



**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: DEVERELL, J.A. (IN CHAMBERS)

Civil Appeal 118 of 2005

BETWEEN

P. N. MASHRU LTDAPPELLANT

AND

MARK OMOLLO AGENG'1ST RESPONDENT

KISYA INVESTMENTS LTD2ND RESPONDENT

WASHINGTON PAULO OKEYO3RD RESPONDENT

DANIEL KIOKO KAHINDI4TH RESPONDENT

(Being an appeal from the ruling/order of the High Court

of Kenya at Nairobi (Mr. Justice G.P. Mbiti) dated 4

th

August, 2003

In

H.C.C.C. NO. 1061 OF 1990)

RULING

This ruling arises from the application under rules 4 and 76, dated 27th June, 2005 and lodged on 29th June, 2005.

The applicant is P. N. Mashru Ltd. It is the appellant in Civil Appeal No. 118 of 2005 and is represented by T.T. Tiego of Shah & Parekh Advocates who appeared before me at the hearing of the application.

There are 4 respondents to the application and the appeal being Mark Omolo Ageng', Kisia Investments Ltd, Washington Paulo Okeyo and Daniel Kioko Kahindi the 4th Respondent.

The Motion seeks orders that:-

- 1. That this Honourable Court do extend time within which this application should have been filed.***
- 2. That service of the Notice of Appeal and Record of Appeal upon the 4th Respondent be dispensed***

with.

3. That costs of this application to be in the main Appeal.

The principal ground for the granting of the application is stated to be that the appellants have just realized while preparing the record of appeal that the 4th Respondent either by himself or through his advocate never took part in the previous proceedings in the superior court save for filing defence on 8th April 1992. Further it is stated that the 4th respondent's advocates cannot be traced and holds no current practising certificate.

It appears from the plaint in HCCC No. 1061 of 1990 which is contained in the record of appeal Civil Appeal No. 118 of 2005 that the 4th respondent D. Kioko Kahindi (Kahindi) was the 1st defendant in the superior court, a case arising from a car accident in which it was alleged that a vehicle owned by the 2nd defendant driven by the 1st defendant caused a collision between it and the first plaintiff's vehicle on or about 1st March, 1987. The 1st defendant filed a defence dated 8th April, 1992 in which, in paragraph 1 of the defence he admitted the allegations contained in paragraph 6 of the plaint that he had caused the collision with the first plaintiff's vehicle by his negligent driving.

This defence of the 1st defendant was signed and filed by Peter C. Onyango as advocate for the 1st defendant.

The 1st defendant does not appear to have taken any part in the various interlocutory proceedings save perhaps that it is deponed in the affidavit of the 1st plaintiff dated 11th July, 2001 that on 10th July, 2000, the 1st defendant prosecuted the application to dismiss the suit for want of prosecution. From my perusal of the record it would seem that this reference to the 1st defendant was an error as the dismissal for want of prosecution appears to have been prosecuted by the 2nd defendant not the 1st defendant.

In these circumstances, were it not for the further submission before me by counsel for the respondents Mr. Meshack Odero, I would have no hesitation in granting the prayer that service of the Notice of Appeal on the 4th respondent/1st defendant be dispensed with under **rule 76** and in granting the prayer that the time for making this application be extended from the 7 days from the lodging of the notice of appeal fixed by the proviso to rule 76 to the date when the application was in fact filed on 29th June 2005.

The submissions of Mr. M. Odero to which I referred to above raised issues which have caused me to consider carefully whether there are any valid objection to my making these orders. Mr. Odero has filed a replying affidavit dated 22nd September, 2005 in answer to the application before me which brings in additional factors. In that affidavit and in his submissions before me he claims that the application is inappropriate, bad in law, and reeks of malafides.

This attack is partly based on the fact that the current application before me was filed on 29th June, 2005 a week after an application filed in this Court on 22nd June 2005 by the 1st, 2nd and 3rd respondents to the current application. The 29th June, 2005 application is still pending unheard. It is an application seeking orders to strike out the Notice of Appeal and Record of Appeal, which will of course be heard in due course by a three judge bench. Mr. Odero suggests that the 29th June application currently before me was apparently prompted by the 22nd June 2005 application where the intention would appear to (be) to circumvent the repercussions that would possibly ensue if the earlier application was heard first. Mr. Odero even went so far as to insinuate that it was peculiar that the later application before me was fixed for hearing before the earlier strike out application.

This suggestion seemed to be based on a lack of appreciation of the fact that it is, in practice, often much quicker to obtain a hearing date for a single judge application such as this than it is to obtain a date for a three judge bench application.

The strike out application has not been made part of the record of the application before me and I am not aware of the basis for that application. I have come to the conclusion that this line of argument put forward by Mr. Odero should not affect my decision in favour of granting the current application. The

line of argument may or may not be relevant to the strike out application but is not relevant to the exercise of my discretion as to whether to grant the extension sought under **rule 4** to extend time.

Mr. Odera also raised the point that the affidavit in support of the application before me which was served on the respondents omitted the date from the jurat of Mr. Tiego's affidavit and was therefore fatally defective. The jurat on the affidavit annexed to the application as filed in this Court was correct in this respect. I do not consider that the omission of the date on the served copy, although regrettable, was a fatal defect rendering the application a nullity.

For all these reasons I hereby order that the time within which this application should have been filed is extended to the date it was actually lodged being 29th June, 2005. I further order that service of the Notice of Appeal and Record of Appeal upon the 4th Respondent Daniel Kioko Kahindi need not be effected and can be dispensed with. I further order that the costs of this application be in the appeal.

Dated and delivered at Nairobi this 30th day of September, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR