



**IN THE COURT OF APPEAL
AT NAIROBI**

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

CIVIL APPLICATION NO. NAI. 189 OF 1996

BETWEEN

BEATRICE NYAMBURA MUCHERU.....APPLICANT

AND

TERESIA GATHONI MUCHERU..... RESPONDENT

(Application for extension of time to file Notice and
Record of Appeal out of time from the Judgment of
the High Court of Kenya at Nairobi (Justice Aluoch)
dated 19th March, 1984

in

H.C.C.C. NO. 722 OF 1984 (O.S.)

R U L I N G

The application by the applicant is for extension of time to file her appeal which had been struck out only on 22.5.1996 by this court as being incompetent on the grounds that the record of appeal did not contain as mandatorily required by the rules of this Court, a certified copy of the decree of the judgment appealed against. It is true that the appeal that was struck out had been filed some twelve years ago, but as counsel for the applicant states, the failure to include the certified copy of the decree was a genuine mistake on his part. Indeed, it was a mistake that was not noticed by a bench of this court which heard submissions by both counsel for the parties when it heard the appeal but which they did not finish hearing only because one of the judges of the bench concerned had retired. Further, after making their submissions to that bench, counsel had on 1.11.1994 written a consent letter to the court that they wished the court to arrive at its judgment on the submissions so far made by them.

This as would be seen on the endorsement by the Senior Judge of this court on the consent letter, was refused and the parties were asked to appear and to conclude their submissions formally. Thus even at this stage, the incompetence of the appeal, had not been noticed by the very court itself and if the consent letter of counsel had been acted on, it is most likely that the incompetency of the appeal would have escaped unnoticed. Anyway, it was only over a year and a half later when the appeal was to be heard before a differently constituted bench of this court, that counsel then appearing for the appellant, the applicant herein, himself, and not counsel for the respondent, who upon realizing at that stage the incompetence of the appeal, had drawn the court's attention to it and which had led to the striking out of the appeal and properly with no order as to costs.

The present application for extension has been brought timeously. What was clearly a mistake on the part of the applicant's advocate in filing an incompetent appeal is one that ought not to be visited upon his client. For a long time until recently, when this court held in the definitive judgment in the case of Roads Springs (K) Ltd v Inamdar & Co.Ltd Civil Appeal No. 35 of 1988 (unreported), this court itself, had overlooked the strict provisions of r 85(1)(h) which requires mandatorily, the inclusion of a certified copy of a decree if an appeal is not to be rendered incompetent

I dare say that when such a mistake is made honestly by an advocate as was done in this case and some twelve years ago, it can be sufficient reason when the application is made timeously, for extending time to file an appeal as sought in the present application. And particularly so, where the appeal can be said, to have been almost completely heard.

The intended appeal also raises arguable points, but I think that what I have already observed to my mind, constitute sufficient reason for my exercising my discretion in favour of the applicant. The applicant shall file her notice of appeal and record of appeal within the next fourteen days. The respondent will naturally, have her costs of this application assessed at 2,000/= to be paid not later than 11.10.1996.

Dated and delivered this 28th day of September, 1996.

A. M. AKIWUMI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.