IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: Platt Ag JA)

CIVIL APPLICATION NO 125 OF 1985

BETWEEN

NAIROBI HOME ECONOMICS TRAINING CENTRE ....APPLICANT

AND

AFRICAN HERITAGE LTD...RESPONDENT

RULING

March 28, 1988, **Platt Ag JA** delivered the following Ruling.

By motion on notice, the applicant, Nairobi Home Economics Training Centre, seeks an extension of time for the filing of an appeal. The respondent, African Heritage Ltd, opposes the motion. Mrs Khaminwa represented the applicant and Mr Fraser represented the respondent.

The formal facts are such that if they are reliable, Mr Fraser conceded that he would not oppose the motion. But he challenges the certificate of delay and that raises the interesting issue in the application.

Mr Gathuku explained in his affidavit supporting the motion, dated December 9, 1985, that on June 14, 1984 the High Court gave its ruling on an application for summary judgment, in which judgment was given for the then plaintiff African Heritage Ltd, as prayed in the plaint. On June 14, 1984, Mr Gathuku filed his notice of appeal in compliance with Rule 74 of the Court of Appeal Rules. Either, on that day or June 21, 1984 Mr Gathuku applied for copies of the proceedings and ruling for the purposes of the appeal. It is not disputed that both the notice of appeal and the request for copies of proceedings and ruling, were served on the advocates of the respondent in time, in compliance with the Rules. On this basis, the record of appeal should have been lodged within 60 days of June 14, 1984. It was not lodged until February 14, 1986. That came about because the registrar gave his certificate that there had been delay in preparing and delivering the certified copy of ruling and uncertified copy of proceedings from June 14, 1984 to December 5, 1985. That would mean that the 60 day period began to run from December 5, 1985 until February 4, 1986. But then Rule 3 of the Court of Appeal Rules allows the period from December 21 to January 6 to be deducted for the Christmas vacation. Therefore if the record was lodged on February 14, 1986 it would be lodged within time, because the period of delay could be excluded under Rules 81 and 3 of the Court of Appeal Rules. If these were the only matters at stake, then Mr Fraser says he would complain that the application was quite unnecessary. Mrs Khaminwa should just have lodged her appeal, supported by the certificate of delay.

But this is not all that is at stake. Somehow Mr Okwach, representing the respondent earlier on in these proceedings, obtained all the proceedings he needed on September 10, 1985. He personally checked the

papers and found that they were complete with the proceedings and ruling. Everything that was required for filing a record of appeal was there. Mr Okwach did not, it appears, see what papers Mrs Khaminwa received. But on the basis of what Mr Okwach had received, Mr Fraser made the point that on reading Rule 81 carefully, it will be seen that the time to be excluded is the time it took the court to prepare the papers, not the time it took Khaminwa & Khaminwa to pick them up. That of course is correct, if it took Khaminwa & Khaminwa from September 9, 1985 to December 5, 1985 to take delivery of the papers. As I shall relate presently Mrs Khaminwa put forward an answer to this challenge on the certificate.

Mr Fraser then developed several arguments. Looking at the certificate it was in error on its face. The record of appeal showed that there had been delivered to Khaminwa & Khaminwa, an uncertified copy of the ruling and a certified copy of the proceedings, not as the certificate said a certified copy of the ruling and uncertified copy of proceedings. That illustrated that something had gone wrong in preparing the certificate. In such cases, taking into account also Mr Okwach's experience, there ought to be a method of challenging the registrar's certificate incorporated into the Rules. There was no such method laid down in Rule 81 and that was unfair. On this aspect of Rule 81 I would have no objection, if Rule 81 was amended in this way, but that is not my province at present. Moreover, it seems to me that this court always has its inherent powers and could correct mistakes under the slip rule, or could send the certificate back for clarification. What this court cannot do, is simply to ignore the certificate. This court is bound to accept the certificate as *prima facie* correct, subject to amendment by the registrar and small corrections of obvious slips.

It was debated whether in this case the certificate should be sent back to the registrar with liberty to the parties to appear and represent their point of view. Mrs Khaminwa had no objection in principle to the certificate being sent back, but her case was that this would not provide the parties with any material benefit. She relied on Mr Gathuku's explanation of the steps that had taken place in her firm. If they were accepted, and they were not directly challenged by first hand knowledge by Mr Okwach, there would be no way to challenge the certificate. Mr Fraser it seemed, wanted the registrar's agreement that what Mr Gathuku said had occurred, had in fact taken place.

Mr Gathuku deponed that on April 17, 1985, he had received a notification that the proceedings applied for were ready. The notification was dated April 10, 1985. The fees was paid on April 17 and the proceedings were received by him. The copy of the record was incomplete and accordingly he wrote to the deputy registrar on May 28, 1985, pointing out that the record was incomplete. The letter attached to the affidavit, shows that the proceedings crucial to the decision on June 14, 1984, had been omitted.

There is no reason to disbelieve Mr Gathuku on this point. Mr Okwach noted that he had seen correspondence between the registrar and Khaminwa and Khaminwa, which further supports Mr Gathuku. Then on November 8, 1985 Mrs Mabel Keya, a clerk, received a further notification from the court dated September 9,1985. November 8, 1985 was the same date that the advocates for the respondent filed an application to discharge the orders staying execution, on the ground that the application had delayed the prosecution of the appeal. The fees were however paid and Mrs Mabel Keya, went to the Registry to collect the proceedings. But on November 28, 1985, only the ruling was received and not the arguments of counsel. On December 4, 1985, Mr Gathuku personally went to the Registry to have the complete record of the proceedings certified, and at 4.30 pm on that day the full proceedings were delivered. On that basis the certificate of delay would be correct.

Mrs Mabel Keya's affidavit of November 25, 1985, as far as it goes supports Mr Gathuku's contention that notice was received on November 8, 1985.

Some further support may be seen from the nature of the notices of September 9, 1985. One has the fee of Kshs 30 and the other the fee of Kshs 54. One was later altered before delivery.

Having read all the affidavits of Mr Okwach it does not appear to me that there is any real challenge on the facts. It seems that Khaminwa & Khaminwa had explained in other proceedings during the period of delay what had occurred. The difficulties of April were mentioned and also the receipt of the notification in November 1985.

In all the circumstances, I do not see any ground upon which the statements of fact by Mr Gathuku should be or could be challenged. In that case, there is no reason why the registrar should not have correctly certified the period of delay, even if the type of document is wrongly described. It follows that this not a case where this court should send back the certificate for clarification, as the *prima facie* correctness of the certificate is supported by Mr Gathuku's affidavit, and the general situation. If that is so then the application must succeed.

In answer to Mr Fraser's attack on the mode of exercising the discretion provided by Rule 4 of the Rules, it is my opinion that applications under Ords 9A or 9B of the Civil Procedure Rules to set aside an *ex parte* judgment, do not form as close a precedent for the exercise of the discretion to extend time as *Gatti v Shoosmith* [1939] 3 All ER 916 and the cases which follow. The first consideration is the reason for the delay, and if the delay is short and the explanation is acceptable, a party ought not to lose his constitutional right of appeal. The merits of the appeal are only crucial in special cases, since generally there is a reasonable question to be decided on an appeal. The provisions to appeal have been made statutorily.

Consequently, I do not think that *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 is of any help. The necessary control rests on the discretion of this court, as *Gatti v Shoosmith* indicates. But Mr Fraser will be interested in the debate in *Palala Investments Ltd v Burt and Sinfield Ltd* [1985] 1 WLR 942, where the continual struggle between rigid control and a more liberal exercise of discretion was once again fought out; of course, always in terms of serving the public interest.

The application is allowed, the record of appeal lodged on February 14, 1986 shall be deemed to be lodged within time. The supplementary record may be lodged as soon as possible, and the appeal shall proceed for hearing.

The costs of this application may perhaps need submissions from both sides, because of Mr Fraser's point that there is no need for an application to extend time if a certificate of delay has been obtained. I should therefore leave that decision open, while informing the parties of their right to refer this decision to the full Bench.

Dated and delivered at Nairobi this 28th day of March 28, 1988

H.G. PLATT

Ag. JUDGE OF APPEAL