



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox, JA, Platt & Gachuhi, Ag JA)

CIVIL APPLICATION NO 29 OF 1984

(In the matter of an intended appeal)

BETWEEN

ESSO STANDARD KENYA LTDAPPELLANT

AND

ONESMUS KIHARA MWANGIRESPONDENT

(Application to strike out notice of an intended appeal from a ruling of the High Court of Kenya at Nairobi (Nyarangi, J) dated July 15, 1980 in

High Court Civil Suit 4046 of 1979)

JUDGMENT OF THE COURT

On July 15, 1980, almost five years ago, Mr Justice Nyarangi, as he then was, gave judgment in favour of the plaintiff company, Esso Standard Kenya Ltd (ESSO) in High Court Civil Suit 4046 of 1979.

This much is clear from the affidavit in support of the application to strike out the notice of appeal which was filed by the defendant (the present respondent) against Nyarangi, J's judgment on July 22, 1980.

However, no further information about the progress of the case is available because it is evident from counsel's submissions that the High Court file has been lost, and we are also informed that the decree, a vital document for the purpose of our jurisdiction, has not been drawn despite the contents of paragraph 10 of the supporting affidavit.

Certified copies of the proceedings and the judgment were, however, applied for by letter dated July 22, 1980, signed by Messrs Wachira & company, who then acted for the respondent. This was followed up by several reminders, copies of which are exhibited to the affidavit of Mr Githuka (who now represents the respondent) filed in response to the application to strike out.

There is also a recent letter to the Deputy Registrar which mentions the delay and renews the application for the certified copies.

Unfortunately the initial letter to the Registrar applying for the certified copies was not copied to the respondent to the intended appeal (that is ESSO) or their advocates as rule 81(2) requires. It is well settled by authority that the proviso to rule 81(1) (see Madan, JA, in Jaswantrai Aggarwal v Lekhraj Aggarwal, Civil Appeal 3 of 1981) cannot be invoked unless that is done. Hence, whatever the fate of the file, or the application to the Registrar for the certified copies, the delay by the court in providing them cannot avail the respondent/intended appellant. The subsequent letters were, it is true, copied to ESSO's advocates, but those were not sent within 30 days of the decision of Nyarangi, J as the proviso requires.

In these circumstances we have to determine the application, on its merits without any time being excluded by the registrar's certificate. The delay is gross, and no active steps appear to have been taken since April 19, 1982. Furthermore, nothing has been done to reconstitute the file as, we are informed, was sought in February, 1983, and the respondent has not even filed a concurrent application for an extension of time to institute the appeal.

It is true that the blame for the loss of the file cannot be attributed to the respondent, but he could at least have ensured that the decree was extracted and cooperated in the reconstruction of the file. No blame attached to Mr Githuka who only came on the scene in October, 1984.

Sympathetic as we are to the respondent we cannot condone a delay of this nature. In the circumstance we grant the application made on behalf of ESSO to strike out the notice of appeal filed on July 22, 1980.

That part of the application which is to set aside the stay of execution granted by Nyarangi, J, on July 23, 1980 is incompetent, but it matters not, because the stay was granted pending the disposal of the appeal which is hereby struck out.

The costs of this application will go to ESSO, in any event.

Dated at Nairobi this 5th day of June, 1985.

A R W HANCOX

JUDGE OF APPEAL

H G PLATT

AG JUDGE OF APPEAL

J M GACHUHI

AG JUDGE OF APPEAL

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

DEPUTY REGISTRAR