

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Miller JA)

CIVIL APPLICATION NO. 5 OF 1980

BETWEEN

GICHANGI.....APPLICANT

AND

MURAGE.....RESPONDENT

RULING

This is an application under Rules 4 of 81 for leave to lodge Notice of Appeal out of time. The application was filed on the November 27, 1979 and is captioned as being in respect of a High Court's decision dated the November 20, 1979; hence breach of Rule 74(2) within fourteen days of the decision against which it is desired to appeal, has been admitted. The case file of the High Court is not before me and the reason for the delay or inability to file Notice of Appeal in time, has been given in the affidavit of advocate for the applicant as failure to trace the case file both in his chambers and at the High Court's Registry.

The affidavit in opposition to the application sworn by advocate for the respondent, paints a different picture. It is therein averred, that consequent upon an ex parte order made against the applicant on the September 27, 1979, application was made to set aside the said order and at the hearing thereof with advocates on both side appearing and heard on the October 11, 1979, the learned judge ruled that the applicant pays the sum of Kshs 15,000 in respect of costs in the High Court proceedings within twenty eight days, failure to do so, the respondent would be at liberty to enforce the ex parte judgment, but if he paid the said costs within twenty eight days, he could set the case down for hearing.

The applicant failed to pay the said costs within the twenty eight days; and this Court's record shows that as late as the July 11, 1980 advocate here appearing, stated that the said High Court costs had not been deposited as they had not been taxed; there is no doubt in perpetuation of the claim that the relevant files are missing or lost.

It has been agreed before me that the judgment which the applicant sought to set aside was delivered on the September 27, 1979 and the ruling upon which the setting aside and restoration of the cause to a hearing on the condition that the applicant with spatium pays the accrued costs was delivered on the November 20, 1979.

In simple terms the applicant was given opportunity by the High Court to show good faith with respect to his cause as a whole. There is nothing before me tending to impeach the ex parte judgment per se; and the question therefore is, inspite the admitted delay in filing a Notice of Appeal, would a grant of this application finally achieve anything more than that which the High Court made optional at the applicant's choice? The applicant's advocate now appearing concedes that the Condition for reinstating the cause has not till now been met; and more particularly, that the lodging of the Notice of Appeal was not dependant upon possession of the case file. In his latter behalf, I cannot help restating that which I have done on hundreds of occasions - ie that I detest the claim to the interest of the litigant being of prior consideration on every occasion; where as in this case, the then advocate for the applicant knew and had to know and with sufficient time and facilities at hand, that even as a matter of precaution, Notice of Appeal ought to have been lodged.

I find no merit in this application it is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 2nd day of March 1981.

C.H.E.MILLER

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR