IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Wambuzi JA (in chambers))

CIVIL APPLICATION NO NAI 3 OF 1978

Between

AO MENYA..APPELLANT

AND

MCCREAS LTD.................................RESPONDENT

JUDGMENT

This is an application under rule 4 of the Rules of this Court to extend time within which to file a notice of appeal against a judgment of the High Court delivered on 23rd December 1977. The applicant was not present when judgment was delivered. By their letter dated 29th December 1977, the applicant's advocates informed him of the decision and advised that an appeal was desirable. By his letter dated 31st December 1977, the applicant authorised his advocates to appeal. The letter was delivered to the advocates' clerk who misfiled it and went on leave. On 9th January 1978, the advocates wrote another letter to the applicant asking for authority to appeal. The applicant informed the advocates of his letter of 31st December, giving the necessary authority. This application was then filed on 31st January 1978, the notice of appeal being some three weeks out of time. It is claimed by the applicant and Mr Hayanga who appeared for him that there is "a good case in points of law and on merits".

Mr Achungo for the respondent opposed the application on three grounds.

(1) That there was an unjustified delay from 9th January 1978 (when counsel and the applicant discovered the error) to 31st January 1978 when the application was filed. (2) That the applicant did not disclose the grounds of appeal and therefore there was no material on which it could be decided whether the appeal had any prospect of success. He relied on *Pollok House Ltd v Nairobi Wholesalers Ltd* (No 2)[1972] EA 172. (3) that a mistake in the chambers of the advocate was not sufficient reason to extend time within the meaning of rule 4.

In *Mugo v Wanjiru* [1970] EA 481, 483, Spry V-P said:

> ... I do not think the fact that an appeal appears likely to succeed can of itself amount to 'sufficient reason'.
>
> 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 invoked. Here the position is that on an application for an order of prohibition, the judge is alleged to have granted the application without allowing the parties an opportunity of addressing the Court, the only

> hearing having been concerned with an application for adjournment on which no ruling was given. If that is so, and it is not seriously disputed, the order was in my opinion a nullity, and these extraordinary circumstances might properly, in my view, be regarded as constituting 'sufficient reason'.

In *Esso Standard Eastern Inc v Income Tax* [1971] EA 127, one of the considerations for extending time was that the points for decision were on a matter of public importance. In *Abdul Aziz Ngoma v Mungai Mathayo* [1976] Kenya LR 61, 62, the Court of Appeal said:

> We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.

In the present application the position is this: the applicant's advocates sent out a letter six days after the judgment, advising that an appeal was desirable. They received instructions in their chambers on 31st December a few days before expiry of the time allowed for filing the notice of appeal.

No action was taken on the letter because, it is claimed, the clerk who received it filed it on one of the two files connected with the applicant and went away on leave. On 9th January, after the time had expired, the advocates followed up their first letter seeking authority to appeal. Do these circumstances amount to sufficient reason?

No cases strictly in point were brought to my attention and I have found none. Most of the authorities that have come my way deal with mistakes of law on the part of the advocate or his clerk. In *Bray v Bray* [1957] EA 302, Bennett J had this to say on the matter:

> There are a great many English and East African authorities on the question as to the circumstances in which it is proper for a Court to grant leave to appeal out of time when the failure to appeal within time arises from some mistake or inadvertence on the part of the would-be appellant's legal advisers.
>
> Formerly the trend of authority in England appears to have been against granting leave to appeal in such circumstances. In recent years, however, the trend of authority has been in the opposite direction.
>
> I think the modern rule is stated in the judgment of Sir Wilfred Greene MR in *Gatti v Shoosmith* [1939] 3 All ER 916 as follows: 'What I venture to think is the proper rule which this Court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument. The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, the discretion should be exercised.'
>
> In that case the Court of Appeal exercised its discretion in the appellant's favour, the failure to appeal within time having arisen owing to the misunderstanding of the effect of a rule by the managing clerk of the appellant's solicitors.

In the case before Bennett J, the applicant's advocates had misinterpreted a rule and had appealed to the Court of Appeal for Eastern Africa when they should have appealed to a bench of two judges of the High Court of Uganda. The application to extend time to appeal to the proper Court was granted.

In *NAS Airport Services Ltd v Attorney-General of Kenya* [1959] EA 53, the applicant's advocates filed an appeal but did not include a formal order with the record. They could not explain their failure to extract the formal order and it was held that no sufficient reason for extension of time was shown under

rule 9 of the Rules then in force, which also required sufficient reason to be shown as the present rule 4. Time was, however, extended to avoid injustice to the respondent who had counter-appealed and had complied with the rules.

In *Commissioner of Transport v Attorney General of Uganda* [1959] EA 329 an appeal was lodged without a copy of the decree appealed from. An application was made for extension of time for lodging the appeal including the decree. It was contended that failure to extract the decree was due to an error of judgment on the part of counsel. Rule 9, then in force, was considered by the Court of Appeal which said, [1959] EA at pages 332, 333:

> It is to be noted that the power can only be exercised 'for sufficient reason'. In this respect the power of the court in regard to extension of time for appealing differs from the power of the Court of Appeal in England under order LVIII, rule 15, of the English Rules of the Supreme Court. As was pointed out in *Gatti v Shoosmith* under order LVIII, rule 15, the discretion of the court is entirely unfettered. Mr Summerfield relied upon *Gatti v Shoosmith* but it seems to us that rule 9 of the Appeal Rules more nearly approximates to the original form of order LVIII, rule 15, of the English Supreme Court Rules before amendment in 1909. Sir Wilfred Green

MR at the beginning of his judgment in *Gatti v Shoosmith* (at page 197) say:

> 'Before 1909 order LVIII, rule 15, which is the order regulating the time for appeals to this Court, was in a different form from that in which it is now cast. Under the order as it then stood, the power of this court to extent the time for appealing required some special reason, because the appeal could not be brought except by special leave of the Court of Appeal.
>
> Under the rule as it then stood, the case of *Re Coles and Ravenshear* [1097] 1 KB 1, was decided. That was a case where counsel had misconstrued the rule, and, as a result of the advice given, the appeal was out of time. It was there held that the fact that the delay was due to a mistake of a legal adviser did not constitute a ground for giving the special leave which the rule required.'
>
> 'Sufficient reason' may not be as stringent a requirement as 'special reason', but adequate reason must still be shown before this Court can exercise its discretion. We deal first with the suggestion that the failure to extract the decree was due to an 'error of judgment.'

Rule 56 was quoted and the Court went on:

> 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. Accordingly, the case would not have fallen within the rule in *Gatti v Shoosmith*, even if our discretion had been as wide as that of the Court of Appeal in England. The decision in *Gatti v Shoosmith* turned upon the fact that there was there, in the words of the Master of the Rolls, 'a mere misunderstanding ... which, to anyone who was reading the rule without having the authorities in mind, might well have arisen.'
>
> In view of the terms of rule 56 no such argument was open to the applicant in this case. 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 and orders is no new matter.

It was held that there was no error of judgment in that case and the application to extend time was refused. In *Northern Province Labour Utilisation Board v Commissioner of Income Tax* [1960] EA 1015 notice of appeal was erroneously given to the Registrar of the High Court of Tanganyika instead of the Commissioner of Income Tax. It was sought to rectify the matter by seeking extension of time to serve the proper person.

The law applicable required different considerations, but it seems that it was accepted that an error of the advocate in serving the wrong party was not sufficient reason within the meaning of rule 9 of the rules then in force.

In *Ngoni-Matengo Co-operation Marketing Union Ltd v Alimohammed Osman* [1959] EA 577, the applicant applied for and obtained from the Registrar a copy of what both believed to be the relevant decree which was incorporated in the record of appeal. It turned out to be an earlier decree in the same action. It was held that sufficient reason had been shown for extension of time to file the proper decree. Windham JA said, [1959] EA at pages 578, 579:

> More recently, it is true, this Court had laid down that, in view of the clear terms of the relevant rules requiring the decree or order to be extracted before an appeal is lodged, in particular rule 56, an advocate who fails to take steps to comply with that requirement cannot excuse himself by pleading that his failure was due to any 'error of judgment' on his part, and such failure may not of itself be held to afford 'sufficient reason:'for the purpose of rule 9.

His Lordship then referred to a number of cases and continued:

> But in each of those cases the applicant's omission to extract the decree or order within the time limited for lodging his appeal had been due either to a failure to appreciate the legal necessity of doing so, or to a lack of diligence in taking steps to see that it was done in time. In the present case the position was very different, since counsel for the applicant was fully aware of the requirement of the rules and of the relevant decisions of this Court, and had taken all steps to comply with them up to the eve of the lodging of his appeal; and it was the mistake of the registry of the High Court in then supplying him with a copy of the wrong decree, which was the primary cause of his non-compliance.

It was held that sufficient reason had been shown for extension of time. More recently in *Kiboro v Posts & Telecommunications Corporation* [1974] EA 155 there was again failure to include the decree in the record of appeal and an application to extend time within which to file the decree was made. The Court was informed that the preparation of the record of appeal was entrusted to a clerk who was under the erroneous impression that order XLI, rule 1A, of the Civil Procedure Rules applied to appeals to the Court of Appeal and that consequently he did not consider it mandatory to file the decree. It was held that, even if the rule applied, it makes it clear that where no copy of the decree or order is filed with the memorandum of appeal, it shall be filed as soon as possible. The clerk was put very much on his guard as to the necessity of filing the decree. No steps were taken to rectify the position until the hearing of the appeal which was over three months after filing the record of appeal. It was held that no sufficient reason had been shown for extension of time and the application was refused.

In *Shah Meghji Mulji Ltd v Shah Kanji Mulji* (unreported) the reason given by the clerk of the appellant's advocates to explain the delay in serving the memorandum and record of appeal was that he was under a mistaken impression as to whose duty it was to serve the respondent. It was held that rule 87 is clear that it is the appellant's duty. Having discovered the error, he took no steps to regularise the position until a preliminary objection was taken at the hearing of the appeal. The application to extend time was refused.

In all these cases there was some element of misconstruction of the law by the advocate or by his clerk. In the instant case, it seems to me that it was sheer negligence on the part of the clerk who failed to draw the attention of the advocates to the applicant's letter of the 31st December which was in fact a reply to the advocates' letter seeking instructions to appeal. I note that the advocates asked for instructions by letter six days after judgment. The time allowed for giving notice of appeal is only fourteen days. The advocates followed up their first letter by another letter of 9th January, after the fourteen days had elapsed. Doing the best I can in the circumstances, I find it difficult to say that sufficient reason has been shown to justify extension of time. In the words of Windham JA, "there was a lack of diligence" on the part of the advocates and their clerk in taking steps to see that the notice of appeal was filed in time. I express my sympathy to the applicant who indicated his desire to appeal at the earliest moment given him, but if a mistake of clear law or of fact without more on the part of the advocate or his clerk will not

constitute sufficient reason I fail to see how inadvertence on the part of either or both as in this case, can. Furthermore there is no element of blame on the part of the Court as in some of the cases referred to in this ruling. The application is refused, with costs.

Order accordingly.

Dated and delivered at Nairobi this 28th day of April 1978.

S.W.W WAMBUZI

....

JUDGE OF APPEAL (in chambers)

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

DEPUTY REGISTRAR