REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 122 OF 1997

BETWEEN

MACHAKOS RANCHING COMPANY LIMITED.....APPLICANT

AND

JOSEPH KYALO MUTISO.....RESPONDENT

CONSOLIDATED WITH CIVIL APPLICATION NO. NAI 123 OF 1997

BETWEEN

MACHAKOS RANCHING COMPANY LIMITED.....APPLICANT

AND

WAEMA ITUMO MUOKA.....RESPONDENT

(Applications for extension of time in intended appeals from a Judgments

of the High Court of Kenya at Machakos (Mr. Justice Osiemo)

dated 29th November, 1995

in

H.C.C.C. NO. 314 OF 1994 & 303 of 1994)

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R U L I N G

I have before me two applications (set out hereinabove) which are consolidated for hearing by consent of Counsel for the applicant and the respondent as the issues raised in both the applications are identical.

Civil Appeals numbered 96 of 1996 and 98 of 1996 were both struck out by this Court (Kwach, Akiwumi & Pall JJ.A) on the 22nd day of May, 1997 as, in both the appeals, the date on the copy of the orders appealed against did not coincide with the date of the order and as the order appealed against appeared to

have been certified on a date subsequent to the filing of the appeal. For record purposes the applicant in both applications before me is the same party, that is, Machakos Ranching Company Limited but the respondents are different. In Civil Application No. NAI 122 of 1997 the respondent is Mr. Joseph Kyalo Mutiso and in Civil Application No. NAI 123 of 1997 the respondent is Mr. Waema Itumo Muoka. Both the applications before me concern refiling or readmission of the said struck out appeals. The cause of action in the superior court in respect of both the intended appeals arose out of the same traffic accident and hence there is consolidation of the two applications before me.

At the outset Mrs. Mwangangi for both the respondents took a preliminary objection to the applications on the basis that as the pages of the applications did not bear the tenth lines numbered on the margin on the right side of the sheets the applications were incompetent and ought to be struck out. She conceded that such non-numbering did not prejudice her in any manner. I did not call upon Mr. Masika to respond to the said objection and I stated that I will incorporate my reasons for overruling Mrs. Mwangangi's objection in the final ruling. I now give these reasons.

Numbering of the 10th line of each page of the record is a matter for convenience of the Court and Counsel and although the rule (Rule 13(5)) makes such numbering mandatory, I am of the view that when no prejudice is caused to the objector, the application ought to be sustained and heard. It did appear to be that the respondent was standing on technicalities. Want of compliance with Procedural rules (unless fundamental and going to the jurisdiction of this court) do not and cannot call for striking out of an application of the kind that is before me. It is the duty of the court to strive to do justice between the parties undeterred by technical procedural rules.Rules of procedure are good servants but bad masters. This has been said often by various eminent judges.

Our rules of procedure have their origin in England where the tendency now is, as I understand it, to move from form to substance. It was stated quite categorically by Upjohn LJ in the case of In re Pritchard Decd (1963) 2 W.L.R. 685 at page 698:

> "I do not think that the earlier cases or the later dicta upon them prevent me from saying that, in my judgment, the law when properly understood is that Ord 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of Ord 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the persons entitled to complain of the defect ex debito justitiae."

As I have already pointed out I do not consider the defect in question as fundamental and the objection already stands dismissed.

Coming to merits of the application I must point out at once that the applicant has moved with alacrity. The appeals were struck out on 22nd May, 1997. That was a Thursday. Notices of Appeal, in anticipation of extension of time, were filed on 23rd May, 1997. These applications were filed on 26th May, 1997 which was a Monday.

Mrs. Mwangangi's objection to the applications on merits is that Mr. Masika ought to have noticed the defects in the struck out appeals earlier and ought to have put his house in order then. Until such time as the appeals were struck out Mr. Masika could not have moved this Court. The defects were such that no supplementary record of appeal could have made good the defects. The intended appeals, said Mr. Masika, are of grave importance to his client as nearly 30 more cases may depend on the result of the intended appeals.

I am satisfied that there is enough material before me to enable me to exercise my discretion to allow the applications which are hereby allowed, with the result that the Notices of Appeal filed on 23rd May, 1997 are ordered as deemed to be filed in time as now extended by me and that the records of appeal be filed within the next 21 days. The respondent will have costs of the applications which, to save time, I assess at shs.4,000/= for both applications which sum must be paid by the applicant to the respondent's advocate

within the next 21 days failing which execution may issue. This ruling will be included in the new records of appeals.

Dated and delivered at Nairobi this 21st day of October, 1997.

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR