IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Wambuzi JJA & Miller Ag JA)

CIVIL APPLICATION NO. NAI 9 OF 1978

BETWEEN

BELINDA MURAI & 9 OTHERS ....APPELLANT

AND

AMOS WAINAINA ....RESPONDENT

RULING

The intended appeal of the applicants was struck out for failure to include in the record of appeal a copy of the decree as required by rule 85(1)(h) of this court's rules. In its ruling striking out the appeal the court observed:

> "Exclusion of such an important document has always been fatal as there would be no basis to the appeal. In this case it does not appear that there was any mistakes of law that a decree was not necessary because the record of appeal as originally filed contains a document which purports to be a decree. We were not persuaded that the failure to include the decree in the record is a mere technicality upon which the court should not insist."

The applicants applied for an extension of time to rectify the procedural lapse and pursue their appeal. This was granted by a single judge whose decision is now challenged before the full court under rule 54 on the grounds that he was wrong to hold that the advocate for the intending appellants made a *bona fide* mistake in not including the formal decree with the record of appeal and that a matter of public importance was involved.

Mr Wilkinson for the respondent quite properly conceded that he had no contention with respect to jurisdiction in the single judge's hearing the application for the extension of time sought by the applicants and incidentally the learned judge of appeal made it clear in his ruling that the intended appeal had not been dismissed but merely struck out. I understand the situation being that the appellants' right to pursue appeal had not been extinguished. Whichever way and indeed the only way the stand adopted for the respondent can be viewed is that the learned Judge of Appeal incorrectly applied the provisions of rule 4 of this court's rules. Mr Wilkinson contended that there was a failure or defect in considering the grounds for "sufficient reason" as provided in the relevant rule. More specifically he said the learned Judge of Appeal "was wrong to call the omission on the part of the advocate for the applicants *bona fide* mistake" because it was negligence.

Rule 4 provides:

> "The court may [for sufficient reason] extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorised or required by these rules whether before or after the expiration of such time and whether before or after the doing of the act and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

Without attempting philosophical reasoning as to the causes and laws of things, I think that there can be in some circumstances a very thin line between mistake and negligence as such and the exercise of maximum care with assuredness in certain premises may nonetheless result in mistake. On the submissions of Mr Wilkinson, one would at least incline to the view that the advocate for the applicants could not have easily satisfied the test of mistake in the light of his experience but that does not exhaust consideration of the application where importance is involved and whether the appeal is not without possibility of success. In my view, there can be no doubt that a question of public importance is involved. Although land holding has been largely regulated by statutory enactments, weighty problems still exist from situations of concurrent customary law concepts and rights to occupation of vast areas of land in the country.

For this reason, I also share the further view of Law JA that there are arguable grounds in the intended appeal. I would like to state in passing that as expected in the course of the arguments in the application, much emphasis was placed on the almost traditional statement (through the cases) that:

> "The discretion of the English Court is unfettered whereas that of this court is limited in a matter as this that 'sufficient reason' must be shown."

The rule does state - "may for sufficient reason" and I take this to mean a sufficiency of reason as assessed by the court to call forth its discretion. In the rule there is also the phrase "whether before or after doing the act." The court does not specially enquire into the non-performance of one or more of the prescribed acts for that shall have been patent with respect to rule 85 and the record. The court is concerned with quality of explanations for default and it is clear that each case must be treated according to its own particular facts. I sincerely do not intend to be tedious but with no possible margin set upon the process of judicial reasoning to determine adequacy, reasonableness or sufficiency of reasons for default, I am constrained to wonder whence the fetter. I am therefore of the view that to say that this court is fettered in the exercise of its discretion is not correct. I do not think that there can be a rule of thumb when attending facts must vary from case to case. Returning to the application itself, I find no ground for saying that Law JA did not properly exercise his discretion and agree that the reference be dismissed. I also agree with the orders proposed by Madan JA.

Wambuzi JA. Under rule 54 of the rules of this court, any person who is dissatisfied with the decision of a single judge and wishes the decision to be varied, discharged or reversed may refer the matter to the court. It would appear therefore that, although technically a reference is not an appeal, it is in the nature of an appeal. Under rule 4 of the rules of this court the power to grant or refuse extension of time is discretionary. In *Moru Farmers Co-operative Union Ltd v Abdul Aziz Suleman* (No 2) [1966] EA 442 Newbold, P as he then was, had this to say,

> "May I pause here to deal with one point which counsel for the respondent made. He submitted, rightly, as a matter of law, that the court on an appeal and presumably on a reference of a single judge, will not interfere with the exercise of the discretion of the judge from whom the appeal or reference is brought unless it is clear that the judge was wrong and had exercised his discretion on improper grounds."

This was a reference concerning extension of time under rule 9 of the Rules of the Court of Appeal for East Africa, then in force, which was substantially the same as the present rule 4 under which Law JA granted extension of time in the present case. It would appear therefore that the respondent in the case before us has to show that the single judge was wrong and had exercised his discretion on improper grounds. The learned judge granted the application to extend time on three grounds. First, he found that the former advocate for the applicant had a *bona fide* but mistaken view that the formal order was not

necessary. Secondly, the intended appeal involves a matter of public importance. Thirdly, that there are arguable grounds of appeal, in other words that the appeal does not lack prospects of success.

From the ruling of the court when it struck out the appeal, it appears that Mr Le Pelley, who then represented the applicant, asked for an adjournment to rectify the record by filing the decree if the Court held the view that a decree was necessary. It was pretty obvious that the adjournment would not have assisted learned counsel unless he also obtained an extension of time during which to file the decree. The Court said:

> "In this case it does not appear that there was any mistake of law that the decree was not necessary because the record of appeal as originally filed contained a document which purports to be a decree."

One may ask if Mr Le Pelley genuinely believed that a decree was not necessary, what was this document purporting to be a decree doing on the record which was certified by Mr Le Pelley himself as correct? Rule 85(1) of the rules of the court provides, in so far as is relevant to this application,

> "For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall contain copies of the following documents …
> (g) the judgment or order
> (h) the ... decree or order"

I think the circumstances of this case are very similar to those in *Transport Commissioner v Attorney General of Uganda and Another* [1959] EA 329 where it was contended that failure to extract the decree was due to an error of judgment on the part of counsel. In that case the Court of Appeal said:

> "We considered that the words of the rule and in particular the words 'but a decree or order shall in any event be extracted before the appeal is lodged' were too plain to admit of misinterpretation or any 'error of judgment'. It was not and could not be suggested in argument that there was any misunderstanding of the meaning of these words … Moreover, there are many authorities on the point. Neglect by advocates to ascertain and follow the plain requirements of the law with regard to the necessity for extracting decrees is no new matter."

I think the same can be said of the case before us. Like Mr Wilkinson for the respondent, I fail to see how on the plain words of paragraphs (g) and (h) of rule 85(1) and the numerous authorities on the subject, counsel can be heard to say that he genuinely believed that a decree was not necessary and at the same time include in the record a document purporting to be a decree which most probably would have passed as such but for the objection by the opposite party who pointed out its real nature.

Be that as it may, Law JA found as a fact that the intended appeal involves a matter of public importance and that there are arguable grounds of appeal. He also seems to have found that there was no inordinate delay in seeking to rectify the record at least after the appeal had been struck out. In his discretion he granted the application. Mr Wilkinson argued that there is no matter of public importance involved in the appeal and that the appeal has no prospects of success. These matters were considered by the single judge and I am not satisfied that it has been shown before us that he came to the wrong conclusion. In the circumstances of this case, even without the advocate's error as to the law applicable, sufficient reason was shown and I do not think this court should interfere with the decision of the single judge. I agree that the reference should be dismissed and concur in the orders proposed by Madan JA.

Madan JA. This is a reference to the full court from the ruling of a single judge of appeal who granted extension of time to lodge a further appeal after the original appeal was ordered to be struck out for non-compliance with rule 85(1)(h) of the rules of the Court of Appeal for failure to include a certified copy of the formal order in the record of appeal, the omission being due to a mistake or error on the part of the advocate then acting for the applicants who considered that as the decision sought to be appealed against was headed "judgment", a certified copy thereof was sufficient to satisfy the rules of the court. As the learned Judge of Appeal pointed out, in this the advocate was wrong as rule 85(1) requires the record of

appeal to include not only copies of the judgment or order appealed against but also of the formal decree or order.

The court has jurisdiction to allow extension of time for an appeal to be readmitted which has been struck out but not dismissed as in this instance (*Ngoni-Matengo Co-operative Marketing Union Ltd v Alimohamed Osman* [1959] EA 577).

The story of this litigation began when by originating summons filed in the High Court, the respondent successfully obtained, first, a declaration that he was entitled by adverse possession of over twelve years to all that piece or parcel of land registered under the Registered Land Act (Cap 300) comprised in Title Number Loc 8/Ngerere/Thombotho/172 and situated at Ngerere/Thombotho and secondly, an order that he be registered as the sole proprietor of this parcel of land. The appeal which was struck out was against the order made by the High Court as prayed by the respondent.

This case was different from an ordinary or straightforward case of adverse possession by a tenant at will, the important difference being that the decision of the High Court sought to be appealed against established, for the first time so far as I am aware, that a *Muhoi* (plural *Ahoi*), who is a person who occupies land in Kikuyu contrary with the permission of the owner and by custom, has rights of cultivation only but cannot acquire any proprietary right to the land but could nonetheless acquire a title by adverse possession because the land is registered land under the Registered Land Act (Cap 300) by virtue of the provisions of Section 163 of that Act. About one third of the Kikuyu homelands are said to be occupied by *Ahoi* with the result that under the decision of the High Court, a large number of the original owners of land in Kikuyu land to which the court was told by custom a *Muhoi* can never acquire title by adverse possession no matter how long he remains in occupation of the land.

Rule 4 of the rules of the court provides as follows:

> "4. The court may [for sufficient reason] extend the time limited by these Rules or by any decision of the court or of a superior court, for the doing of any act authorised or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and a reference in these rules to any such time shall be construed as a reference to such time as so extended."

The learned Judge of Appeal said he accepted the dicta as I do also in *Shah H Bharmal and Brothers v Kumari* [1961] EA 679 and also as endorsed by Spry VP in *Hamam Singh and Others v Mistri* [1971] EA 122 that the mistake of a legal advisor may amount to sufficient reason and he held that he had jurisdiction to entertain the application for the extension of time, but he thought it incumbent upon him before exercising his discretion to extend the time to consider various other matters, such as delay, the public importance of the matter and the prospects of success of the intended appeal. To these matters mentioned by the learned Judge of Appeal I would add the requirements expressly of the interests of justice though the same may be said to be implicit in what has already been included.

The learned Judge of Appeal said:

> "As to delay I am satisfied that the applicants and their former advocate have not been guilty of unreasonable delay at any rate after the original appeal was struck out. Any delay before that was due to the advocate's *bona fide* but mistaken view that a formal order was not necessary."

I note that the order to strike out the appeal was made on February 17, 1978 and the reasons for the court's ruling delivered on February 28. The High Court order was extracted on March 7, 1978 for filing with the application for extension of time to lodge a further appeal and the application itself was filed on March 10, in this court.

Mr Wilkinson for the respondent submitted that what happened here was not a *bona fide* or genuine mistake which could be excusable but gross negligence on the part of the former advocate who is also Senior Counsel of many years' standing and experience at the bar that even a novice starting life as an

advocate could not genuinely believe that it was not necessary to attach a certified copy of the order more so when there is included in the record of the original appeal an uncertified copy of what Mr Wilkinson referred to as a fictitious decree which record was certified as correct by the advocate (referred to as fictitious because it is not authenticated by anyone).

On the face of it, there seems merit in Mr Wilkinson's submission. If I understand it right, what Mr Wilkinson is saying is that the mistake here means an error without fault. Though said in another connection by Russeel LJ in *Mitchell v Harris Engineering Company Ltd* [1967] 2 QB 703 at p 721 the mistake here should not be so narrowly construed as to mean only error with fault. It is not possible to say legitimately that a fact completely within physical apprehension can neither be *bona* or *mala fide*: a mental fact may be either. But there may be a *bona fide* act, belief, intention, claim, objection or mistake or a person's conduct may be *bona fide*. "Each of these is, so to speak a mental fact having its origin in the individual" Stroud's Judicial Dictionary, 4th ed Vol 1 pp 302, 303.

In *Duckett v Gover* 6 Ch D 82 it was said that a "*bona fide* mistake" is in Order XVI rule 2 of the rules of the court, 1875, includes a mistake of law as well as of fact. Jessel MR said, p 85:

> "he has made a blunder on a point of law. A blunder is a 'mistake'."

He further said, p 86:

> "… in nine cases out of ten if there is a mistake in substance, it will be found that there is a mistake in law. Why should it not include a mistake in law? In my opinion it does."

Tompkins J said in *White v Arther Nicol Limited* [1966] NZLR 645 at p 647:

> "I think ignorance of the law can constitute a mistake of law."

The former advocate's belief was a mistake on a point of law however wrong he might have been in his belief. No one has said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely, though mistakenly, believed his view was correct.

A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.

As regards the prospects of success of the intended appeal, without wanting to express an opinion thereon at this stage, I will only say this briefly. The original grounds of appeal and the further grounds of appeal now advanced with the present application certainly do not permit it to say reasonably that the intended appeal is without prospects of success or devoid of merit. I express no opinion whether the learned trial judge was right in following the dictum of Duffus JA (as he then was) in *Kimani v Gikanga* [1965] EA 735 in which he equated a *Muhoi* with a tenant at will and also whether he was right in holding that even if the respondent was a *Muhoi*, this did not prevent him from acquiring a title to land by adverse possession by virtue of the provisions of the Registered Land Act. I also express no opinion on what effect the wording of Section 3(2) of the Judicature Act (Cap 8) has in this matter which reads as follows:

> "The High Court, the Court of Appeal and all subordinate courts shall be guided by African

> Customary Law and in civil cases in which one or more of the parties is subject to it or is affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

I now come to deal with the question of public importance of the matter.

It was referred to as "the most substantial question" by Duffus P in *Esso Standard Eastern Inc v Income Tax* [1971] EA 127 at p 141. In addition to what I have said already, it is a question which now swings my mind definitely into wanting to dismiss this reference to the full court.

We do not want to have a wilted legal system in this country. We want a legal system for the common will. A question of general public importance is a question which takes into account the well being of the society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society? Landmarks are the basis of continuity of life in human society.

If the position of a *Muhoi* which I have earlier set out has been correctly expounded, which has yet to be decided, the question is obviously made one of general public importance for the subject affects the land rights of a large number of people and not merely the portion to the appeal. If the submission turns out to be right, there would be no change involved in this concept of land holding by the original land owners vis-a-vis the *Ahoi* that it would blow a tempest. An economic and social upheaval would arise which would upset the age-old established values and lead to dethroning of a large number of original owners of land. Such a change should be legislated for by parliament and not introduced as the incidentally resulting effect of a judicial decision. Should such a change be introduced, let parliament say so in expressing the will of the people. Indeed it is of general public importance that the exact status of *Ahoi* be resolved by the court.

In my opinion, a point of general public importance in some cases may in itself be enough to constitute sufficient reason for the grant of extension of time. In this case I would so hold. For these reasons, I would dismiss this reference to the full court with costs. There is also this. The learned judge of appeal exercised his discretion in granting extension of time. I look at the matter as a whole. In my opinion, he did not err in acting the way he did. There is one other matter. The following passage appears in the reasons for the ruling delivered by the court in this case for the order striking out the original appeal:

> "It has been held before that an error of law by itself on the part of the counsel cannot constitute sufficient reasons for extension of time."

I had the privilege of being a member of the court. Upon reflection, I think that this is too strict a statement of the law which ought to be made a little flexible. I feel reluctant now to subscribe fully to the view expressed in the foregoing passage which seems to completely close the door to grant of extension of time in a case of an error of law by itself on the part of the counsel. It should not be expressed in such bare and harsh form. Spry VP also seems to have had a similar thought for he said in *Mugo & Others v Wanjiru and Another* [1970] EA 481 at p 483:

> "Normally I think the sufficient reason must relate to the inability or failure to take the particular step in time but I am not prepared to say that no other consideration may be involved."

I think the correct approach would be to consider the circumstances and reasons, if any, for the error of law on the part of counsel combined with the interests of justice before saying that it cannot constitute sufficient reason. After all, the primary purpose of the court is to do justice between parties without being balked by procedural hurdles, though, of course, the procedure of the court must be followed and if it is neglected or not complied with brazenly, the court will not grant any indulgence. I would put the matter thus, that as in terms of rule 4 of the rules of this court "sufficient reason" must be shown before the court will exercise its jurisdiction to grant extension of time. If there is no more than an error of law by itself on the part of counsel, it cannot constitute sufficient reason for extension of time but if the error of law is due to a *bona fide* mistake on the part of counsel and the interests of justice in which I include the

maintenance of economic and social stability of the general public or a substantial part of them such as in this case dictate that the appeal not be shut out, extension of time ought to be granted. I consider it fortunate that there is no dearth of reasons which are put up as the cause of the delay in not complying with the rules. The reasons which are offered vary and they are as many as the ingenuity of the mind can work out. As the question always is whether the excuse for the delay that is offered constitutes sufficient reason, the fear of an application being wrongly refused disappears.

As I have said, I would dismiss this reference with costs.

As Wambuzi JA and Miller Ag JA agree, it is so ordered.

Dated and delivered at Nairobi this 8th day of March, 1979.

C.B MADAN

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JUDGE OF APPEAL

S.W WAMBUZI

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JUDGE OF APPEAL

H.E MILLER

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Ag.JUDGE OF APPEAL

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

DEPUTY REGISTRAR