REPUBLIC OF KENYA

Kihuni v Gakunga

Court of Appeal, at Nairobi June 11, 1985

Platt Ag JA

(Application from the High Court at Nyeri, Patel J, High Court Civil Case No 110 of 1983)

June 11, 1985,

Platt Ag JA delivered the following Ruling.

The application before the court, dated August 23, 1984, was brought on behalf of Mr Irungu Kihuni by Mr Gatimu. The supporting affidavit, however, was sworn by Mr Patrick Kiragu Irungu. After an adjournment, Mr Irungu Kihuni was given written authority for his son Patrick to continue with the application. The reason for Mr Patrick's action was that his father was sick at the time when the application was made, and it was necessarily made as a matter of urgency, as the rest of this ruling will explain. At this stage it is sufficient to say that the preliminary objection, taken quite properly by Mr Wamae for the respondent, has been answered satisfactorily.

The application asks for an extension of time within which to lodge the appeal. The most important facts are as follows:-

The judgment in this matter was given on June 14, 1984. At that time Mr Irungu Kihuni was represented by an advocate, other than Mr Gatimu. On June 15, 1984, the previous advocate filed a notice of appeal and applied by a letter of request of the same date, for copies of judgment and proceedings. Unfortunately, the letter of request was not copied to the respondent as rule 81(2) of the Court of Appeal Rules visualizes may not happen. However, on July 27, 1984, the copies of judgment and proceedings were received in the previous advocate's office on July 29, 1984. On August 17, 1984 Mr Patrick Irungu collected the papers and instructed Mr Gatimu on August 20, 1984. Mr Gatimu acted quickly by bringing this application on August 23, 1984

It follows from these facts that by virtue of rule 81(1) of the Rules of this court, the appeal ought to have been lodged within 60 days of the date when the notice of appeal was lodged; that is to say by August 14, 1984 (or as provided by rule 3 of the Rules). The applicant was some 9 days late. Of course, it will be anticipated that Mr Gatimu was unable to answer fully for the actions of his predecessor, but his point is that that person could have filed the record of appeal in time and did not. Therefore he argues that the fault lies in the inactivity of the advocate, and not the client. Consequently under the new rule 4, the court should exercise its discretion and grant leave to lodge the record of appeal out of time.

Mr Wamae opposed the application upon two main grounds, the first being the views expressed by this court in Civil Appeal No 33 of 1983, and the second being that there is no explanation for the delay of the previous advocate.

On the first pointed, the short answer is that the earlier ruling was given on the basis of the old rule 4 before it was amended in 1984. The principles to be applied are very well set out in Gatti v Shoosmith (1939) 3 All ER 916, a case in the Court of Appeal in England, which was based on a similar rule to the present amended rule 4 in Kenya. The discretion of this court is free to be exercised judicially in accordance with the circumstances of each case. In that case there had been a delay of a few days caused by the mistake of a legal adviser, and the court, considering it a proper case for the exercise of discretion, granted leave. This decision has been recently approved in Palata Investments Ltd and Another v Burt & Sinfield Ltd set out in the Law report in the Times of May 28, 1985.

It is clear that, if the request for copies of proceedings is made within thirty days of the date of the decision, and the request is copied to the respondent; then such time taken to get the proceedings can be excluded when computing the time within which the appeal is to be instituted, as may be certified by the registrar of the superior court (see rule 81(1) and (2) of the rules). It is also clear, that the previous advocate had not moved in any way by August 14. He had not lodged the appeal. He had sent a copy of the letter of request for proceedings to the respondent, and so he could not avail himself of the exclusion rule from the computation of the period of sixty days. Thus by the time that Mr Patick Irungu took the proceedings on August 17, whatever the cause of delay, the advocate had not either lodged the appeal nor applied for extension of time; indeed he did not explain to his client nor Mr Gatimu what happened. Of course, he would have done that if it were not his fault. It can be assumed that the advocate was at fault in these circumstances.

That being so, I apply the approach of Lord Green (as he then was) in Gatti v Shoosmith. I find that as the delay is very small, and due to the inadvertence of the advocate, that the application should be allowed. The record of appeal will be lodged in 30 days and the respondents will have the costs of this application.