REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 197 of 1997

GABRIEL KIGI

JOSEPH MUHINJA

JANE NJERI

EUNICE GATHEGA

PATRICK NDUNGU

PATRICK NDICHU KIMANI

DANIEL KINYANJUI KAE.....APPLICANTS

AND

KIMOTHO MWAURA

LISURA FARM (KIN ESTATE).....RESPONDENTS

(Application for extension of time to file notice of appeal and record of appeal out of time in an intended appeal from a judgment and decree of the High Court of Kenya at Nairobi (Shields J) dated 20th June, 1994 In H.C.C.S NO 212 OF 1994)

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RULING

When this application came up for hearing before me on 9th October, 1997, Mr Balala, for the respondents, took objection to the jurisdiction of this Court to grant extension of time to file a notice of appeal and record of appeal. As the objection is to the very jurisdiction of this Court I directed that the issue be argued as a preliminary point and that the merits of the application be kept in abeyance.

Mr Balala's argument, as I understood him, was that rule 4 of the Court of Appeal Rules (the Rules) is sub-servient to section 7 of the Appellate Jurisdiction Act (the Act) Cap 9, Laws of Kenya and that in view of the mandatory nature of rule 41 of the Rules only the superior court could in the first instance

grant extension of time to file a notice of appeal out of time. In support of his argument, Mr Balala referred *in extensor* to the recent ruling of the learned Chief Justice in the case of *AFRO MEAT COMPANY LIMITED V SYPROSE AGEKE OWUOR*, Civil Application No NAI 95 of 1997 (unreported). The learned Chief Justice sitting as a single judge of this Court ruled (in the *AFRO MEAT COMPANY* application) that an application for extension of time must first be filed in the superior court. The learned Chief Justice said:-

"The provisions of S.7 of the Act are very clear. The High Court is empowered to extend the time for giving notice of intention to appeal. Likewise there is no ambiguity in the provisions of rule 41 of the Court of Appeal rules which has prescribed that whenever an application may be made in either of the two courts it shall in the first instance be made in the High Court."

Having said what I have just set out the learned Chief Justice accepted the respondent's submission that the application for extension of time to file and serve notice of appeal must in the first instance be filed in the High Court. The learned Chief Justice then proceeded to dismiss the application. I think he must have meant to strike out (rather than dismiss) the application.

Mrs Wahome in response relied on another recent single judge decision of this Court. This is the case of *ROBINSON & OTHERS V MUTHAMI*, Civil Application No NAI 187 of 1997 (78/97 UR), (unreported) handed down by Bosire, Ag. JA on 7th August, 1997. The learned Chief Justice was not probably availed of this ruling when he was hearing the *AFRO MEAT COMPANY* application. Bosire, Ag JA after considering the effect of Section 7 of the Act and rule 41 of the Rules said:-

"I have no doubt in my mind that an appellant whose appeal has been struck out for being incompetent has the right to move a court for extension of time to lodge a competent appeal. (See, *Ngoni Matengo Co-operative Marketing Union Ltd V Osman* [1959] E.A. 577, *Elizabeth Kamene Ndolo v George Matata Ndolo*, (Civil Application No NAI 104 of 1995 – unreported). Before 1963, when section 10 of the Appellate Jurisdiction Act, 1963 was promulgated there was no doubt at all to where the application would be made, namely to the Court to which the intended appeal would be lodged. Section 10, above conferred jurisdiction on the High Court to entertain such application. As I stated earlier that section was replaced by section 7 of the current Appellate Jurisdiction Act."

Since at least 1953 the predecessors of this court, namely Court of Appeal for Eastern Africa and its successor Court of Appeal for East Africa have been handing down decisions to the effect that a single judge of the court had the jurisdiction to entertain and in the appropriate cases, allow an application or extension of time to file a notice of appeal and record of appeal or putting it differently, to readmit a struck out appeal.

