



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 78 OF 2006

KENYA HORTICULTURAL EXPORTERS LTD..... APPLICANT

AND

JULIUS MUNGUTI MAWEU RESPONDENT

(Application for leave to file and serve a Notice of Appeal and the Record of Appeal out of time against the judgment and decree of the High Court of Kenya at Machakos (Nambuye, J.) dated 27th June, 2003

in

H.C.C.C. NO. 75 OF 1997)

RULING

On **8th March, 2006**, ***Civil Appeal Number 9 of 2004*** came up for hearing before the full Court. There was a mistake in the Notice of Appeal upon which that appeal was based in that whereas the record of appeal showed that judgment was delivered on **27th June, 2003** the Notice of Appeal read that judgment was delivered on **26th June, 2003**. Mr. Masika, the learned Counsel for the applicant in this application who was then acting for the appellant sought leave of the Court to amend the Notice of Appeal, whereas Mr. Nyakundi, the learned Counsel for the respondent opposed that application and sought the striking out of the appeal. The Court made an order part of which reads as follows:-

“We feel the matter should be given full consideration and we therefore decline to decide either way today as we feel there is need to file proper application for amendment for full consideration. We therefore adjourn this appeal to a date to be taken at the Registry. In the meantime, if Mr. Masika is serious in his application for amendment of the Notice of Appeal, then he is to file and serve the same application for amendment within fourteen (14) days of the date hereof failing which the appeal stands struck out with costs to the respondent. Costs of this adjournment shall be in the appeal.”

Mr. Masika did not comply with that order requiring him to file application for amendment within **14 days** of **8th March, 2006**. He however filed this application on **22nd March, 2006**, the last day that order was to expire. That in effect means that as at the date he filed this application the appeal **No. 9 of 2004** had not been struck out as it was to stand struck out if no application for amendment was filed within 14 days of the date **8th March, 2006**. The effect of Mr. Masika’s action is that the applicant through him, is

asking me through this application to extend time to file and serve Notice of Appeal and record of appeal against the judgment of Honourable Lady Justice R. Nambuye in the ***Machakos HCCC No. 75 of 1997*** delivered on 27th June, 2003 out of time whereas there was as of 22nd March when this application was filed a notice of appeal and record of appeal extant.

Further, before me on 17th January, 2007, when this matter was partly heard, Mr. Masika told me and Mr. Makundi confirmed it that the applicant had made the application for amendment and for leave to serve the respondent with that application for amendment. It is on that ground that Mr. Masika sought adjournment of the hearing of this application after I had heard him and was hearing Mr. Makundi, as he felt the result of that application for amendment could affect the outcome of this application. However, when this application came up for hearing yesterday Mr. Masika did not attend to tell me what happened with that application for amendment but Mr. Makundi told me that application has not been heard and determined. That again means that the fate of the original notice of appeal and record of appeal is not yet known. In either case, this application is premature and I do agree with Mr. Makundi that is an abuse of the Court process. The law is well settled, that Court cannot extend time to have a Notice of Appeal filed when there is another Notice of Appeal extant in the record. In the case of ***FORTUNE FINANCE LTD. VS. GEOFFREY GITHAIGA*** – Civil Application No. NAI. 22 of 1999, this Court stated:-

“A notice of appeal is a primary document within the meaning of rule 85 of the Rules and the learned Judge had clearly no jurisdiction to make an order for filing a fresh notice of appeal while the original was still extant.”

In this application, as I have stated, at the time it was brought the original Notice of Appeal was still validly in the record as the court had not struck it out because the fourteen days given had not expired. The fourteen days were expiring on that day. Later it continued on record because the application for amendment was filed even though allegedly filed out of time, the Court could still act on it to revive the appeal. If that were to happen, there would be two notices of appeal supporting one appeal. I have no jurisdiction to grant this application.

In the result, the Notice of Motion dated 22nd March, 2006 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 8th day of April, 2008.

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR