



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Miller, Potter JJA & Simpson Ag JA)

CIVIL APPEAL (APPLICATION) NO. 23 OF 1980

BETWEEN

ADERA.....APPELLANT

AND

MACHINERY SERVICES.....RESPONDENT

JUDGMENT

We dismissed this application in this appeal for an extension of time within which to serve the appeal documents on the respondent, with costs at Kisumu on December 5, 1980. We now give our reasons for doing so. The applicants' suit against the respondent and another for the return of a Lister diesel engine and other relief was dismissed by Cotran J on April, 1980. Notice of appeal was lodged on April 12 and application was made for a copy of the proceedings in the High Court on April 14. The last day for lodging the memorandum and record of appeal under Rule 81 was June 11. Mr Ajuang', who by then had become the applicants' advocate, lodged a memorandum and record of appeal at the High Court Registry at Kisumu. The record lodged by Mr Ajuang' included a copy of a draft decree which he presumed had been approved by his predecessor as advocate to the applicants and then extracted and sealed. However, he discovered on June 11 that there was no sealed decree in the court file.

Mr Ajuang' on the same day obtained the approval of the respondents to the draft decree in his possession, and presented it to the Registrar for signature and sealing. The Registrar was in court and did not sign the decree until the following day. Then, in breach of rule 87, Mr Ajuang' did not serve copies of the memorandum and record of appeal on the respondent before or within seven days after lodging the memorandum and record. The service was not effected until September 6, some eighty days out of time.

On September 12, Mr Ajuang' lodged a notice of motion seeking an extension of time within which to serve the appeal documents on the respondent. Mr Ajuang' explained this failure to serve the documents in his affidavit. On June 14, he found that he had misplaced both the copies of the record of appeal in his possession. They were returned to him by a relative on September 5, 1980. Apparently the records were hidden among some magazine lying on Mr Ajuang's table and had been taken to Mombasa by the relative, who for almost three months did not return them to Mr Ajuang'.

By letter dated November 27, the respondents' advocate gave notice of intended objection that the formal decree had not been extracted until the day after the last day for filing the record, which was June 11. In his supplementary affidavit Mr Ajuang' referred to this omission as a "mere procedural technicality." Mr Ajuang' has failed to satisfy us that the failure to file a complete record on or before July 11, 1980 or to serve the appeal documents on the respondent within seven days thereafter, was anybody's fault but his

own.

We have also considered the merits of the intended appeal. The only issue in the appeal is whether the applicants purchased the Lister engine from the defendant/respondent Machinery Services or from Webuye Quarry. There is ample evidence, oral and documentary, to support the learned judge's findings that this engine was sold by Machinery Services to Webuye Quarry in November 1974 and by the latter to the applicants in December 1976. There is in the record a copy proforma invoice showing that Machinery Sales sold to Webuye Quarries on September 25, 1972 *inter alia*, a Lister diesel engine Serial Number 194 HRW 3A 25. In his affidavit dated December 2, 1980 the respondent's advocate has exhibited a copy of what he says is the correct exhibit, which is an invoice showing the sale by Machinery Services to Webuye Quarry on November 25, 1974 of a Lister diesel engine Serial Number 270 HRW 3A 24, which is the number of the engine sold to the appellants in December 1976.

We do not think that there is any merit in the intended appeal or that it would have any reasonable prospects of success.

For the above reasons we dismissed the application with costs.

Dated and delivered at Kisumu this 24th day of March, 1981.

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

SIMPSON

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR