



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
KISUMU
(Gachuhi Ag JA (In Chambers))
CIVIL APPLICATION NO NAI 57 OF 1985

BETWEEN

SANGURA MABUSI APPLICANT

AND

MASINDE MABUSI RESPONDENT

(Application for extension of time to file an intended Appeal from an order of
the High Court of Kenya at Kakamega (Gicheru J) dated June 28, 1984

IN

High Court Civil Case No 39 of 1980

RULING

In this application Mr Sungura Mabusi the original defendant in Kakamega Civil Suit No 39 of 1980 is seeking an extension of time to file record of appeal out of time.

The background of this case is that the dispute between the parties was referred by consent, to arbitration chaired by the District Officer, Kimilili Division. The order for reference was made on April 23, 1981. The award was to be filed within 90 days.

The original file was not shown to the court and no reference was made as to the date when the reference was served on the District Officer, or whether the arbitration was to be filed within 90 days from the date of the order. The information could be relevant because the complaint by the applicant before the High Court was that the award was filed out of time without the order of the court extending time. However, it is on record that the dispute was arbitrated on February 10, 1982 and the award filed on March 23, 1982. Could the delay be accounted for!

Judgment in terms of the award was entered on July 28, 1982 which judgment was later set aside on October 29, 1982 on the grounds that the parties had not received notice of the filing of the award in court as provided by order XLV rule 10. The applicant's application for setting aside the arbitration, award was dismissed on August 18, 1983. The judge said, though the award was filed out of time, it was fair and just in the absence of any allegation under O XLV rule 15(1) of the Civil Procedure Rules. The applicant then made an application to set aside the said order of dismissal. The later application was also dismissed on

June 28, 1984.

The applicant made an application before this court for extension of time to file record of appeal out of time. The application is Nai 71 of 1984 (KMU 5/84). The application which is similar to Nai 71 of 1984.

There are two orders made by the High Court. For the applicant to obtain the order he is seeking, he must show that he has already file a valid Notice of Appeal against the particular order and the facts relied on are regarding the particular order. If no such notice is filed, then he should seek first for leave to file Notice of Appeal out of time. The present application is for extension of time under rule 4, to file the record of appeal out of time.

From the submission before me, the applicant stated that Notice of Appeal was filed on July 16, 1984. No copy was filed with this application or shown to the court during the hearing. The respondent submitted that the notice relates to the ruling made on June 28, 1984 while the grounds of the application as deponed in the applicant's affidavit are based on the ruling of August 18, 1983 to which no Notice of Appeal has been given.

This is so because the applicant in his affidavit – paragraph 13 states:

13. "That I was ignorant of the law and did not know that I was required to appeal against the ruling and order of the learned judge, of August 18, 1983 to the Honourable Court of Appeal."

Even without seeing the actual notice, I accept the undisputed sub-mission by the respondent that the Notice of Appeal filed relate to the later order made on June 28, 1984 in the application for setting aside the dismissal order made on August 18, 1983. The later application was not for review of the previous order. It has been submitted by the counsel for the respondent, which fact is also undisputed, that the judgment has not been entered in terms of the arbitration award. The order of August 18, 1983 was a refusal to set aside the arbitration award.

Mr Ayugi for the applicant submitted that it was an error of judgment by the previous advocates in failing to file the appeal. The applicant in paragraph 8 of his affidavit stated that he had instructed his advocate to file the appeal on the ruling of August 18, 1983 which was not done. Undoubtedly, the applicant had been represented and advised by several advocates. It is not his personal fault in failing to appeal but that of his advocates. It is not proper for the litigant to be penalised due to the mistake of his counsel.

The application No Nai 71 of 1984 as I understand from the file, was withdrawn so as to give the applicant chance to correct the situation. If one considers the proceedings leading to the order made on June 28, 1984, the agreement seems to have been that the order of August 18, 1983 could be set aside as it was given *ex parte*. But there was little chance of success on that ground. The attitude of the applicant now seems to be that instead of applying to the High Court to set aside the order of August 18, 1983, there should have been an appeal to this court against that order. No useful purpose would be served by the appeal against the order of June 28, 1983. Indeed the application was for extension of time to file the record of appeal based on facts which by implication an appeal against the ruling of August 18, 1983, which a notice of appeal has not been.

The applicant has not corrected the situation yet. Though the application relates to land about which the court's view is expressed in *John Kuria vs Kalen Waluilo* Civil Appeal No Nai 19 of 1983 (unreported), yet proper procedure to put the matter before the court must be complied with. The applicant has not given notice of appeal against the ruling of August 18, 1983 and so cannot rely on that ruling in asking for extension of time to file record of appeal on the ruling dated June 28, 1984 because in effect, as outlined in the affidavit in support, he is appealing against the ruling dated August 18, 1983.

Under the circumstances, this application is refused and dismissed accordingly. Any party aggrieved by this ruling can apply to the Deputy Registrar in writing to refer the matter to the full court.

Dated at Kisumu this day of February 11, 1986.

JM Gachuhi

Ag Judge of Appeal

I certify that this is a true copy of the original.

DEPUTY REGISTRAR