IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law JA)

CIVIL APPLICATION NO. NAI 9 OF 1978

BETWEEN

BELINDA MURAI & 9 OTHERS .....APPLICANT

AND

AMOS WAINAINA .....RESPONDENT

RULING

This is an application by intending appellants for an extension of time to lodge a further appeal after the original appeal was struck out for noncompliance with rule 85(1)(h) of the rules of this court, no certified copy of the formal order having been included in the record of appeal. This omission was due to a mistake or error on the part of the advocate then acting for the applicants whose considered view it was that as the decision sought to be appealed against was headed "judgment" and that a certified copy of the judgment was sufficient to satisfy the rules of this court. In this the advocate was wrong, as rule 85(1) aforesaid 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.

This court has jurisdiction to entertain an application for an extension of time to enable an appeal to be re-instated which has been struck out and not dismissed (as was the case here) see *Ngoni-Matengo Co-operative Marketing Union Ltd v Alimohamed Osman* [1959] EA 577. Before this jurisdiction can be exercised, "sufficient reason" must be shown for extending time under rule 4 of the rules of this court. The "sufficient reason" relied on by Mr Satish Gautama for the applicants is that the applicants engaged a leading firm of advocates to safeguard their interests and that it was an error on the part of their advocate which led to their appeal being struck out and that no blame for this can be attached to the applicants personally. Mr Wilkinson for the respondents correctly pointed out that the discretion vested in this court is more restricted than in England where it is unfettered. In Kenya it can only be exercised after "sufficient reason" has been shown and he submitted that this court had consistently held that an advocate's error could not constitute "sufficient reason" and he cited *Attorney General of Kenya v Steve Clarke*, Civil Appeal No 26 of 1974 (unreported) and *Tolo v Otina*, Civil Appeal No 23 of 1974 (unreported) in support of this proposition.

Mr Gautama countered this submission by referring to *Shah H Bharmal and Brothers v Kumari* [1961] EA 679 in which case Sir Alistair Forbes VP said at p 685:

> "Mistakes of a legal advisor may however amount to 'sufficient cause' under the East African Rule."

This view was endorsed by Spry VP in *Hamam Singh and Others v Mistri* [1971] EA 122 when he said at p 126:

> "… in relation to applications to this court for leave to appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part …"

I accept these dicta and hold accordingly that I have jurisdiction to entertain this application. Whether or not I should exercise my discretion in favour of the applicants is another question. Had the failure to extract a proper formal order been due to a mistake on the part of the registry, I would extend time without more ado. That is not the position here, so it is incumbent on me to consider various other matters such as delay, the public importance of the matter and the prospects of success of the intended appeal.

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.

As regards public importance, the decision sought to be appealed against established that an occupier of Kikuyu land known as *Muhoi* who by Kikuyu custom, has rights of cultivation but cannot acquire proprietary rights to the land, could nevertheless acquire a title by adverse possession as the land was registered under the Registered Land Act (Cap 300) and by Section 163 of that Act the common law of England applies to registered land. There is evidence that about 30% of all Kikuyu homelands is occupied by *Ahoi* (the plural of *Muhoi*) and that if the decision in the suit is upheld a large number of Kikuyu land owners will be liable to lose land which by custom cannot pass to a *Muhoi* by adverse possession. This, to my mind, is a question of general public importance in that it would affect a large number of citizens of Kenya and not merely the parties to the intended appeal.

As regards the prospects of success of the intended appeal, the learned trial judge followed a dictum by Duffus JA (as he then was) in *Kimani v Gikanga* [1965] EA 735 equating a *Muhoi* with a tenant at will and he held that even if the respondent was a *Muhoi* this did not prevent him from acquiring a title of land by adverse possession. This would appear to be the common law of England which applies to registered land in Kenya. Mr Gautama's submission on this point is that although the common law of England applies under Section 163 aforesaid it does so "save as may be provided by any written law for the time being in force" and he relied on Section 3(2) of the Judicature Act (Cap 8) which reads as follows:

> "The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or 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 or procedure and without undue delay."

Mr Wilkinson submitted that the status of a *Muhoi* is regulated by custom but it is not part of the customary law. That is a fine distinction. It would seem on the evidence before me that the status of a *Muhoi* is regulated by Kikuyu Customary Law. Whether it is "inconsistent" with the written law embodied in Section 163 of the Registered Land Act or whether it should prevail over the English common law in the matter of the acquisition of a title by a *Muhoi* or tenant at will by adverse possession, are matters which in my opinion raise arguable grounds of appeal. I cannot say that the intended appeal is without prospects of success or devoid of merit.

In all the circumstances, I allow this application and extend time for filing the intended appeal by 7 (seven) days from today. The record of appeal used in the former appeal (No 46 of 1977) shall be the record in the intended appeal supplemented by the inclusion of a copy of the formal order and of new or further grounds of appeal. The costs of this application will be the respondent's costs in the appeal in any event as the applicants are being granted a substantial indulgence in circumstances for which the respondent is in no way responsible.

Dated and delivered at Nairobi this 25th day of May , 1978.

E.J.E LAW

JUDGE OF APPEAL

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

DEPUTY REGISTRAR