IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi JA)

CIVIL APPLICATION NO NAI 8 OF 1989

SULEIMAN.....APPELLANT

VERSUS

KARASHA.....RESPONDENT

RULING

(In an intended appeal from the Ruling of the High Court at Nairobi, Tanui J dated 5th December 1988

in

Civil Case No 22 of 1988)

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March 17, 1989 **Gachuhi JA** delivered the following Ruling.

The applicant was a defendant in a High Court suit filed against him for specific performance of a contract of sale of land. It is alleged that he was served with summons to enter appearance but he claims that he was never served. Judgment was obtained against him in default of appearance by way of formal proof. His application to set aside the said *ex-parte* judgment was dismissed. The applicant wishes to appeal against that ruling.

From the record, the applicant has been overtaken by events. The ruling that he wishes to appeal against was delivered by Tanui J on 30th November, 1988. Subsequent to that, there were other rulings one of which was delivered by Mbaluto, J on 5th December, 1988 for eviction. These two orders became confusing to the applicant in that the application for extension of time to file the notice of the intended appeal was based on the order of 5th December, 1988 instead of that of 30th November, 1988.

The parties concluded their argument on the application dated 23rd January, 1989. It became apparent in the course of the argument that the parties were not consensus in their submission as both were basing their submissions on different orders. I called for both rulings to enable me to write the ruling.

Before writing the ruling, the applicant filed another application in the same application for amending the previous motion. This time, the order to be appealed against was the order made on 30th November, 1988. The application was opposed on the ground that the application ought to have been presented

separately and again it was too late.

I have to consider the latter application for amendment as to whether the amendment should be allowed. In the application for extension of time, it was argued that on the conclusion of the submission, ruling was reserved. The date of the ruling appeared in the daily cause list. The applicant states that he never received any notice to the effect that the ruling was to be delivered on 30th November, 1988.

The ruling was delivered in their absence and that they learnt of the date later when the application for eviction came up. It was then the time he filed the notice of the intended appeal only to learn later that the same had been filed out of time without the leave of the court contrary to the rules of the court. Mr Kowade has submitted that he pointed out to the applicant long before, that the ruling to be appealed against is of 30th November, 1988. As a result of this the application for amendment was resisted.

Under the Civil Procedure Rules, the parties can amend their pleadings with the leave of the court at any time before judgment. Such amendment would clearly set out the issues in dispute to enable the Court to arrive at a just decision. It does not matter if the hearing has been concluded but the Court has to consider the application for amendment and give effect to it as it may deem just. In *Cheleta Coffee Plantations Ltd v Eric Mehlsen* [1966] EA 203 the High Court refused to grant leave to the application for amendment to the pleading after the hearing of suit had been concluded and the trial judge was waiting to write judgment.(On appeal, it was held:

> "the amendment to the plaint asked for by the respondent would be granted since there was no agreement between counsel on the tonnage (not directly in issue) but merely an acceptance of a figure that was incorrect in the light of evidence and of the construction adopted by the Court of the words limiting the relevant period; the appellant was not prejudiced and no estoppel arose."

A similar situation arose in the *General Manager E.A.R & H.A v Thierstein* [1968] EA 354 where Harris J following the provisions of order 6 rule 18 of Civil Procedure (Revised) Rules 1948 allowed the amendment though hearing had been concluded. He allowed further submissions to be taken after the amendment.

On the basis of these two authorities, I can find no basis for resisting the granting of leave to amend the Notice of Motion to read that the ruling to be appealed against is that of 30th November, 1988 and not that of 5th December, 1988. The amendment is allowed. Costs occasioned by the amendment is allowed to the respondent.

Reverting to the motion for extension of time, the ruling was on 30th November, 1988. Notice of the intended appeal was filed on 22nd December, 1988. The notice ought to have been filed on 14th December, 1988. But the period 21st December to 6th January in any year should not be included in the computation of time for the amending, delivering or filing of any pleadings or the doing of any other act.

In that case, the notice of the intended appeal could have been taken as having been filed on 7th January, 1989. It has also been deponed in the applicant's affidavit that the month of December was full of celebration activities as the country was celebrating its 25 years of independence. It was difficult for the applicant to instruct his counsel to lodge the notice of the intended appeal. For these reasons, delay of six days was not inordinate. The court should exercise its discretion under rule 4 of the Court of Appeal Rules. On the other hand, the respondent argues that there is no point in allowing the application since the decree obtained has been executed. The transfer has been effected, the applicant has been evicted from the land and there is a charge on the property now created by the respondent.

I understand from the application itself that inspite of the present position the applicant wishes to appeal as a matter of principle since he was not served with the summons. He claims that he has good defence to the action.

I think that at this stage, it is not the duty of the Court to consider the merit or demerit of the appeal. The

question before the Court is whether the court should extend the time within which to lodge the notice of appeal. Whether the appeal will eventually be filed or what the outcome of it will be is not part of the present application.

It is therefore my view, having heard the arguments by both parties, considering the circumstances of the matter pertaining at the time the notice of the intended appeal was filed, there was no inordinate delay and because of the events at the time, such delay could be excused. It is for those reasons that I exercise my discretion and extend the time for filing the intended notice of appeal under rule 4 to 7th January 1989. Since it was not served pending the outcome of this application the said notice will be served on the respondent within 7 days from the date of this ruling. Cost of the application is awarded to the respondent.

Any party aggrieved by this ruling may apply to the Deputy Registrar within seven days of today to refer this ruling for determination by the full bench.

Dated and delivered at Nairobi this 17th day of March , 1989

J.M GACHUHI

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JUDGE OF APPEAL