



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 251 OF 2002

BETWEEN

CONCORD INSURANCE COMPANY LIMITED.....APPLICANT

AND

SUSAN NYAMBURA HINGA.....RESPONDENT

(An application for extension of time to file Notice and

Record of Appeal from a judgment and decree of the

High Court of Kenya at Nairobi (Mbaluto, J) dated

19th December, 2001

in

H.C.C.C. NO. 60 OF 2001)

RULING

I have before me an application brought under rule 4 of the Rules of this Court whereby the applicant, **Concord Insurance Company Limited**, seeks extension of time to lodge its fresh notice of appeal and record of appeal out of time. The intended appeal is against the judgment and decree of the superior court (*Mbalut o, J*) delivered and given, respectively, on 19th December, 2002.

A certified copy of the judgment as supplied to the applicant shows ex facie that it was delivered on 20th December, 2001 but it is now common ground that the judgment was actually delivered on 19th December, 2001.

The applicant's then advocate Mr. Pramod Patel lodged a notice of appeal seeking to challenge the said decision. That notice of appeal was lodged in the superior court on 3rd January, 2002, in time. It refers to a "ruling" delivered by the learned Judge on 19th December, 2001. There was obviously no such ruling. The present advocates for the applicant realized, upon receiving a copy of the proceedings that there were two discrepancies they had to deal with. The first one was that the notice of appeal was a non-starter because of the use of the word "ruling" and that the copy of the judgment they had, although purportedly

delivered on 20th December, 2001 was in fact delivered on 19th December, 2001.

Mr. Munyu who appears for the applicant says that he did not know of the correct date of delivery of the judgment until he received a copy of the proceedings on 14th May, 2002. Mr. Murimi says that Mr. Munyu ought to have known by 4th January, 2002 that the judgment was delivered on 19th December, 2001 and not 20th December, 2001 and that he ought to have put his house in order sooner than he attempted to do as the time to lodge the record of appeal expired on 14th March, 2002 assuming that the proceedings were ready on 4th January, 2002.

Whilst the judgment carries the date of certification as 4th January, 2002 it is quite clear to me that the proceedings were not supplied to Mr. Munyu until 14th May, 2002 as, firstly, the Registrar of the superior court says so in the certificate of delay and as the proceedings themselves are upto and including 4th April, 2002 when a consent order was recorded by a Deputy Registrar of the superior court.

In these circumstances I accept Mr. Munyu's explanation that he was not supplied with the proceedings until 14th May, 2002.

Having realized the problems he was facing Mr. Munyu set out to put the matters right. He applied to have the judgment date corrected. He got the orders to do so on 19th July, 2002. He filed a notice of withdrawal of the aforesaid notice of appeal on 1st August, 2002 by virtue of a notice of withdrawal (under Rule 93 of the Rules of this Court) of the said notice of appeal. He then applied to this Court, on 28th August, 2002 for extension of time, which application I am now dealing with.

Although Mr. Murimi's view is that Mr. Munyu has been indolent I do not think so. He did his best to put his house in order. Perhaps looking at it in hindsight, he could have moved a little faster but I cannot penalize him for what he did.

The time span between putting matters in order and the date of this application is therefore really a period of 28 days and the delay is not so inordinate as to deprive the applicant of its undoubted right of appeal. It is a matter of notoriety that mistakes will be made by court as well as counsel and corrected. Mistakes of counsel in normal circumstances ought not to be laid at the door of the litigant. It is also quite clear to me that the applicant has always wanted to appeal and the intended appeal, as I see it, is not a frivolous one. It raises an important issue of liability, if any, of an insurer to pay for damages for injuries suffered by a passenger in a private vehicle as opposed to one in a passenger-service vehicle.

Mr. Murimi took issue on the fact that the decree which has been drawn carries the date of judgment as 20th December, 2001. That fact is correct but that is not the decree that may go into the record of appeal and if Mr. Munyu still does so he will do so at his client's risk.

Taking into account all the circumstances as shown to me I am minded to exercise my almost unfettered discretion to extend the time as sought but I will do so on the condition that the applicant pays to the respondent a sum of Shs.8,000/= as costs of this application within the next 30 days.

I order therefore that the applicant may lodge its fresh notice of appeal within the next seven days and the record of appeal within 30 days of the date of lodgment of the notice of appeal. If the condition that I have set out above is not fulfilled this application will stand dismissed with costs.

Dated and delivered at Nairobi this 24th day of January, 2003.

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR