IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI JJA)

CIVIL APPLICATIONS NOS NAI 7 & 166 OF 1986 (CONSOLIDATED)

OWINO GER …….....…….APPLICANT

VERSUS

MARMANET FOREST CO-OPERATIVE & CREDIT SOCIETY LTD…...RESPONDENT

(In an intended appeal from a ruling of the High Court at Nairobi,

Shields J)

RULING

Two motions are before the court, the one No 7 of 1987 seeks to gain extension of time, and the second No 166 of 1986 seeks to have the notice of appeal struck out. We decided to hear and determine the motion No 7 of 1987 first.

On May 30, 1986 the High Court gave a ruling, short but not so sweet, according to the applicant, to the effect that the relationship of advocate and client existed between the applicant and respondent. Upon that ruling being given, the High Court then adjourned the hearing of the originating summons before that court, to June 3, 1986. Further adjournments brought the case to June 13, and finally June 26, 1986. On the latter date, the High Court decided to stay the proceedings pending the hearing of the appeal, which had then been commenced by notice of appeal filed on

June 13, 1986. It is acknowledged that that notice was filed just in time. Unfortunately the notice of appeal was not served within 7 days in accordance with rule 76 of the Court of Appeal Rules.

Then a further mishap occurred in that the copies of proceedings and order were not applied for until July 4, 1986. That was too late to comply with rule 81, whereby, if the applicant wished to deduct the time taken for obtaining the proceedings and ruling, he must have applied within 30 days of the date of the decision against which it was desired to appeal, sending a copy to the respondent. The period ended on June 29, 1986.

The applicant asks for extension of time for service of the notice until January 14, 1987 when it was actually served. The applicant also asks for extension of time to lodge the record of appeal; what he calls “filing the appeal.”

The mistake as to service of the notice came to light when the applicant was preparing the record of

appeal. He applied for extension of time on October 30, 1986. That application was withdrawn as it was not in proper order. The present application has taken its place. Counsel for the applicant states clearly that all these problems arose out of his own mistakes. On the first leg of the application, his mistake was that he thought that the notice of appeal had to be signed by the Registrar of the High Court before it was served. On the second leg, he thought that the proceedings had continued until the stay had been granted pending appeal, and that therefore he was well within time when he applied for proceedings on July 4, 1986.

Looking back, counsel for the applicant carefully acknowledged that these were rather obvious mistakes when one reads the rules carefully, and Mr Muthoga pointed out with inexorable force that rule 76 provides that the notice of appeal shall be served on all persons directly affected by the appeal "before or within seven days after lodging the notice of appeal," or the end of the proceedings. Indeed Mr Muthoga castigated counsel for the applicant as having deliberately and calculatingly delayed this appeal. His firm had warned counsel for the applicant on July 2, 1986 that the notice had not been served. Fortunately, the proceedings before the High Court on June 26, 1986 had shown the respondent that there was a genuine notice of appeal filed; otherwise the stay of proceedings would not have been granted. The respondent then brought application No 166 of 1986 on October 17, 1986 to strike out the notice. In one sense the respondent was clearly aware of the appeal and it is one of the main aims of rule 76 to prevent the respondent from acting to his disadvantage because he is unaware that an appeal is being prosecuted (see *Palata Investments Ltd v Burt Sinfield Ltd* Times May 28, 1985). But the respondent would wish to be clearly acquainted with the notice in case it was not in proper form, and to allow him to carry out his part as provided by rule 78 of the rules. Fortunately on these formal matters the respondent in this application has not suffered. He knew early of the appeal; the notice was in proper form and it does not seem that there has been difficulty under rule 78.

The matter with which the respondent is most aggrieved is the delay. The ruling of the High Court was given in May 1986. The stay of proceedings in the High Court was granted in June 1986 on the basis that the appeal against this interlocutory appeal, would be prosecuted without delay. Any person taking an interlocutory appeal must certainly not delay because of the nature of that type of appeal, so as not to delay the hearing of the main trial. Indeed one should note that appeals on interlocutory rulings canform part of the grounds of appeal against the complete judgment. However, this appeal was taken, and from the papers before the court there is an important point of law in this dispute between these parties to be decided. It is necessary for the intending applicant to proceed with the dispatch.

Unfortunately mistakes have been made, which is regrettable. Having carefully examined the situation we are not satisfied that Mr Muthoga's charges are made out. We think that the mistakes are due to lack of experience in the procedures of this court. We are satisfied that there was no ulterior motive or bad faith, which might affect the exercise of the discretion which has been entrusted to this court in rule 4 of the rules.

Approaching the discretion to be considered in the above rule, Mr Muthoga submitted that while to err is human, the errors in this case could not be forgiven. Indeed clients should not rely on the mistakes of advocates. The reasons given must be adequate, the prejudice to the respondent considered, as well as the chances of the appeal succeeding. In this particular case, it would be an unproductive exercise, because a certified copy of the order to be appealled against had not yet been obtained, so that even if the application were allowed, a further striking out motion would have to be brought.

We detect a note of atavism in Mr Muthoga's address. True enough at one time, the discretion to extend time was exercised within strict boundaries, and mistakes of advocates and their clerks for whom they were responsible, were not matters which would attract the exercise of the discretion. Very strict rules were observed as to the quality of the reasons to be given for the extension of time. Mr Muthoga cited examples of decisions of this nature. But fortunately the tide changed originally with the decision in *Gatti v Shoosmith* [1939] 3 All ER 916, and taken in the same spirit was the amendment of rule 4 of this court's rules. It was wise to leave this court with an unfettered discretion to examine the quality of all the mistakes which may occur, whether by an advocate and his firm or a client himself. But even before the amendment it was foreshadowed by such important decisions as *Belinda Murai v Amos Wainaina,* Civil

Application No 9 of 1978 when an advocate's *bona fide* error on a point of law was held to be a mistake in the nature of a special reason. Again in *Cassam v Sachania,* Civil application No 1 of 1982 an advocate's wrong interpretation of a rule led to the exercise of the discretion. Other examples are *Peterson Mbogori & Another v Farhax T Aliwala* Mombasa Civil Application No 34 of 1983 and *Kisee Maweu v Liu Ranching & Farming Co-operative Society Ltd,* Civil Application No 2 of 1983. On the other hand when too many mistakes have been made, the court has not hesitated to decline to extend time; see *Stephen Muriithi Gitahi v Jesse Mugo Gitahi,* Civil Application No 51 of 1984 and the recent decision in *Kirpal Signh Sirha v Barclays Bank Ltd,* Civil Application No 115 of 1986.

It was in *Gitahi v Gitahi* (supra) that rule 76 had not been complied with. That was again a problem of confusion with the registry staff about the signing of the notice by the Deputy Registrar, so that the notice was not served in time. Kneller JA referred to *Cassam v Sachania* (supra) saying that as long as 1981 Madan, JA had pointed out the notice need not be signed before service. If Mr Muthoga is right about the words "before or within seven days" in rule 76 presumably it need not be date-stamped by the registry. Kneller JA foresaid in *Gitahi's* case that the notice would be most useful if date-stamped. But the matter is still left open. At any rate, the purpose of referring to these cases is that similar mistakes of misreading rule 76 have in the past been accepted as genuine mistakes. We agree with Mr Muthoga that this mistake should not be made, but we suppose that it cannot be forever forsworn.

There is no special hardship arising out of a decision to extend time to serve the notice. Accordingly we propose to extend time to January 4, 1987 and we deem service on that date to be good service within the time so extended.

The second leg of the application is concerned with applying for proceedings late. Once rule 81 has not been applied correctly time cannot be excluded under that rule. But the application can be made outside that rule. It is clear that the record was about to be made ready in October which may possibly have been timeous if the time taken for the obtaining of the proceedings had been excluded. It is not quite clear perhaps. It is plain that setting these blunders right has been costly in time lost. It is a pity that the applicant did not ask for an urgent hearing of his first application, because of the wording of the High Court's order on June 26, 1986. This court would have made time available to assist the High Court's very proper order. It is also a pity that the application itself was wrongly conceived. But there it is, and we have to consider both sides in this matter.

Mr Muthoga's point that this would be a useless exercise of discretion we leave open to a reading of rule 85(1) and (2) (A) of the rules. We consider it proper in this case to extend time for lodging the record of appeal on or before 21 days from today's date.

It goes without saying that as indulgence has been extended to the applicant, the applicant will pay the costs of this application.

It also follows that application No 166 has been overreached and abates. But the applicant will pay the costs occasioned and thrown away in the course of that applications as well.

Dated and Delivered this 18th day of February, 1987

J.O NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL