IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kneller & Hancox, JJA and Nyarangi, Ag JA) CIVIL APPLICATION NO NAI 34 OF 1983 (MSA 5/83)

(In the matter of an intended appeal) BETWEEN

PETERSON MBOGORI

KIPANGA MBOROGI ……..…….…….APPLICANTS

AND

FARHAT T RALIWALLA ……..……RESPONDENT

(Application for extension of time to file notice of appeal out of time in an intended appeal from a judgment of the High Court of Kenya at Mombasa (Bhandari, J) dated 18th February, 1983 In

Civil Case No 912 of 1982) _____

RULING OF THE COURT ON REFENCE TO FULL COURT

Peterson Mbogori and Kipanga Mbogori, the applicants, by their advocate Mr Mbogholi- Msagha, have referred to the full court their application,by motion on notice of July 19, 1983, for the time in which to lodge a notice of appeal to be extended, which was rejected by a single judge of the court (Chesoni, Ag JA) on July 26, 1983.

They wished to appeal from a decision of the High Court (Bhandari J) in Mombasa on February 18, 1983. They had 14 days within which to lodge their notice of appeal, so they had to take this step by March 6 that year.

The litigation between these parties, so far, begins with a plaint filed on September 27, 1982, by Farhat T Alliwalla, the respondent landlady, against the appellants whom she describes as 'Mombasa businessmen'. She owns a building at Mwembe Tayari and by that date, the applicants had unlawfully taken possession of its ground floor in which they ran a business called the Upcountry Bar and Restaurant. She asked for judgment against them jointly and severally, for vacant possession of it, damages and/or mesne profits of Shs 200 a day from August 7, 1982, until judgment, and thereafter until recovery of possession, costs and interests on those sums.

The applicants in their written statement of defence, drawn by Mr Adembesa, and filed on October 23, 1982, denied they were there unlawfully and maintained they were there, when their father started the business and they stayed on and took it over, when he died. The respondent landlady, by a motion on notice of December 15 the same year, asked for summary judgment under Rule 1, against the applicants. It was supported by an affidavit of November 8, 1982, from Amirali Gurji, a director of Pirbhai Jiwanjee &

Company which manages the respondent's building, saying the applicants were on the ground floor without the permission of the respondent, their father Daudi Mbogori was dead and no grant of probate or letters of administration to his estate had been made by anyone, so they had no valid defence to the suit.

The first applicant replied in an affidavit of February 8, 1983, claimed the respondent landlady was trying to evict them because she wanted to raise the rent from Shs 1,800 a month to Shs 6,000, and they refused to agree and suggested the matter should be referred to the appropriate Rent Restriction Tribunal.

The second applicant filed his affidavit on February 18 attesting that, the Bar and Restaurant were 'a subsidiary' of M'Thamba Ltd, of which the late Daudi Mbogori was the proprietor and a director and he and his fellow applicant, had been up-to-date with the rent. The respondent's advocate, Mr Anjarwalla, made his submissions on February, 11 and the application was stood over to February, 18 for Mr Adembesa's reply. Mr Adembesa did not, however, attend on February, 18 because his car broke down. The application was heard later and the respondent was successful in obtaining summary judgment against them in their absence.

Mr Adembesa filed an application the next day, February 19, to set aside that judgment which was withdrawn with no order as to costs on June 18, 1983, according to the High Court record.

When the applicants turned to Mr Mbogholi-Msagha on June 15, 1983, he advised them to lodge an appeal from the judgment of the High Court, and in order to do so, his clients had to get the time to file the notice of appeal extended. Both advocates before us appear to have overlooked the fact that, Mr Adembesa, before his instructions were withdrawn, had purpoted to file a Notice of Appeal in the court on the June 9. It is not, however, that notice of appeal which, as we understand the position, is the subject of this reference, but that filed by Mr Mbogholi-Msagha on July 14, (or maybe a fresh third one?).

Mr Mbogholi-Msagha, therefore, had to persuade Chesoni, Ag JA to exercise his discretion under Rule 4 of the Court of Appeal Rules by showing sufficient reason for the failure to file his notice of appeal within the period prescribed.

Mr Mbogholi-Msagha submitted the sufficient reason was that Mr Adembesa, made a mistake in applying to set aside the judgment rather than lodging a notice of appeal from it. The learned Judge of Appeal held that, the sufficient reasons generally must relate to the failure to take the particular procedural step: Musoke, JA in Nyagi v Munyiri [1975] EA 179; and Mr Adembesa's error did not constitute a sufficient reason, so he could not go on to consider other matters such as the absence of any prejudice to the respondent or the prospects or otherwise of success in the appeal; Abdul Aziz Ngoma v Mungai Mathayo and Another, [1976] KLR 61.

The merits of the proposed appeal were said to be impressive, because all along the lessee was not the applicants' father but this company, called M'Thamba Ltd (of which the first applicant, at any rate, was a director, according to it's March 5, 1982, applications for its licences), though none of this is mentioned in their written statement of defence. Lodging a notice of appeal is a simple, formal, inexpensive step to take. It was, in fact, done by Mr Adembesa on June 9, 1983, and by Mr Mbogholi-Msagha on July 12, 1983, according to the High Court record but the first is 92 days and the second 125 days out of time. So Mr Mbogholi-Msagha either had to persuade the learned judge of appeal to extend the time for validating the lodging of the first one (since it was not withdrawn or struck out) by, say 95 days or by 130 days, to validate the second one or to lodge a fresh one. Wambuzi, P, Law, V-P, and Mustafa, in the former Court of Appeal for East Africa at Mombasa, in Abdulaziz Ngoma v Mungai Mathayo & Another, [1976] KLR 61, 62 held that, an advocate's service of copies of the memorandum of appeal and the record of appeal out of time (about 30 days) on each respondent, is fatal unless it can show sufficient reason for the delay, which the advocate before it could not do. It is not clear from the judgment, what reasons, if any, were advanced by the advocate for his dilatoriness.

And yet, Madan and Wambuzi JJ A and Miller, Ag J A in this court in Nairobi, on March 8, 1979, in Belinda Murai & Others v Amos Wainaina Civil Application NAI 9 of 1978 (unreported) held, in effect, that an advocate's bona fide error on a point of law is a 'mistake' and constitutes sufficient reason for the

purposes of considering an application under Rule 4. The error there was, was the applicants' belief that a certified copy of a judgment of the High Court rather than of the formal decree or order, complied with Rule 85(1).

Madan, JA on December 15, 1981, held that the bona fide error of the applicants' advocate in wrongly interpreting a relevant rule of this court (and the temporary loss of the High Court file), induced him to extend the time for service of a notice of appeal Cassam v Sachania NAI Civil Application 1 of 1981. They were following dicta of Forbes V-P in Tharmal v Kumari, [1961] EA 679, 685 and Spry, V-P in Harman Singh v Mistry, [1971 EA 122, 126.

Here, in this reference, the mistake is that of Mr Adembesa who, when he discovered that his clients, the applicants, had had judgment entered against them summarily, when he or they had not been heard in reply to Mr Anjarwalla for the respondents, should have either

applied to have had it set aside under Order, IXB Rule 8 and not (Orders IXA Rule 10 and XXI Rule 22 (Cap 21) or lodged a notice of appeal from it to this court. A reference is not technically an appeal, but it has the nature of one and we are mindful of our duty not to interfere with the exercise of a discretion of the single judge of appeal from whom the reference is brought, unless it is clear that the judge erred or exercised his discretion on improper grounds and the onus is on the applicant to persuade the court of this Newbold, P in Meru Farmers Co-operative Union Ltd v Abdul Aziz Suleman(No 2), [1966] EA, 443.

In that case, as in this, the learned single judge made it clear that he would have exercised his discretion and granted the application, if he could have done so, but he held he could not do so.

The circumstances relating to this application, with great respect, constitute sufficient reason for an exercise of the discretion of the court. The prospects or otherwise of success in the proposed appeal at this juncture appear to be in favour of the applicants.

For these reasons, we allow this reference and recall the order of the learned acting Judge of Appeal and instead, grant an order in the terms that, the time within which the fresh notice of appeal should be lodged, be extended by 14 days from the date of the delivery of this ruling and we order that the costs of the application and the reference, are to be costs in the cause of the intended appeal, if such appeal is filed and determined and if no appeal is filed, that each party has liberty to apply, on notice to a single judge of this court, for an order as to these costs.

Delivered at Mombasa, this 30th day of January, 1984.

A A KNELLER

JUDGE OF APPEAL

A R W HANCOX

JUDGE OF APPEAL

J O NYARANGI

AG JUDGE OF APPEAL

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

DEPUTY REGISTRAR

so that 108 pieces of this glass were damaged for which the respondent claimed Shs 119,568/60.

The respondent served written notice containing the particulars of the claim to the appellant's Managing

Director, waited at least a month for a reply and or payment of that sum and in default filed its plaint for it on October 18 1982. All this complied with the provisions of section 87 of the Act (ibid).

Appearance was entered for the applicant by the Attorney-General on November 24 1982.

The respondent's advocates, Bryson, Inamdar & Bowyer, sent a letter on December 17 1982 asking the Attorney-General to file the appellant's defence before the end of the year. On January 12 1983 they wrote again saying that if the appellant's defence was not filed by January 23 they would apply for judgment against it in default. Still no defence was filed so the respondent made the application and judgment in default was entered for it against the application on February 3 1983.

The Attorney-General then filed the appellant's defence on March 10 1983. It admits most of the respondent's allegations in the plaint but denies 9 cases were not delivered in

sound or the same condition in which they were accepted. The respondent had also pleaded:

"6 it was the duty of the defendant [appellant] or the defendant expressly or impliedly contracted to take due and proper care of the said 30 cases and to deliver them to the plaintiff [respondent] at Nairobi in the same condition in which they were when railed." .with which the appellant did not specifically deal but appears to have tacitly admitted The Attorney-General applied by summons in chambers of May 5 1983 under O IXA rules 10 and 11 (Cap 21) to have the judgment set aside.

It was supported by the affidavit of a Nairobi State Counsel, Mr Ogoti Kenani, who explained the default was .due to his being on leave when the defence was due and finding this was still so when he returned but he buckled to and had it ready by March 4 but it took 6 days by post to reach the Mombasa High Court registry. It would seem, therefore that Mr Kenani was on holiday from November 24 1982 to March 4 1983 and someone in the Attorney's chambers marked the file for his attention though he was not there. Mr Kenani also attested in his affidavit to the appellant's written statement of defence and added that it was a good one.

The learned judge in his May 16 ruling said the delay and failure to file the defence in time was due to the negligence of a clerk in the Attorney-General's chambers from which he expected a higher standard than that of private practitioners. He did not condone this negligence and he dismissed the application. Order IXA rules 10 and 11 provide:

"10 Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

11 Applications under this Order shall be made by summons/" There were two grounds of appeal. First, the ruling of the learned judge was delivered without hearing either party to the application and, secondly, the proceedings were, therefore, against the rules of natural justice.

Today, Mr Nanji for the respondent concedes that the learned judge did not hear either party so faced with this serious error of law the appeal must be allowed with no order as to costs, the chamber summons filed on May 5 must be heard by another judge according to the usual correct rules of procedure and we so order.

Delivered at Mombasa this 30th day of January, 1984.

A A KNELLER

JUDGE OF APPEAL

www.kenyalawreports.or.ke

A R W HANCOX

JUDGE OF APPEAL

J O NYARANGI

AG JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR