IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 236 OF 1992

BETWEEN

BABER ALIBHAI MAWJI …….....……APPELLANT

AND

SULTAN HASHAM LALJI & 2 OTHERS…….RESPONDENTS

(Reference to full bench against the decision of single judge in respect of an application for extension of time to file the memorandum and Record of Appeal in an intended appeal from a judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice Rauf) dated 6th June. 1998

in

H.C.C.C No. 2763 of 1982)

RULING OF THE COURT

On 6th June, 1988 Mr. Justice Rauf ordered the plaint in H.C.C.C No. 2763 of 1982 struck out . He also therefore dismissed the plaintiff's claim with costs.

M/s A.R. Kapila & Co then took over the conduct of the case on behalf of the present applicant (the plaintiff) and filed a notice of appeal on 14th June, 1998 (in time) and served a copy thereof on the intended respondents within time again.

Again within time M/s A.R. Kapila & Company applied for certified copy of the proceedings and certified copy of the Ruling of Rauf J. That was done within 30 days as followed by the proviso to rule 81 of the court of Appeal Rules (the Rules).

Although the letter bespeaking such copies was not copied (on the face of it) to Mr. Rustam Hira (then counsel for the defendants-present respondents a copy of it was actually served on Mr. Hira and Mr. Oraro for the plaintiff did not, in our view correctly, object to Mr. Nowrojee showing the copy of the letter confirming such service to us, Mr. Oraro reserved his position thereto stating that the first time that proof of such service was offered. Mr Nowrojee (who appeared for the applicant) explained the position by a statement from the bar which was in to the effect that the reverse side of that copy of the letter which contained Mr. Hira's acknowledgement was inadvertently not included in the photocopy annexed to the affidavit in support of the application made before a single Judge of this Court (Kwach, J.A).

The bone of contention before the learned single Judge as well as before us was the delay in filling of Civil Appeal No. 193 of 1991. Whilst Mr. Hira filed his appeal on or about 4th October, 1990 (emphasis ours) and served the record of appeal on M/s A.R Kapila & Company on 4th October, 1990 the applicant's counsel kept on inquiring why he had not been notified of the fact of proceedings and ruling being ready.

Putting it at the mildest way we can, we can but point out that since 4th October, 1990 the applicant's then advocates were on notice that whatever they needed to prepare and file a record of appeal was available.

At that stage instead of looking up Rule 85 of the Rules as amended in 1985 (emphasis ours) the advocates again sought certified copy of proceedings.

It would be proper, in our view, at this stage to point out that whilst knowing that Mr. Hira had been supplied with certified copies of the proceedings and the ruling of Rauf. J. M/s A.R Kapila & Company wrote to the Deputy Registrar of the High Court as follows: -

> "So far we have been supplied with a certified copy of the ruling but have not been supplied with a certified copy of the proceedings. Rustam Hira Esq, Advocate, has been supplied with a certified copy of the proceedings and the ruling and therefore the proceedings must be ready. We have paid for the certified copy of the proceedings and the ruling and we shall be grateful to have the certified copy of the proceedings to enable us to prepare the record of appeal."

This request was repeated by the said advocates letter of 5th March, 1991.

After the plaintiff withdrew instructions from M/s A.R. Kapila & Company Advocates he instructed M/s Kilonzo & Company who followed up the request yet again for certified copy of the proceedings.

The learned single judge was not impressed by the alleged lack of knowledge on the part of the plaintiff, of the need only of an uncertified copy of the proceedings as opposed to a certified copy of the proceedings. Whilst he used strong language (" it is inconceivable that a firm of the standing of A.R Kapila & Company Advocates, which is owned by some of the most able and experienced advocates in Kenya, would have been unaware of the amendment"), we would wish to put it in another way.

It is quite probable that M/s A.R Kapila & Company Advocates were not aware of the 1985 amendments until the time they were served with the record of appeal filed by Mr. Hira on 4th October , 1990. On that date or soon thereafter M/s A.R. Kapila & Company Advocates could have easily seen that the record of appeal did not require a certified copy of the proceedings or even the judgment or ruling. The only requirement for a certified copy left was that of the decree or order appealed against and we would venture to state that the difficulties created by legal notice No. 14 of 1984 (which brought in the requirement of certified copies of almost all documents needed for a record of appeal) were well known to counsel regularly appearing before this court and complaints in that regard led to amendment of rule 85(1) by legal notice No. 101 of 1985.

We would agree with what was stated in a passage in the speech of Lord Parker of Waddington in LONDON ASSOCIATION FOR THE PROTECTION OF TRADE VS. GREENLANDS LIMITED (1916) 2 AC 15, 38 and we quote:

> " My Lords, the irregularities which characterized the pleadings in the present case and the unusual course taken (apparently without objection from anyone) by the trial judge have in my opinion, considerably obscured the real issue. In some cases, no doubt, a waiver of technical points may be conductive to sustained justice being done between the parties. In others, again, it may be dangerous if only because the dividing line between technicality and substance is not always clearly defined. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may lead to disregard of the principle involved."

The rule requiring no certified copies of proceedings or judgment (or rather the removal of the word 'certified' in rule appeal filed bears the legend signed by Counsel: -

"Certified correct and prepared to accord with copies as Supplied by the High Court."

Equally the necessity for inclusion, in the record, of certified copy of the decree or order appealed against is based on the principle that the document gives this court the jurisdiction to hear the appeal.

Mr. Nowrojee for the applicant argued with conviction that the High Court registry overlooked informing counsel that copies bespoken were ready for collection and that that factor was amongst one of the factors which would have enabled the learned single judge to extend the time as sought. But is that really so? When the record of appeal filed by Mr. Hira was served on M/s A.R. Kapila & Company Advocates on 4th October, 1990 they were put on notice that proceedings and judgment copies (even certified) were ready.

At that stage and later what was done? The requests for supply of such copies were repeated instead of collecting the same. We see in this case, no impediment in the way of counsel being aware of the fact that such copies as are required were available for collecting rather than awaiting a letter stating

Appellant's solicitors a misunderstanding which, to anyone who was reading the rule (emphasis added) without having the authority in mind, might well have arisen. The period involved is a short one, it is only a matter of a few days and the appellant's solicitors within time, informed the respondent's solicitors by letter of there client's intention to appeal. This was done within the strict time. And the fact that the notice of appeal was not served within the strict time, was entirely due to a misunderstanding."

Yet again we point out that there is difference between misunderstanding and not reading a rule.

We think that the learned single judge was right when he said that ignorance cannot be equated to genuine mistakes or error o the part of a legal adviser. What happened here was not a mistaken view of law of procedure.

Mr. Nowrojee relied to a great extent on the ruling of this Court delivered on 30th June, 1995 **IN BANK FUR ARBEIT & WIRTSCHAFT AG VS. THE ATTORNEY GENERAL & TWO OTHERS** Civil Application No NAI 210 OF 1992 (unreported). The facts there are very different. The legal adviser of the applicant was stopped by the first respondent from acting for the applicant, a foreign bank (Australian), quite unaware of our procedures and until Mr. Nowrojee came to act for the applicant (the bank), it did not even know that a notice of appeal had to be filed within 14 days of the date of judgment or ruling. A bank established and carrying on business in a country which follows the continental system of law had to rely on advice of local counsel who was effectively stopped by the first respondent from acting for the bank.

Then Mr. Nowrojee relied on the issue of the matter of public importance of the appeal itself (or rather the issues to be canvassed in the appeal). Whilst a matter of gravest public importance has some bearing on the mind f a single judge or full bench when it comes to extension of time (but only as a less important factor) we ought in this case decline to take the merits of the main appeal into a account in accordance with the decisions in **PALATA INVESTIMENTS LTD VS BURT & SINFIELD LTD** (1985) I WLR 942, as followed by this court in **ATTORNEY GENERAL V THEURI** (1982-88) 1 K.A.R. 929.

The issue proposed to be raised as being of public importance was that of trusts relating to properties. This is matter between private individuals and is not a matter as such of public importance. As to when a court can or ought to imply a trust (although what was really pleading in a plaint in superior court amounts to an e express trust, not written) was settled as long as 1963 in **MARIE AYOUB & OTHERS VS STANDARD BANK OF SOUTH AFRICA & ANOTHER** (1963) E.A 619 where the privy council sitting on an appeal from this court's decision in Civil Appeal No. 33 of 1960 settled the circumstances under which a trust in respect of land can be applied. However we would make it clear that merits of the main appeal ought not be gone into. Hence the Law report in the Times of Monday 28th June, 1993

TINSLEY VS MILLIGAN relied upon by Mr. Nowrojee is not very relevant here.

The disputes between the parties arose in or about 1982. we are now in 1995. As correctly pointed out by the learned single judge legal business ought to be conducted more efficiently. We think that the learned single judge correctly relied on the passage at page 62 in **KETTEMAN VS HANSEL PROPERTIES LTD. (1988) 1 ALL E.R**.38. We need not set it out here.

Despite the fact that the learned single judge was not aware of the fact of copy of the letter seeking copies of proceedings and ruling was received by Mr. Hira we are of the view that he came to a correct conclusion.

On the other factors before him the learned single judge exercised his discretion judicially and we see no reason to interfere with the same and this reference to full bench is dismissed with costs.

Dated and delivered at Nairobi this 11th day of August, 1995.

A.M. AKIWUMI

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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

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

DEPUTY REGISTRAR