



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 108 OF 1996 (40/96UR)

BETWEEN

GRINDLAYS BANK INTERNATIONAL (K) LTD (Now Stanbic Bank Kenya Limited)

AND

GRINDLAYS INTERNATIONAL FINANCE (K) LTD

(Now Stanbic Finance Kenya Limited.....APPLICANTS

AND

GEORGE BARBOUR.....RESPONDENT

**(Application for extension of time to serve Notice of
Appeal out of time in an intended appeal from the
judgment of the High Court of Kenya at Nairobi
(Justice Aragon) dated 5th May, 1989**

in

H.C.C.C. NO. 4669 OF 1986)

RULING

The present application which has been brought under Rule 4 of the Rules of this court, is for an order that the subject Notice of Appeal be deemed to have been served in time or for leave that it be served out of time.

The dispute which is the subject of the Applicants' intended appeal, was heard and determined by the High Court as far back as 5th May, 1989. The appeal by the applicant against the decision of the High Court was struck out by this court on 8th October, 1995, on the ground that the related record of appeal did not, as mandatorily required by the Rules of this court, contain a certified copy of the decree of the High Court. The Applicants then as they were entitled to do, applied before a single judge of this court, Mr. Justice Lakha, for extension of time within which, to start the process of appeal all over again, by filing this notice of appeal and lodging their record of appeal. The learned judge on 8th February, 1996, granted the Applicants their wishes and ordered that the notice of appeal should be filed within seven days from 8th February, 1996, and the record of appeal within fifteen days thereafter.

Thereafter, and a day before the expiry of the extended period for the filing of the notice of appeal, the

advocate then representing the Applicants, forwarded by means of a letter dated 14th February, 1996, the notice of appeal for lodging on that same date, in the registry of the High Court.

A copy of this letter was sent to the advocate of the Respondent. In his affidavits in support of the present application the advocate of the Applicants had deponed that in his view, the notice of appeal was not competent and could not be served on the Respondent, until it had been signed by the Registrar and that the signed notice of appeal was only ready on 22nd February, 1996, and served on the Respondent's advocates on 28th February, 1996. The delay in receiving the signed notice of appeal was five working days and two more in serving it.

Mr. Deverell for the Respondent has quite correctly stated the construction that should be put on our Rule regarding the service of a notice of appeal namely, as held in *Cassam v. Sacharia* (1982-88) 1 KAR, that since Rule 76(1) permits a notice of appeal to be served on persons affected by the appeal even before the lodging of the notice of appeal, and Rule 74(6) which relates to the substance of notice of appeal only requires that it be signed by or on behalf of the appellant, such a notice of appeal does not require to have been first signed by the Registrar before it is served. I would add that the reference in Rule 74(6) to Form D in the first schedule to the Rules of this Court is to provide guidance as to the proper contents of the actual notice of appeal and has nothing to do with the endorsement that appears beneath the body of the notice of appeal itself, which is to be signed by the Registrar merely to indicate in which registry and at what time and date, the notice of appeal was lodged.

Mr. Deverell has also urged that in the particular circumstances surrounding the present application, namely, the amount of money involved in the dispute; the fact that even after Mr. Justice Lakha had extended time for the Applicants to take proper steps to commence their intended appeal this had not again through the mistake of the Applicants' advocate been done and another application had been brought yet again, to extend time for doing the right thing, which would be a mockery of the Rules of this court; and that in this particular case the error of the Applicants' advocate should be borne by the Applicants.

Mr. Deverell drew attention to two recent decisions of this court which are relevant to his case. These are *Wanjohi Kariuki v. Waruhiu Kariuki* Civil Application No. NAI 186 of 1995 (135/95UR) and *Baber Alibhai Mawji v. Sultan Hashan Lalji and Two Others* Civil Application No. NAI 236 of 1992. The first authority reaffirms the reluctance of this court to interfere with the exercise of the discretion of a single judge of this court where this appears not to have been done on improper grounds. The second authority in which an application for extension of time to file a record of appeal was dismissed and as relates to the present application, deals with an obvious failure of an advocate to look up the rules and failing, when he was aware that copies of proceedings were available to collect the same. The distinction between misunderstanding a rule and not reading it was also drawn in this way:

"As already pointed out, simply looking up the rules would have put counsel right. It was not an error of judgment on part of counsel. It was not a slip on part of counsel. It was purely and simply inaction and that will not be condoned.....We think that the learned single judge was right when he said that ignorance cannot be equated to error on the part of a legal advisor. What happened here was not a mistaken view of law or procedure."

The court in that authority had also expressed the view that if the period of delay involved had been a short one, it would not have dismissed the application then before it.

Mr. Kontos for the Applicants has conceded that his interpretation of Rule 74(6) that the notice of appeal could not be served before the endorsement beneath it had been signed by the Registrar was due to a genuine mistake on his part. This would appear to be so since according to the letter of 13th March, 1996, from the Deputy Registrar addressed to his law firm he must have been inquiring after a notice of appeal which had been signed by the Registrar so as to serve it on the Respondent. What happened in my view was a genuine error on the part of the Applicants' legal adviser. But would the present application amount to making a mockery of the Rules of this court? It would I think, if the present advocate of the Applicant, had been the same that had failed to include a certified copy of the decree in the record of appeal in the

appeal which had earlier been struck out and also if the delay involved in the present application had been even as from when the appeal was struck out, and not as is the case, only from the day namely, 8th February, 1996, when Mr. Justice Lakha had granted extension of time.

Furthermore, although the notice of appeal as I have already noted, was lodged only a short time after the expiration of the time extended for this by Mr. Justice Lakha, the Respondent was through his advocates aware that it had been lodged. In all the circumstances of the present application, I do not think that the Applicants should be denied their chance of appealing.

I have been informed that the ruling of Mr. Justice Lakha has been referred to the full bench of this court and my ruling in the present application may well be an exercise in futility. But be that as it may, and for the reasons and observations that I have made, I exercise my discretion under Rule 4 in favour of the Applicants and deem the notice of appeal described in the first order sought in the Applicants' notice of appeal filed on 20th March, 1996, to have been served within time and as prayed in that order. The Applicants will of course, pay the Respondent's costs for this application in any event.

Dated and delivered at Nairobi this 26th day of July, 1996.

A.M. AKIWUMI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR