IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo JA)

CIVIL APPLICATION NO. 55 OF 1984

BETWEEN

GATU.....APPLICANT

AND

MURIUKI.....RESPONDENT

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

RULING

On February 12, 1981, the applicant as plaintiff, sued the respondent as defendant in the High Court at Nyeri for the refund of the sum of Shs 45,000 which he alleged he paid to the defendant as the purchase price of a piece or parcel of registered land at Gichugu. It was said the sale fell through and the plaintiff sued for a refund of the purchase price for a consideration that has wholly failed. The defendant resists the claim and in a statement of defence, denied receipt of any sum of money from the plaintiff. The defendant for his part, sought a dismissal of the plaint with costs. Thus, on the pleadings, the only issue joined between the parties was a simple one, namely, whether or not the plaintiff paid to the defendant the sum claimed as the purchase price of the land which sale fell through.

That issue was not determined on its merits. The action was dismissed because when it was called for hearing on June 9, 1983, neither the applicant nor his advocate was present. Accordingly, the court dismissed the suit for non appearance of the plaintiff. The available evidence suggests that both applicant and his advocate did not turn up because they mistook the hearing date. So upon learning of the dismissal, the applicant, by counsel, sought to have the order of dismissal set aside and to re-instate the suit for hearing on is merits.

This application could only properly be brought under OR 9(8) of the High Court Civil Procedure Rules. However, when the applicant brought the application, he erroneously put down as the authority on which he sought his relief OR XLIV Rule 122 and OR VI R 3. They were quite wrong. The learned judge seems to have laid great stress on the fact that although it was a competent application, the wrong procedural warrant was cited for it. He also said the applicant’s reason that they mistook the hearing date was false though the reason for the falsity is not clearly articulated in the ruling. What seems to have weighed heavily with the learned judge, was the fact that the applicant quoted the wrong order as the statutory authorization for his application to re-instate.

The applicant was understandably aggrieved at the judge's refusal to set the judgment of dismissal aside. So on June 27, 1984, he lodged a notice of appeal in the High Court Nyeri. Within sixty days of that date, he is obliged by rule 81 of this court's procedure rules to institute an appeal by lodging in the Nyeri registry a memorandum of appeal and fulfil the other conditions prescribed by rule 81 of the Court of Appeal Rules. This means the appeal should have been instituted on or by August 27, 1984. The applicant did not institute the appeal within the period prescribed by the rule.

According to the applicant, he did not institute the appeal within the prescribed time because although he applied for the record of appeal on June 21, 1984, he did not receive it until August 30, 1984. At that date, the period for instituting an appeal had ran out by 3 days. So on September 28, 1984, he brought this motion and prayed that this court exercise its power under rule 4 and grant leave for the appeal to be instituted out of time and that this court also give direction as to what time the memorandum and record of appeal should be filed.

The delay in lodging the appeal seems comparatively short, and the reason for the delay seems to me plausible. It is by no means a tardy application. Just about one month after the time limited for appeal elapsed, the applicant, filed this motion for extension of time in this court. Although I am not now concerned with the merits, I cannot shut my eyes to the fact that the main ground on which the learned judge declined to exercise his discretion to set aside the judgment of dismissal was that in bringing the motion to relist, the applicant, in error quoted the wrong order. That seems to me hardly a sound basis for dismissing the motion. Ideally, a court should not give a final judgment against a party unless he has an opportunity of being heard. In the application before the court below, no harm would result to the respondent, if he were compensated in costs. A consideration of all these matters inclined me to the view that this is a suitable matter to exercise my discretion in enlarging time to appeal. At the very least, the applicant has shown *prima facie*, that he has an arguable case for consideration by this court.

The respondent, however, resists this application on grounds which do not seem to me particularly weighty. It was said, the application was premature as the appellant was within time to appeal. It was also said, the applicant produced no material on which this court's discretion could be exercised in his favour. Finally, counsel for the respondent, submitted that although this motion was lodged over two years ago, the applicant took no steps to have it heard and that this long delay disentitled him to the exercise of this court's discretion.

The grounds of opposition urged by the respondent's counsel are easily answered. A consideration of the date of the judgment, notice of appeal and of the completion of the record, satisfied me that the applicant was out of time by three days. He could therefore not set on foot a competent appeal without enlargement of time by this court. As to the second ground, the very basis of the High Court's ruling leads me to think that the applicant has an arguable, if not a strong chance of having the ruling the court below overturned and that by itself satisfies me that he should not be shut out from prosecuting an appeal against the court below's ruling.

With regard to the third ground that the applicant was tardy in not having this motion heard for upwards of 2 years, I notice from the court file that the applicant has on a number of occasions sought the help of the registry of the court to have his motion heard. It did not prove convenient for the court faced with a backlog of many earlier similar applications. In those circumstances, it would not be right to penalise the applicant for a matter which he was in no position to prevent. That being the opinion I have formed on the various matters urged in opposition to this motion, I consider it just and convenient to grant this motion.

Accordingly, in exercise of the jurisdiction conferred on this court by rule 4 of the Court of Appeal Rules as amended by LN 14/84, leave is granted to the applicant to file a memorandum of appeal out of time. It is ordered that such memorandum and record of appeal be filed on or before November 26, 1986.

Costs of this application will abide the result of the appeal.

Orders accordingly.

Dated and delivered in Nairobi this 12th day of November 1986.

F.K.APALLO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISRAR