



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI & SHAH JJ.A.)

CIVIL APPLICATION NO. NAI.69 OF 1996

BETWEEN

MWANZI ROAD PROPERTIES LIMITED.....APPLICANT

AND

MAINA MUCHIRI.....1ST RESPONDENT

GILBERT ROAD PROPERTIES LIMITED.....2ND RESPONDENT

(Application for extension of time to file a Notice of Appeal and Record of Appeal out of time from a Judgment of the High Court of Kenya at Nairobi (Mr. Justice Shields) dated 5th October, 1993

in

H.C.C.C. NO. 1800 OF 1990 (O.S.))

RULING OF THE COURT

On 8th day of March, 1996 the learned single judge of this Court (Lakha J.A.) dismissed with costs an application by Mwanzi Road properties Limited (the applicant) for extension of time to file a notice of appeal and record of appeal out of time. That application was filed on 22nd day of February, 1996. The filing of the said application came as a result of the appeal filed the applicant being struck out as being incompetent since it did not include a certified copy of the decree appealed against as mandated by rule 185(1)(h) of the Court of Appeal Rules (the Rules).

The brief history of the matter is that the first respondent (Mr. Marna Muchiri) had sued the second respondent (Gilbert Road Properties Limited) in the superior court seeking Orders that property known as plot L.R. 1370 situate in Nairobi (the suit property) be vested in him, he having acquired title thereto by adverse possession from the second respondent. On 5th day of October, 1993 the superior court (Shields J.) ordered that the second respondent do deliver up to the first respondent an executed transfer of the suit property free from all encumbrances thereon created by the second respondent or any person claiming under or through the second respondent and that in default there do issue an order vesting the suit property in, the applicant free from all encumbrances.

At the time Shields J. made the aforesaid orders the suit property already stood assigned to the applicant by an indenture dated 23rd July, 1992 and received at the Lands Office on 24th July, 1992.

The applicant, after the date of judgment delivered by Shields J. applied to be joined in the suit as an interested party on the grounds (inter alia) that it was the registered proprietor by assignment made on 23rd July, 1992 of the suit property and that its interests as such stood jeopardized by the orders made by Shields J. on 5th October, 1993. Bosire J. heard the application by the applicant and dismissed it on grounds that the applicant ought to have moved the court earlier in time than it actually did as it was aware of the pending proceedings and that it bought the suit property during the pendency of such proceedings. However, the learned judge proceeded eventually to dismiss the said application on the basis that the hearing of the suit having been finalised, there was nothing left to be heard.

We note that Mr. Ougo had in fact told Bosire J. that even though his client was not a party to the suit at the time of the judgment he had a right to file a notice of appeal under rule 74 of the Rules pursuant to the decision in *Commercial Bank of Africa vs Isaac Kamau Ndirapgg*, Civil Appeal No. 157 of 1991 (unreported).

The applicant sought and obtained from a single judge of this court (Omolo J.A.) far extension of time within which to file notice of appeal who also ordered that the notice of appeal filed on 21st July, 1994 be deemed to be filed in time. That matter came up for arguments before the Court when (on 19th May, 1995) the Court declined to interfere with the orders made by Omolo J.A. and confirmed his ruling.

Pursuant to such orders Civil Appeal No. 143 of 1994 was filed by the applicant. As the record of that appeal did not contain a certified copy of the decree appealed against the same was struck out as already pointed out above.

The learned single judge (Lakha J.A.) having dismissed the application the matter is now before us by way of reference to full Court.

Mr. Ougo complains that dismissal of his application by the learned single judge on the ground that the applicant had preferred no appeal against the ruling of Bosire J. referred to above was based on wrong premises as rule 74(1) of the Rules enables any person, even if he is not a party to the suit, to file a notice of appeal if his interests are adversely affected by the decision of the superior court. We note that the learned single judge did take into account what was said by this Court in *Commercial Bank of Africa Ltd. v. Isaac Kamau Ndirangu* Civil Appeal N. 157 of 1991 (supra) is that any person can file a notice of appeal, if he is adversely affected by the decision. Mr. Ougo had before Bosire J. expressly reserved this position.

We think with respect that the learned single judge of this Court did fall into error when he put the right of appeal against refusal by Bosire J. as superceding right of an affected party to file a notice of appeal even if he was not a party to the suit. The two procedures stand on their own and the earlier one does not oust the later.

The second issue taken by Mr. Ougo is that the learned single judge of this Court misdirected himself when he dismissed the application on ground of non--disclosure of what happened before Bosire J. It is of course most desirable that the learned single judge of this Court ought to have had before him the whole history of the matter but in our view what happened before Bosire J. was not relevant to the application before him. He had before him an application under rule 4 of the Rules which was to be heard inter-partes and he had been provided with the missing facts by the respondent. We think that the want of reference of what happened before Bosire J. was not intended to mislead the Court. Mr. Kirundi knew of such facts as did Mr. Ougo.

Where the learned single judge faulted, we think, was when he did not consider the position taken by Mr. Ougo that it was his mistake when he included in the record of appeal a certified copy of the vesting order instead of a certified copy of the decree. Mistake it certainly was and we think the learned judge ought to have considered the application from that point of view. It therefore falls on to us to decide that point.

At all stages, the applicant has been denied a hearing on account of errors or mistakes of counsel. The applicant is currently the registered proprietor of the suit property and in our view it is but right that

before it is deprived of the same it ought to be heard. The applicant's advocates, within seven days of the appeal being struck out, moved to seek extension of time within which to file notice of appeal and record of appeal. There is no delay in that respect. In reversing the learned single judge, we have kept in mind the guiding principle that we would not normally interfere with the discretion exercised by him unless it is clear that the learned single judge erred or exercised his discretion on improper grounds, the onus being on the party seeking reference to full court. See A.G. vs Theuri (1932-88) 1 KAR 1 at page 931.

We think therefore that this reference must succeed and we order that the notice of appeal sought to be filed be filed within the next seven days and the record of appeal be filed within 21 days thereafter.

Costs of this reference and those of the application before the learned single judge will be in the intended appeal.

Dated and delivered at Nairobi this 27th day of March. 1996.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL