



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: SHAH, J.A. (IN CHAMBERS))  
CIVIL APPLICATION NO. NAI 306 OF 1996  
BETWEEN

NJOROGE KUNG'U.....APPLICANT

AND

1. KAMAU KUNG'U

2. GATUNGU KIARIE

3. KAMAU MACHARIA.....RESPONDENTS

(An application for extension of time to file Notice of Appeal and Record of Appeal  
out of time in an intended appeal from an order of the High Court of Kenya  
at Nairobi (Mr. Justice Akiwumi) dated 8th December, 1989

in

H.C.C.C. NO. 359 OF 1981)

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**RULING**

The applicant seeks two orders by his application dated 9th October, 1996. These are

1. That the time for filing and serving Notice of Appeal BE EXTENDED for a period of ten (10) days from the date of this order, upon such terms as this Honourable Court deems fit and just.

2. That the time for filing the Record of Appeal in this intended appeal from the above mentioned decision of the High Court of Kenya in H.C.C.C. No. 359 of 1981 BE EXTENDED for a period of SIXTY (60) days from the date of this Order upon such terms as this Honourable Court may deem just to grant in the circumstances of this matter.

This application was prompted by reason of an Order of this Court made on 16th September, 1996 whereby the notice of appeal filed by the applicant on 15th December, 1989 was struck out. It was struck

out as the letter bespeaking copies of proceedings and ruling was not copied to the respondents' advocates as a result of which the applicant could not make use of the proviso to rule 81 of the Court of Appeal Rules which proviso stops the time for filing of record of appeal until after the copies bespoken of are available to the party so applying.

The appeal intended to be filed was to be against the refusal by Akiwumi J (as he then was) to set aside an award of elders concerning family land registered in the name of the applicant for himself and as trustee for other family members.

It must be pointed out that the notice of appeal filed on 15th December, 1989 was filed in time. In the absence of the letter bespeaking copies of proceedings and ruling the applicant had only 60 days to file his appeal. It was on this narrow basis that that notice of appeal was struck out.

The application now before me is for regularization of the error by Counsel in not copying the said letter to the other side. That is one error which was quite common in the days gone by. Counsel do not now commit such errors. But I must consider the application in its entirety and with reference to all surrounding circumstances.

According to Mr. Kamonde, who appears for the respondents, the copies of proceedings and ruling were ready as early as 20th November, 1992 and that a letter to that effect was despatched by the Registry of the superior court to M/s Machira & Company, advocates for the applicant. M/s Machira & Company say that they never received that letter. Mr. Kamonde frankly admitted that he never received a copy of that letter and that he has never seen it.

In the meanwhile M/s Machira & Company took things easy. After writing their letter of 14th December, 1989, bespeaking the said copies they did nothing until 22nd October, 1992 when they reminded the Registry of the superior court of their earlier request. The letter of 22nd October, 1992 does not specifically refer to the letter of 14th December, 1989, but talks of "previous correspondence" and several unsuccessful visits by their Mrs. Onchanda to the superior court Registry to collect the proceedings. The next letters are dated (in chronological order) 1st December, 1993, 2nd February, 1994, 1st March, 1996, 6th June, 1996, 15th May, 1996 and 30th July, 1996. It appears, somewhat, that M/s Machira & Company were galvanized into action by the respondents' application dated 28th March, 1996.

It was not until 18th August, 1997 that the superior court Registry sent a "1st Reminder" to M/s Machira & Company informing them that the proceedings and ruling were ready for collection as early as 20th November, 1992 and enclosed a copy of the letter of that date. It is common ground that neither M/s Machira & Company nor Mr. Kamonde received the letter of 20th November, 1992. It is also not disputed that M/s Machira & Company kept on writing letters (at irregular intervals) seeking those copies. Mr. Kamonde has not challenged the fact that M/s Machira & Company kept on asking for those copies. This leads me to believe that whilst being not too enthusiastic about expedition of typing of the proceedings and ruling M/s Machira & Company, on being pressed by their client, were attempting to keep his right of appeal alive.

The question that I pose to myself is what do I do in the circumstances as are before me? The applicant had an undoubted right of appeal but his counsel did not appear to be too serious about obtaining the copies in question. Only the letters of 15th June, 1996 and 30th July, 1996 were copied to Mr. Kamonde. It is for the intended appellant to move to expeditiously obtain the papers he needs and I think that Counsel was not serious about the intended appeal.

If I were to allow this application it could tantamount to re-opening a 1981 matter. No system of justice can tolerate a situation such as I have before me. Litigation would never end if I were to allow the application.

In view of counsel's inaction the rights have accrued to the other side. I am bound to look at the interest also of the respondents. I would not want the litigation to continue hanging over them for any longer.

In conclusion I am not convinced that I ought to exercise my discretion in favour of the applicant. The application is dismissed with costs.

Dated and delivered at Nairobi this 3rd 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