IN THE COURT OF APPEAL

AT NAKURU

(CORAM: SHAH J.A)

CIVIL APPLICATION NO. NAI 85 OF 1995

BETWEEN

BARCLAYS BANK OF KENYA LIMITED …….APPELLANT

AND

ELIJAH M. KUIRA……..……RESPONDENT

RULING

On 23rd February, 1995 Civil Appeal No. 141 of 1992 came up for hearing at Nakuru. It was struck out as being incompetent for having failed to include a certified copy of the decree appealed against. This was because the appeal was filed in contravention of Rule 85 (i)(h) of the Court of Appeal Rules.

The facts as referred to in the judgment of the superior court (Nakuru H.C.C.C. No. 227 of 1987) are briefly that towards the end of 1977 was applicant had granted a loan facility of K.shs.200,000/- to the respondent. In 1978 the applicant bank's Molo branch had granted further facilities to the respondent and the loans were consolidated; the respondent had deposited documents of title relating to his property known as Nakuru Municipality/Block 21/131.

In 1980, the applicant filed R.M.C.C. NO. 662 of 1980 (at Nakuru) against the respondent claiming a sum of shs. 14,942/70 bank charges etc. The applicant also filed Nakuru H.C.C.C. No. 218 of 1980 against respondent claiming a sum of shs.363,549/15 with costs and interests.

There were consent judgments entered in favour of the applicant.

At some stage, it appears, the amount due by the respondent to the applicant was disputed in regard to interest payable. The learned judge in the superior court came to the conclusion that the decrees in the said two case carried interest at 11% per annum and declined to let the applicant have, so to speak, two bites at the cherry, that is selling the property under the two decrees in the said two cases and also selling the same under foreclosure proceedings. That is, the learned judge said that as the applicant already had court orders in his favour to sell the property it (the applicant) could not invoke additionally section 74 of Registered Land Act.

The applicant had appealed against that judgment of the superior court delivered on 10th April 1991.

I keep in mind (and I must) the fact that the debt was incurred in 1977 and 1977. To-day we are in year 1995. It is 18 years now. The litigation between the parties has been going on since 1980, that is for over 15 years.

The error on part of Counsel in filing the struck out appeal lay in not having had a certified copy of the decree in the record of appeal. The amendment to the Rule 85(l)(h) was brought in 1985. But except for one year or so prior to the 1985 amendment, the requirement for a certified copy of the decree appealed against was a mandatory one. Legal notice number 14 of 1984 survived only for a little over one year in respect of rule 85 until legal Notice No. 101/85 changed the position.

The requirement for inclusion of a certified copy of the decree in the record of appeal was subsisting at all times. So Kiboro vs. Kenya Posts & Telecommunications (1974) E.A. 155. It was held therein that even a supplementary record of appeal cannot contain one of the basic documents required by rules. That is also the position to-day.

The rules being known, or ought to have been known, is one factor I cannot overlook. This court has held very recently in the case of Mawji vs. Lalji & Others Civil Appeal No. Nai 236 of 1992 (unreported) that ignorance of rules as opposed to misinterpreting on misunderstanding a substantial procedural or legal point is not excusable unless the delay is a very short one.

But what is the position here. The respondent has a decree in his favour in NKU H.C.C.C. No. 227 of 1987. The applicant has decrees in its favour in the other two cases referred to. I doubt if the applicant can ride two horses at one time. The applicant can still (I presume) excuse its decrees in NKU RMCC No. 662 of 1980 and NKU H.C.C.C. No. 218 of 1980. This is so unless the execution is time-barred.

The applicant has sworn an affidavit per a "bank officio" (who remains undesignated) and has not shown why the decree was not certified. That is not good enough.

The application itself (on its front page) is bare. What it is for? It does not say? however I dare say nothing much turn on this aspect.

It is a cardinal principle of Land Act all litigation ought to come to an end. It has been said on several occasions by the Court of Appeal. Gone are the leisurely days of litigation. Pressures on Courts have increased. Legal business must be carried on with proficiency and sufficient speed.

It is bad enough even for a large corporation to have a large claim hanging over its `head' and it is even worse for an individual litigation to have the anxiety (over 15 years) of a lawsuit and not knowing where it would reach and when it would end.

I decline to exercise my discretion to extend time to (if I may say so) refile the struck out appeal, although what is sought is filing of notice of appeal out of time.

The application is dismissed with costs.

Dated and delivered at Nakuru this 26th day of September, 1995.

A.B SHAH

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JUDGE OF APPEAL