The Court of Appeal for Eastern Africa in the case of *HARNAM SINGH BHOGAL V JADWA KARSAN* [1953], 20 E.A.C.A in a unanimous decision by Sire Barclay Nihill (President), Sir Newham Worley (Vice-President) and Mayer J. (Kenya) said this at page 17:-

"By virtue of rule 9 (1) of the E.A.C.A Rules we have power to extend the time for entering an appeal and the advocates for the applicants and the respondents have referred us to a number of English reported cases which illustrate the principle on which an Appellate Court will usually determine an application of this nature."

In the said case of *HARMAN SINGH BHOGAL* the applicant was seeking leave to restore the appeal on the plea that the omission to file a certified copy of the formal order was due to an honest but mistaken opinion of his advocate. It must be borne in mind that the then Rule 9(1) was similar to our present Rule 4 but with a stricter requirement of "sufficient cause". However in *Bhogal's* case the Court declined to extend time on basis of insufficiency of grounds.

In the case of *NGONI MATENGO CO-OPERATIVE MARKETING UNION LTD* (supra) the Court of Appeal for East Africa (Sire Kenneth O'Connor, Gould & Windham JJ.A) said per Windham JA at Page 580 and I quote:-

"It is therefore in my opinion, open to us to permit the appellant to lodge an appeal if he can show "sufficient reason" for an extension of time for that purpose under R.9"

In an unreported single judge decision (Law JA) this Court in the case of *BELINDA MURAI WIDOW OF IGNATIUS MURA & OTHERS V AMOS WAINAINA*, Civil Application No NAI 9 of 1978 (Unreported) said:-

"This Court has jurisdiction to entertain an application for an extension of time to enable an appeal to be re-instated which has been struck out and not dismissed (as was the case here, …"

In the final analysis Law JA in *BELINDA MURAI* application ordered:-

"In all circumstances I allow this application and extend time for filing of intended appeal by 7 (seven) days from today. The record of appeal used in the former appeal (NO. 46 of 1977) should be record in the intended appeal, supplemented by inclusion of a copy of the formal order and of new or further grounds of appeal."

This single judge decision in *BELINDA MURAI* application was referred to full court consisting of Madan & Wambuzi JJ.A and Miller Ag. JA (as they all then were) and in a unanimous decision but delivered individually by all the three learned appellate judges the Court confirmed the decision of Law JA.

The cases I have referred to are just a few of the decisions of this Court or those of its predecessor courts. For at least the last 40 years the final appellate courts in East Africa and Kenya have clothed themselves with jurisdiction to extend time under rule 9 (then) or rule 4 (now). I must, therefore, point out that the task I have before me is a formidable one. Do I follow what has been held good for the last 40 years or so or do I follow what the learned Chief Justice said in the *AFRO MEAT COMPANY* application?

To enable me to decide this, which is now a burning issue, I must refer to the relevant Acts, namely the Civil Procedure Act and the Act. The Civil Procedure Act and the rules made thereunder do not prescribe any specific time to file a notice of appeal in the superior court. As there is no specific time provided in the Civil Procedure Act or the rules thereunder as regards filing of a notice of appeal, I must look at the Act. The Act also provides no specific time for filing of a notice of appeal in the superior court. The only place where this time is provided for is by or under rule 74 (2) of the Rules. This is to my mind the cruz of the matter before me. It is rule 74 (2) of the Rules which prescribes the time for filing of notice of appeal. It must therefore be reasonable to assume that the time prescribed under rule 74 (2) of the Rules can properly be extended by reference to rule 4 of the Rules, that is by an application grounded on rule 4 of the Rules. At this stage it becomes material to set out S.7 of the Act:-

"The High Court may extend the time for giving notice of intention to appeal a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that the time for giving such notice or making such appeal may have already expired."

In my humble view the fact that the High Court has a discretion (may extend) time for giving of intention to appeal cannot override the fact that the actual time for filing a notice of appeal is prescribed by rule 74 (2) of the Rules. Hence, again in my humble view, rule 4 of the Rules becomes relevant and rule 41 of the Rules does not bar an application of this nature made to this Court in the first instance.

If I am wrong in what I have said, it must follow therefore, that the reliance on rule 9 (old) and rule 4 for the past 40 years was also wrong. As I am bound by the doctrine of Stare Decisis, what has been good for the past 40 years is still good today. I must keep in mind the fact that S.7 of the Act or its equivalent has existed for a very may number of years and if that section barred this Court from hearing such an application as the one before me this point would have been taken in the past by many illustrious lawyers or eminent judges who have sat on the bench of this Court before me.

I am reinforced in what I say by what was stated by Madan JA (as he then was) in the reference against Law JA's decision in the *BELINDA MURAI* application. Madan JA said:-

"The court has jurisdiction to allow extension of time for an appeal to be readmitted which has been struck out but not dismissed as in this instance."

Wambuzi JA (as he then was) said in his ruling on the said reference:-

"Under rule 4 of the Rules of this Court the power to grant or refuse extension of time is discretionary."

Miller Ag. JA (as he then was) said in his ruling on the said reference:-

"Mr. Wilkinson for the respondent quite properly (emphasis added by me) conceded that he had no contention with respect to jurisdiction in the single judge's hearing the application for extension of time sought by the applicants."

Having said all this I must also point out that the learned Chief Justice is not alone in what he said in the *AFRO MEAT COMPANY* application. Recently in Mombasa Lakha JA has ruled in the same vein as the learned Chief Justice did. I have not been able to obtain a copy of the ruling of Lakha JA, unfortunately. However, my view on the matter would still remain the same.

In my view there is a reason, and a good one too, behind this Court's single judge's jurisdiction to extend such time. Let us assume that the High Court orders extension of time. The respondent in the High Court then can only appeal against that decision with leave. Such leave may be refused. The respondent then has to come to this Court for such leave. On a hearing before a single judge in this Court the aggrieved party's remedy simply is to invoke the provisions of rule 54 of the Rules. I can imagine a situation whereby this Court will become bogged down by such appeals as I have just referred to.

I would treat the filing of a notice of appeal and record of appeal, after the appeal has been struck out by this Court on a different footing from filing, out of time, for the first time, a notice of appeal. Once an appeal stands struck out, in my humble view, the same can be refilled, either per its original record supplemented by inclusion of a copy of the formal order and of new or further grounds of appeal. To enable the filing of a re-done record of appeal and a fresh one would need, ex abundanti cautela the filing of a notice of appeal, although in my view filing a fresh notice of appeal is superfluous as the original notice of appeal is filed in the superior court is still in the record. What has gone out with a struck out record of appeal is the duplicate notice of appeal which forms part of the record.

The learned Chief Justice in the *AFRO MEAT COMPANY* ruling opines follows:-

"The purpose of a notice of appeal, therefore, is to manifest an intention to appeal and, where necessary, to specify the part of the decision intended to be appealed against. When an appeal has been filed the purpose of filing the appeal has been fulfilled. A duplicate copy of the notice of appeal. On fulfillment of the purpose of the notice of appeal the document filed in the High Court, in my view, now becomes a document which has lost its value. Clearly because if there is an intention to file an appeal again that intention has to be manifested afresh."

With great respect I do not quite agree with the learned Chief Justice. Whilst I hold everything said by the learned Chief Justice in great regard, my humble view is that upon the striking out of a record of appeal for technical reasons the appellant is different footing from filing, out of time, for the first time, a notice of appeal. Once an appeal stands struck out, in my humble view, the same can be refilled, either per its original record supplemented by inclusion of a copy of the formal order and of new or further grounds of appeal. To enable the filing of a re-done record of appeal and a fresh one would need, ex abundanti cautela the filing of a notice of appeal, although in my view filing a fresh notice of appeal is superfluous as the original notice of appeal as filed in the superior court is still in the record. What has gone out with a struck out record of appeal is the duplicate notice of appeal which forms part of the record.

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to specify the part of the decision intended to be appealed against. When an appeal has been filed the purpose of filing the appeal has been fulfilled. A duplicate copy of the notice of appeal has become a part of the record of appeal. On fulfillment of the purpose of the notice of appeal the document filed in the High Court, in my view, now becomes a document which has lost its value. Clearly because if there is an intention to file an appeal again that intention has to be manifested afresh."

With great respect I do not quite agree with the learned Chief Justice. Whilst I hold everything said by the learned Chief Justice in great regard, my humble view is that upon the striking out of a record of appeal for technical reasons the appellant is not in any manner manifesting an intention to abandon his right of appeal. The appellant soon, in most cases, files an application for extension of time thereby making it clear that his original notice of appeal in the superior court file is still meant to be there. One cannot, with respect, say that the notice of appeal filed as deemed to have withdrawn. Rule 82 (a) of the Rules, I think, provides that a notice of appeal filed is deemed to have been withdrawn when a party who has lodged a notice of appeal fails to institute an appeal within the appointed time. The rule [82(a)} as worded is clear and cannot apply to appeals which are struck out, that is to say, on striking out of an appeal the provision in rule 82 (a) of the Rules does not become effective. But what I have just said in regard to what happens to the original notice of appeal in the High Court file on striking out of an appeal filed in this Court is one way of putting it. The other way of putting it, in my view, is to say that the appellant has not in any way manifested an intention to abandon his right of appeal until it becomes obvious and it does not become so obvious when he filed expeditiously an application for enlargement of time.

I would wish to point out that what Law JA said in the single judge application (*BELINDA MURAI V WAINAINA*, [supra]) and what Madan JA, Wambuzi and Miller Ag JA said the ruling on Reference to full court (*BELINDA MURAI* case) amounts to saying simply that this Court has the jurisdiction to readmit a struck out appeal.

But I must revert to section 7 of the Act. That section in my view gives discretionary power to the High Court to allow extension of time to file a notice of appeal when there is as yet nothing before this Court. It is in this particular aspect that I agree with the ruling of Bosire Ag. JA in the *ROBINSON & OTHERS V MUTHAMI* application (supra).

Bosire Ag. JA quoted with his own approval what was stated in the case of *NGONI MATENGO CO-OPERATIVE MARKETIG UNION LTD V OSMAN* (supra).

But to leave no room for doubt I reiterate that filing of a fresh notice of appeal after a record of appeal has been struck out is a matter of abundant caution simply because the appellant's intention to appeal does not stand withdrawn.

The learned Chief Justice placed great reliance on the case of *G.S. SURI & ANOR VS ROYAL CREDIT LTD*, Civil Application NO. NAI 281 of 1995, (Unreported). I am fully aware of that decision as I was a member of the Court which heard that application. I sat with Gicheru & Omolo JJ.A. What this Court ruled in that case was primarily that as there was a specific provision in the Civil Procedure Rules (Order 41 rule 4 [1]) to the effect that the application of that nature must first (emphasis mine) be made to the Court from whose decree or order the appeal is taken. I have pointed out earlier in this ruling that insofaras the 14 day period of filing of a notice of appeal is concerned there is no provision in the Civil Procedure Act or rules. It is only in rule 76 (2) of the Rules. In Suri case (supra) this Court did hold that its previous decision in the case of JEAN PIERRE DE-LEU V ADRIAN MUTESHI, Civil Application NO. NAI 169 of 1995 (unreported), was per incuriam in so far as application for stay of execution under rule 5 (2) (b) of the Rules was concerned. But the *Suri* case did not state anywhere that section 7 of the Act takes away the jurisdiction of this Court to extend time.

These are my views. It is obvious by now that I am about to dismiss the preliminary objection. I have given my reasons. The preliminary objection by Mr Balala is dismissed and I will proceed to hear the application on its merits unless Mr Balala wishes to refer this issue to full Court under rule 54 of the Rules. Costs occasioned by this preliminary objection will be the applicant's in any event.

Dated and delivered at Nairobi this 5th day of November, 1997.

A.B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR