REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: BOSIRE AG J.A (IN CHAMBERS)
CIVIL APPLICATION NO.NAI 241 OF 1997

BETWEEN

JENIFFER NYAKINYUA WAMBUGU ..... APPLICANT

AND

NAIROBI CITY COMMISSION ..... RESPONDENT

(An application for leave to file an appeal out of time in an intended appeal from a judgment of the High Court of Kenya at Nairobi (The late Hon. Mr. J.A. Mango dated on 8th April 1992
in
H.C.C.C. NO.2559 of 1990)
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R U L I N G:

The applicant has come to this court for the second time with an application under rule 4 of the Rules of this court for an order extending the time within which to file a competent appeal. The applicant's appeal No.72 of 1996, was struck out on 7th June, 1996, because the record of appeal did not contain a certified copy of the decree in breach of the mandatory provisions of rule 85(i)(h) of the court rules. Upon application the applicant was granted further time to file a competent appeal, but the appeal she filed, notably Civil Appeal No.222 of 1996, was also struck out on 4th June 1997, on the ground that the copy of the decree in the record of appeal was invalid. The applicant now seeks further time to regularize the mistake and thereafter file a competent appeal.

At the hearing of the application Mr Mwangi, for the respondent, raised a preliminary point as to the jurisdiction of this court to entertain the application in view of the provisions of section 7 of the Appellate Jurisdiction Act and rule 41 of the rules of court. In his view the applicant having not first applied to the superior court for the extension sought in her application could not properly bring the application before this court. Mr Mwangi cited the case of **Bruno and others .vs. Uganda** [1969], E.A 400, a decision of the Court of Appeal for East Africa, in which an application similar to this one was struck out for want of jurisdiction.Relying on that decision and the provisions of section 7 and rule 41, above, Mr Mwangi submitted that all decisions of this court in which it has been held, directly or otherwise, that the court has jurisdiction, on first instance, to entertain an application under rule 4, are wrong and should not therefore be followed.

Mr Owino Okeyo for the applicant, relying on two decisions by two Judges of this court sitting as single Judges, the first by me of **Edward Allan Robinson and 2 others .v. Philip Gikaria Muthami,** Civil Application No. NAI 187 of 1997 (unreported) and the second by my learned brother Shah J.A of Gabriel Kigi & others .v. Kimotho Mwaura & Another Civil Application No. NAI 197 of 1997, (unreported) submitted that this court has for long exercised the jurisdiction to extend time under rule 4, on first instance, and that to rule otherwise would offend common sense and cause inconvenience and expense to the litigants.

This is the second time I am called upon to adjudicate on the issue raised. The first time was in the case of **Edward Allan Robinson and 2 others .v. Philip Gikaria Muthami** (supra). There I held that this court has the jurisdiction on first instance, to entertain an application under rule 4 from an applicant whose appeal has been struck out on technical grounds and who desires to institute a competent appeal. Since then at least two other decisions have been given on the issue. In Afro Meat Co. Ltd .v. Syprose Ageke Owuor, Civil Application No. NAI.95 of 1997 (unreported) Cockar CJ sitting as a single Judge, was of the contrary view. In **Gabriel Kigi & Others .v. Kimotho Mwaura & Another** Civil Application No. NAI 197 of 1997 (supra) Shah JA, agreed with me, but for different reasons, that this court has the jurisdiction to entertain, on first instance, an application under rule 4.Having had the advantage of their Lordships' views, and also the views expressed in Bruno and others .v. Uganda (supra), I do not repent.

It should be recalled that the first Appellate Jurisdiction Ordinance (Act No.38 of 1962) was not enacted to regulate the activities of the then Eastern African Court of Appeal. That Court was a creature of an imperial legislation, the Eastern Africa Court of Appeal order in Council, 1950. Act No.38, of 1962, set out what use Kenya made of the court. Previously, although the Judges of that court were appointed by the imperial authority, the appointment of the other staff and daily operations of the court were undertaken by Kenya. The court was as if it was one of Kenya's domestic courts. But when in 1962 the court became a constituent part of the East African Common Services Organization, Kenya lost its control over the court and hence the enactment of the Appellate Jurisdiction Ordinance, as I said earlier, to spell out what use it would make of the court.

It should be noted that section 10 thereof which was subsequently re enacted as section 7, came into being, for the first time, in that Ordinance. By that enactment Kenya was in effect attempting to give its citizens a first chance to be heard by a domestic court and to have a second chance in a regional court under a provision equivalent to our rule 4, in the regional court's rules. Section 10 did not at all divest the appellate court the jurisdiction to entertain, on first instance, an application for extension of time. Had that been so then appropriate words like those in O.41 rule 4(1) of the Civil Procedure Rules would have been employed. It should also be noted that rule 41 (formerly rule 18) was in existence when section 10 (now section 7) was passed. It should not, in my view, be read as mandatorily requiring an applicant for extension of time to first be heard in the superior court. The provision is only directory intended merely to regulate the business of the court. It does not, like section II of the Civil Procedure Act, which requires that suits be instituted in the lowest court competent to hear them, render incompetent the suit or application filed in breach of those provisions. That I think explains why this court and its predecessors have entertained applications under rule 4 for extension of time within which to file a notice of appeal without any hesitation.

In the above circumstances and particularly considering the historical background of section 7, its benefit more particularly since, 1977 when this court came into being is doubtful.

For the foregoing reasons I do not agree with any local decision which holds that this court lacks the jurisdiction to entertain, on first instance, an application for extension of time to file a competent appeal. For the same reasons the decision in the case of **Bruno and Another .v. Uganda** (supra) is inapplicable.

In the result I overrule the preliminary point. As Mr Mwangi abandoned his opposition to the application on any other ground the result is that I will allow the application, extend the time within which to file a fresh notice of appeal by 7 days, and thereafter by 30 days within which to lodge a record of appeal. Considering that this is the third opportunity the applicant has been given, she will pay the costs of the

application assessed at Kshs.5,000/=.

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

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR