

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL NO 21 OF 1986

MWANZO SHIRANDULA.....APPELLANT

V

MARKO MUKHWESO.....RESPONDENT

JUDGMENT

This is an appeal against the order of the High Court given on October 18, 1985, whereby, the High Court refused the appellant's application for leave to appeal out of time. The application was made under section 79G of the Civil Procedure Act. That section requires an appeal to be lodged within 30 days, but there may be excluded such period which lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

But it is usual for the memorandum of appeal to be completed after getting a copy of the proceedings and judgment. The appellant says that he applied for these copies.

There is also power to admit an appeal out of time in the proviso to section 79G if the court is satisfied that the applicant had good and sufficient cause for not filing the appeal in time.

Two factors are of particular importance in this case. The record of the proceedings was lost. That meant that the lower court would find it difficult to make the certification. Secondly the appellant was put in jail for two months in execution of the decree. These matters were ignored by the High Court.

Mr Wafula complains that the affidavit of the appellant in support of the application did not have all the dates necessary to tell exactly what occurred. Quite so: but how could the appellant give all those details without the record? Secondly Mr Wafula did not raise this objection in his affidavit in reply.

The learned judge simply took note of the date of the judgment which was August 4, 1985. He took no account of what occurred thereafter. He took no account of the appellant's plea that the record had been lost. The judge did not decide the matter on the apparent merits of the appeal. It was simply the inordinate delay. That delay may well not have been the appellant's fault at all.

Because of the misdirection and no-directions, the judge did not exercise his direction judicially.

It follows that we must allow the appeal. Looking at the matter all around, the application should have been allowed. We allow the appellant 30 days to file his appeal based on the skeleton record and such other documents as he can obtain. The appellant will have the costs of this appeal and of the application in the lower courts.

March 27, 1987

NYARANGI, GACHUHI & APALOO JJ A