



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox JA)

CIVIL APPLICATION NO. NAI 58 OF 1983

BETWEEN

KIMARU.....APPLICANT

AND

RUKUNGU.....RESPONDENT

(In an intended appeal from the High Court at Nairobi)

RULING

Judgment determining the question raised by the originating summons filed in this land case in the High Court on January 10, 1979, was delivered by Cockar J on December 7, 1982. The applicant desired to appeal against that judgment, and Mr Kariithi, acting for him, filed the notice of appeal on December 21, 1982, within the permitted time. Although that notice contained Mr Kimiti's (the respondent's advocate's) name, Mr Kariithi was unable to produce evidence of service thereof, as required by this Court's Rule, rule 76(1). Accordingly, I think this application to extend the time for filing the appeal, (meaning the institution of the appeal under rule 81(1), must include an extension of time to serve the notice of appeal on the respondent.

The institution of the appeal is, however, the matter with which this application is principally concerned. Unfortunately, there is no certificate of delay, which Mr Kariithi says, occurred because the proceedings, a copy of which he applied for on December 14, 1982, though ready in April, as shown by the letter exhibited to Mr Kimiti's affidavit, contained a number of mistakes which the judge had to correct. This can, indeed, be seen from the manuscript additions to the judgment.

Notwithstanding several enquiries by Mr Kariithi, the proceedings were not finally ready until October 16, 1983. As Mr Kimiti pointed out, even then the applicant did not file this application for nearly a month, added to which there was the unexplained delay, (in filing the application for extension of time) since April. Mr Kimiti says that the laxity on the part of the applicant has been such that I should not extend the court's indulgence under rule 4, as it now is.

As no copy of the application for the proceedings was sent to the respondent or his advocate, the applicant cannot, in any event, under the express terms of rule 81(2), rely on the proviso to sub-rule (1) of the rule. The certificate, if given, would be to no avail. Thus, he is thrown back on the discretion under rule 4, which Mr Kariithi says I should exercise in his favour, and consider the substance of the case and not mere technicalities.

I am far from convinced this is a technical matter. I think Mr Kimiti has every right to criticize the applicant's apparent lack of enthusiasm, and demonstrable lack of industry, in prosecuting the appeal. The fact remains, however, that the courts are unwilling to deprive a litigant of his right to be heard on an appeal, even though he has had a full, and, I may add, a patient, hearing in the High Court. Moreover, it is evident that there has been delay in the compilation of the High Court record, and that Mr Kariithi, who practices far from Nairobi, has had to journey in to make enquiries.

This is a borderline case, but, in all the circumstances, I am prepared to extend indulgence on both counts. But, I would again emphasise that intending appellants who fail to serve their notice of appeal, or fail to send a copy of their request for the certified proceedings, on or to the other side, do so at their peril. I repeat that which Madan JA said in *Taracisio Githaiga Ruthibo v Mbuthia Nyingi*, Civil Appeal 21 of 1982, and which the court repeated in *Roboi Holdings v Kantilal Chandulal Shah* Civil Appeal 50 of 1982, in this respect. Moreover, the nature of the case should always be outlined in accordance with the decision by this court's predecessor in *Bhatt v Tejwant Singh* [1962] EA, 497, setting out the following passage from Sir Owen Corrie JA's judgment in *Shah v Jamnadass* [1950] EA 838, at p 840, as follows:

"Finally it is objected that the nature of the case which gives rise to the application should have been stated. This is, in my view, the most substantial ground of objection. The object of including r 9 in the rules of court is to ensure that the strict enforcement of the limitations of time for filing documents prescribed by the rules shall not result in a manifest denial of justice. It is thus essential, in my view, that an applicant for an extension of time under r 9, should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the court to determine whether or not a refusal of the application would appear to cause injustice."

In Bhatt's case the court said:

"The rule laid down in the passage above quoted from *Shah v Jamnadass* (1), is a general but none the less salutary one, and advocates would be well advised to comply with it in all cases, both for the full information of the court and because failure to observe it, may well result in their application being refused."

This requirement was repeated by Kneller JA in *Municipal Council of Kitale v Nathan Fedha*, Civil Appeal 7 of 1983, at page 5 of his judgment.

In the result, I grant leave to serve the notice of appeal out of time and direct that it shall be done by April 2, 1984. I also grant leave to institute the appeal out of time and direct that that shall be done by April 9, 1984. In default of any of these conditions this application shall stand dismissed. I ask that the Registrar consider bringing my above remarks to the attention of the Law Society for the assistance of practitioners.

Dated and delivered at Nairobi this 30th day of March 30, 1984.

A.R.W HANCOX

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR