AM AKIWUMI

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JUDGE OF APPEAL

AB SHAH

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JUDGE OF APPEAL