

IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gachuhi JA)

CIVIL APPLICATION NO 135 OF 1989

CHUMO.....APPLICANT

VERSUS

KOECH.....RESPONDENT

RULING

(Application for extension of time in an intended appeal from a Judgment, decree of the High Court of Kenya at Nakuru (Masime, J) dated 24th April, 1987

in HCC No 228 of 1986)

September 26, 1989, **Gachuhi JA** delivered the following Ruling.

This is an application under rule 5 of the Court of Appeal Rules for the extension of time within which to file the record of appeal.

Judgement was entered on 27/4/87. Notice of appeal was filed on 8/5/87 and served on the respondent. The applicant claims that he instructed his advocate to file the appeal and kept on enquiring whether the appeal had been filed until he discovered that it had not. He then withdrew the instruction from him and instructed Mr Mutakha who had filed his application. Mr Mutakha states the necessary proceeding of the Court in order to file the record of appeal.

Mr Maraga opposes the application and states that there has been intervening court proceedings and the applicant must have been aware all along that the appeal had not been filed. When he was arrested on execution for costs, he asked for time to pay.

This may be so, because what goes on between the advocate and his client is not known outside that office. The facts remains as deponed in the applicant's affidavit that he has always been intending to appeal and the delay had been caused by his advocate. On the other hand it was open to the respondent to apply to strike out the notice of appeal. This was not done.

This Court has to consider the allegation for the delay and whether the same was due to his advocate. The applicant is incapable of filing the appeal himself and that is why he instructed an advocate to do so. The advocate has failed to do so. The delay is now slightly over 2 years which is not inordinate. Should the applicant be penalized for the mistake of his counsel? In *Pithon Waweru Maina v Thuku Mugiria* CA 27/82 (unreported) and in *Haji Ahmed Sheikh t/a Hasa Haulier Ltd v Highway Carriers Ltd*, CA 46/86 (unreported) and in *Shah V Mbogo and Another* [1967] EA 116 this Court held that a litigant should not be penalized for the mistake of his counsel.

Under rule 4, the Court has unfettered discretion to enlarge time but it has to be exercised judicially. From the submission before me, the delay in filing the record of the appeal, was not caused by the applicant himself but by his previous counsel. Under the circumstances, I exercise my discretion and allow this application. The applicant will file the record of appeal with 30 days from the date thereof.

The costs of this application will be costs in the appeal.

Dated and Delivered at Nakuru this 26th day of September, 1989

J.M GACHUHI

JUDGE OF APPEAL