IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Platt Ag JA)

CIVIL APPEAL NO 7 OF 1983

BETWEEN

MUNICIPAL COUNCIL OF KITALE …….……………. APPELANT

AND

NATHAN FEDHA …………………….....…………..RESPONDENT

(Appeal from the judgement of the High Court of Kenya at Eldoret (Mbaya, J) dated December 1, 1982 in Civil Suit 106 0f 1981

RULING

There are three applications before this court (two by the Municipal Council of Kitale, the appellant, and one by Nathan Fedha, the respondent) which have been consolidated and I will deal with them in chronological order.

First, the appellant's motion on notice of February 10, 1983 expressed to be brought under rules 42(1), 44 and 1(3) for leave to have a copy of the decree of the High Court included in the record of appeal filed on February 3, 1983 because it was not possible to obtain it before that date for there was a delay in receiving a copy of the proceedings and judgment.

Rule 42(1) sets out the form for such application to this court and it has been faithfully followed.

Rule 44 deals with applications to this court for leave to amend one so it is a mistake and it is rule 4 that should have been cited.

Rule 4 reads as follows:

> "The Court may on such terms as it thinks just by order extend time limited by these Rules or by any decision of the Court or superior court for the doing of any act authorised or required by these Rules, whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to such time as so extended."

Rule 1(3) is this:

> "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Judgment in the High Court in this matter was delivered on December 1 and notice of appeal was lodged on December 2, 1982, which is well within the period of 14 days of the date of the decision against which it's desired to appeal. Rule 74(2).

The appellant applied in writing on December 29 to the deputy registrar of that court for a certified copy of the proceedings and judgement and copied its letter to the advocate for the respondent. The appellant's advocate received the copy on January 28, 1983.

He filed the record of appeal on February 2, 1983 without a copy of the decree though he had extracted it on February 1 so he took it from Kitale to the deputy registrar at Eldoret on Friday February 4 who signed it and handed it back to the appellant's advocate the same day.

The appellant's advocate kept no note of the judgement when it was delivered and did not check it in the manuscript or typescript in the registry at Eldoret. Instead, he waited for a certified copy of it before he extracted and drafted the decree. He practices in Kitale and the file was at Eldoret so it is understandable that he should have waited for the copy of the judgement.

If he had not filed the record on February 2 but waited a little he could have slipped into it a copy of the decree and filed it on or about, say, Monday February 7 and, then, because the twenty one days taken by the Eldoret High Court registry to prepare a copy of the proceedings is to be excluded in the computation of the time taken to file the complete record (see the proviso to rule 81(1) and also rule 81(2) the appellant would have been in time with the complete record.

He admits this defect in the record was due to his oversight. Normally this does not constitute 'sufficient reason' for applying rule 4. *Commercial Bank of Africa Limited v General Motors Kenya Limited,* Civil Appeal 45 of 1981.

Once the record was filed, however, the extra twenty one days were extinguished either then or on February 23 and because it was a document he should have had in the record in the first place, the omission cannot be cured by filing it in a supplementary record. *Kiboro v Posts & Telecom Corporation* [1974] EA 155.

He has, therefore, not explained satisfactorily the delay in getting a copy of the decree signed, filed and served and he has not established "sufficient reason" for extending the time for filing and serving a copy of the decree. He has not surmounted the first hurdle in such an application. *Abdul Aziz Ngoma v Mungai Mathayo and Another* [1976] KLR 61, 62 (CA-K).

This is not a case where the appellant has exercised all due diligence but could not lodge a complete record in the time because the High Court did not supply him with the necessary copies needed to complete it in time, which is a very special class of case. *Bhatt v Tejwant Singh* [1962] EA 497 (CA-K)

The second hurdle is this. A party who wants time extended:

> "… should support his application by a sufficient statement of the nature of the judgement and of his reasons desiring to appeal against it to enable the court to determine whether or not a refusal of the application would appear to cause an injustice.

Sir Owen Corrie Ag JA in *Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd* [1959] EA 838, 840 (CA-K). The appellant's advocate has not attempted to do this.

The upshot is that the appellant's application fails and should be dismissed with costs.

The second one is that of the respondent who applied to this court by motion on notice filed on March 8, 1983 under rules 42 (1) and 80 for the notice of appeal filed by the appellant in this court on December 2, 1982 and its record of appeal filed on February 2, 1983 to be struck out with costs because –

1) The notice of appeal was not served on him or his advocate within time;
2) it does not state the address of the appellant for service;
3) proof of its service on the respondent is missing;
4) a copy of the decree or order of the High Court is missing from the record of appeal.

Rule 42 (1) has already been set out in this order and rule 80 provides that:

> "A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

The appellant, it is true, was required to serve a copy of the notice of appeal on the respondent before or within seven days of lodging it. Rule 76(1) seven days from December 2 to December 10 and the respondent was served with it on December 14 so the appellant was three days out of time in doing this.

The delay has been satisfactorily accounted for by the appellant's advocate in his affidavit in reply of March 18, 1983. An independent or private process server failed to find his respondent's advocate in his office in Kitale on December 6, 1982. He does not say no one else was in it that day or on other succeeding days. The deponent was away in Nairobi from December 8 to December 11, a Saturday, and the next two days were public holidays so he discovered the process-server's dilatoriness too late.

Again, the absence of the outline of the judgement and grounds for appealing against it means the court cannot determine whether or not a refusal to extend the time for serving the notice of appeal would seem to be unjust and the second motion should succeed on this point.

The notice of appeal does not have details of the address of the appellant or its advocate rule 74(3) but the respondent, who was the former Town Clerk of Kitale, and his advocate, who has his office in the same town, know where to find the appellant and its advocate, who also practices in the same place and was its advocate in the trial. There is no merit in this objection.

These addresses should be in the record of appeal rule 85(1)(b) and so they are.

The record of appeal does not contain the certificate of delay but there is no rule that specifically requires this, though rule 85(1)(k) impliedly does so. It was not paid for until December 18 because the deputy registrar did not bill the advocate of the appellant for it until then. This does not affect the date of the institution of the appeal because it is not the same as the prescribed fee for doing so. Rule 81(1) (c).

The appellant had another seven days after lodging the memorandum and record of appeal in the registry which was done on February 2, 1983 in which to serve a copy of each on the respondent rule 87(1) and he did this on February 8, so he did it in time.

The record should have a statement in it proving service of appeal on the respondent, according to rule 85(1) (b), and this is missing, but the advocate of the respondent in his affidavit of March 3, 1983 in support of the motion swears he was served with it on December 14, 1982.

None of those objections in the application of the respondent should have persuaded this court to strike out the notice of appeal or the record of appeal.

There is, however, the last point in it which must also succeed, namely, the record does not contain a copy of the decree or order of the High Court rule 85(1)(h) with which I have already dealt. So the application of the respondent to strike out the appeal ought to succeed.

The third, and last in time, application, also by motion on notice, of March 18, 1983 of the appellant was for the time in which to serve its notice of appeal on the respondent to be extended. I have already said that the notice of appeal was not served on the respondent in time, the delay was satisfactorily explained

but the material on which the court must exercise its discretion to extend the time for doing this was missing so this application would fail.

The result of all this, in my view, should be, briefly,

1) the appellant's motion on notice of February 10, 1983 is refused with costs;
2) this respondent's motion on notice filed on March 8, 1983 is allowed with costs;
3) the appellant's motion on notice of March 8, 1983 is rejected with costs; and
4) the notice and record of appeal are struck out with cost. Hancox JA agrees there will be orders accordingly.

Hancox JA. I have had the advantage of reading in draft the ruling of Kneller JA. I agree that the appellants' two notices of February 10 and March 18, 1983 should be dismissed and that the respondent's notice of motion to strike out the appeal filed on March 8 should succeed.

In my view, if a respondent has no *locus standi* to apply to strike out by motion rule 80, because he has not been served with a copy of the notice of appeal, then he can do so under rule 42, as was stated recently in *Taracisio Githaiga Ruithibo v Mbuthia Nyingi*, Civil Appeal No 21 of 1982. I accordingly agree with the orders proposed by Kneller JA and with the orders in relation to costs proposed by him.

Platt Ag JA. At the hearing of the appeal, three motions were argued as preliminary matters, affecting the jurisdiction of the court.

The first motion was brought by the intending appellant, and was filed on February 10, 1983. It prays that the "applicant be given leave to have the decree of the High Court at Eldoret in Civil Case No 106 of 1981 included and form part of the record of appeal."

The third motion filed on March 18, 1983 by the applicant prays that "the time for serving notice of appeal (already served out of time) be extended from the required seven (7) days to fifteen (15) days."

The second motion filed on March 8, 1983 links up with both the first and third motions set out above. The respondent prays that:

"a) the notice of appeal filed in court on December 2, 1982 be struck out;
b) that the appeal filed on February 2, 1983 be struck out."

The grounds given in these orders are *inter alia* that the notice of appeal was not served within the prescribed time. It is clear from the third motion filed on March 18, 1983 that the notice of appeal was admittedly served late. On the other hand, the record of appeal was admittedly not properly filed, because, as the first motion explains, it was filed without a copy of the decree of the High Court being included in the record of appeal.

The court heard argument on all three motions but it is not necessary to answer more than the first.

In the first application, it is clear that the record of appeal is defective in a manner which renders the appeal incompetent. In *Kiboro v Posts & Telecom Corporation* [1974] EA 155 the same omission occurred. It was held that the decree could not be added to the record nor even by way of supplementary record because a supplementary record cannot comprise documents, which ought to be included in the original record of appeal, after the time prescribed has ended. All that can be done, is to apply under rule 4 of the rules of this court to extend the time to file the record of appeal afresh. That has not been done in the first motion and therefore the application must be dismissed, because it is a mandatory requirement under rule 85(1) of the rules of this court, to include a copy of the decree. This was also decided in *Kamau v Kamau* Civil Appeal No 49 of 1982, which was referred to in argument.

It follows what the appeal is incompetent and must be struck out.

In that case it would serve no useful purpose to deal with third motion and its corresponding part of the second motion.

Dated and delivered at Nairobi this 23rd day of November, 1983.

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

H.G PLATT

………………………

Ag JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR