IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox JA)

CIVIL APPLICATION NO NAI 27 OF 1984

BETWEEN

OCHIENG……..APPLICANT

AND

RANMAL MERAG LTD.....….....……RESPONDENT

JUDGMENT

The application for that which is described in the notice of motion healed as being under rule 42 of this Court's Rules (cap 9) for leave to file the intended appeal out of time. I take this to refer to the institution of the appeal under rule 81(1), that the application is made under rule 4, as it now stands, and that the reference to the general enabling rule as to the manner of bringing the application before the court is surplusage. In all applications the substantive rule providing for the exercise of the power sought should appear in the heading of the Notice of Motion.

Mr Omondo, who appears for the applicant, has outlined the history of the appeal since the decision of Schofield J (against which the appeal is intended) on November 2, 1983, whereby he dismissed an application under order XXI rule 78 of the Civil Procedure Rules (cap 21) to set aside the proposed sale of the applicant's property at Bukhayo/Mundika/1525, which had been sold pursuant to a court order of July 15, 1983. The action was originally for the amount of a dishonoured cheque for Kshs 99,192 and the decree ordering the applicant to pay this sum to the respondent company, plus interest and costs, was issued as far back as September 9, 1980. The action was undefended and the judgment was given in default of appearance.

Mr Omondo stated that the intended appeal had been struck out by order of the court on June 22, on a number of technical grounds which included the condition of the record and the institution of the appeal out of time. He therefore filed a fresh application to file the appeal out of time, because of course the striking out of an appeal does not amount to a dismissal: see the ruling of Law JA in *Belinda Murai & Others v Amos Wainain*a Civil Application NAI 9 of 1978 (later upheld on a reference to the full court) where he stated:

> "This Court has jurisdiction to entertain an application for an extension of time to enable an appeal to be reinstated which has been struck out and not dismissed (as was the case here), see *Ngoni-Matengo Co-operative Marketing Union Limited v Alimohamed Osman* [1959] EA 577."

Accordingly there is no doubt that there is jurisdiction to entertain this application not withstanding the order of striking out, of which unfortunately no copy is available here. I have however, with the consent

of both counsel, used the record of the appeal which has been struck out for reference purposes only.

Mr Omondo eventually agreed that the inclusion of Schofield J's decision of January 26, 1984, whereby he refused to accede to that which was stated to be an application for a stay of execution, (which was filed 26 days after the first decision, on November 28, 1983) as part of the decision appealed against was not in his client's interests at this stage, if for no other reason than that (as Mr Raichura on behalf of the respondent points out in his affidavit of November 29, 1984), there has been no notice of appeal lodged against that decision. A valid notice of appeal was, however, lodged against the earlier decision on November 7, 1983 and Mr Raichura agreed that a copy of that had been served on his firm. However, although an order of the High Court refusing a stay of execution is appealable, with leave, under order XLII rule 1(2), it is more usual to file a fresh application to this court for a stay either under order XLI rule 4(1) or under rule LII(b) of this Court's Rules (cap 9). This, indeed was done in this case and Mr Omondo informed me that it had been withdrawn at around the same time as the order of striking out the appeal.

Mr Omondo put in the forefront of his submissions his contention that the chances of success in the appeal were very high, because the court broker who carried out the sale, which was unsuccessfully sought to be set aside, did so outside his area of operation and, as the applicant stated in his supporting affidavit, purported to transfer the powers under his court broker's licence to another firm by procuring them to execute the court warrant. Moreover, the first purported sale of the property was carried out before his client's valuation was ready, and was set aside on terms. The second sale, presumably the one in July, 1983, was after the valuation report had been prepared valuing the property at Kshs 1.2 million, a report which Mr Raichura criticized as unrealistic. Mr Omondo urged me to grant the orders so that the appeal, which had been struck out due to technicalities, should be heard on its merits and accordingly, that justice would be done.

In a supplementary affidavit filed on November 29, 1984, which Mr Raichura rightly stated was done without leave, as required by rule 43(2), Mr Omondo stated that he had encountered difficulties in obtaining copies of the proceedings from the court, and reiterated that the appeal had overwhelming chances of success on the merits. Despite the objection I propose to consider this new affidavit along with all the other material before me.

As Mr Raichura stated, however, the affidavit supporting the application does not give any satisfactory reason for the delay in instituting the appeal against Schofield J's decision. He agreed that the relevant rule had recently been modified, but even so, he said, some explanation of the delay was due. He traced the history of that which he said were delaying tactics on behalf of the applicant, and in particular that he had failed to comply with court orders requiring the deposit of the rents from the property in a suitable account. He referred me to various passages in the record of the appeal which has been struck out in support of his contention, showing that the applicant, despite several opportunities, had not found another purchaser for the property, for which purpose he had consented to an adjournment of the hearing on May 4, 1983, and that there had been no response to a subsequent letter to the applicant urging him to find a buyer at a higher price. Furthermore, Mr Raichura said, what was the position of the purchaser of the property who had bought it in good faith at the auction? Was he not a person directly affected by the appeal within the meaning of rule 76(1), and should thus have been served with a copy of the notice of appeal and with this application? Finally, if contrary to his submissions, the application is granted it should only be done on terms which include the deposit of the decretal sum, originally Kshs 110,954 but now well in excess of Kshs 150,000.

In *Taracisio Githaiga Ruthibo v Mbuthia Nyingi*, Civil Appeal 21 of 1982 this court held that a judgment-debtor whose property was the subject matter of the attachment was a person directly affected by the appeal and should, accordingly, have been served with the notice of appeal. In the instant case, if the sale is set aside on a successful appeal, the purchaser of Bukhayo/Mundika/1525 would undoubtedly be affected to a considerable degree, although he was not a party to the original proceedings. In my view he is a person directly affected by the intended appeal and should have been served with the notice of appeal and with this application.

I now propose to consider the exercise of my discretion under rule 4. True sufficient reason is no longer required to be shown, but even so I agree with Mr Raichura that there should be some explanation for the delay. The notice of appeal having been lodged on November 7, the appeal should, in the absence of any extension, have been instituted by January 6, 1984, unless of course there is in existence a certificate by the Registrar of the High Court under the proviso to rule 81(1). But apart from a reference to the delay in paragraph 3 of Mr Omondo's latest affidavit, which concludes:

> "as per the certificate of registration"

there is nothing before me to indicate that any period should be excluded under the proviso from the computation of the sixty day period under the sub-rule.

If I take the earliest possible date of the institution of the appeal, namely, the filing of the record which was struck out, which was on May 18, 1984, the institution of the appeal is still four and a half months outside the time permitted. If, however, the period is taken until the filing of this application, the excess period is almost six months.

After much hesitation I have reached the conclusion that there is force in Mr Omondo's submission that there has, as yet, been no hearing of the appeal on the merits, even though the order of striking out is the fault of the applicant and his counsel for not getting the record straight and lodged in due time. At the same time, it is evident that there have been delaying tactics, and that court orders have not been complied with.

In all the circumstances of the case, I propose to extend the time for instituting the appeal until 28 days from today, that is to say January 7, 1985, but on the following terms, namely that the applicant shall, before that date, render to the respondent certified true accounts of all the monies he or any person on his behalf has received by way of rents in respect of the property at Bukhayo/Mundika/1525, since the court order requiring him to deposit the same, and will deposit that sum in court by the said date. The applicant must also pay the costs of this application within twenty-eight days of the taxation thereof. Finally he must serve a copy of the notice of appeal, and of this application, on the purchaser of the property, also by January 7, 1985.

In default of compliance with any of these conditions this application shall stand dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 10th day of December, 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