



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI.344 OF 2002 (UR.166/02)

BETWEEN

TOPEN INDUSTRIES LIMITEDAPPLICANT

AND

AFROLITE INDUSTRIES LIMITEDRESPONDENT

(Application for extension of time to file Notice of Appeal and Record of

Appeal out of time in an

intended appeal from the Judgment and Decree of the

High Court at Nairobi (The Hon. Commissioner of

Assize Mr. Philip Ransley) dated 27th June 2002

in

H.C.C.C. NO.619 OF 2000)

RULING

Topen Industries Ltd, the applicant, was the unsuccessful party in a passing off suit in which it was the defendant. Its earlier appeal against the decision was struck out as incompetent as certain essential parts of the proceedings before the trial court were omitted from the record of appeal.

In the application before me the applicant seeks an order extending the time within which to file and serve a fresh notice of appeal and a record of appeal. The application was brought under rule 4 of the Court of Appeal Rules (the Rules), which provision gives me the unfettered discretion to grant the orders sought. But the discretion being judicial should not be exercised whimsically. Evidence is essential. The duty to produce that evidence lies on the applicant.

The decision against which an appeal is intended was given on 27th June, 2002. The applicant promptly filed a notice of appeal and a record of appeal, but omitted from the said record of appeal certain parts of the proceedings of the superior court. Miss Wanjiru Nduati for Afrolite Industries Limited, the

respondent, swore the affidavit in reply to the application. She has averred therein, inter alia, that the omission was deliberate and mischievous with a view to mislead the court. She has not deponed as to why she thinks so. In her submissions before me, however, she argued that in an earlier application by the applicant for stay of execution it included the entire record of proceedings and she does not therefore understand why parts of it were omitted from the record of appeal. Submissions not being evidence it will not be proper to accept that contention against the applicant's case.

The applicant's case is that the parts of the lower court's proceedings which were omitted were so omitted inadvertently. Mr. Billing for the applicant submitted that the omission could not have been deliberate as it was not in the interests of the applicant's case to leave them out. In his view the omission was an oversight and urged me to excuse the same.

It is trite practice that an appellant whose appeal has been struck out as incompetent may move the court under rule 4 for leave to restart the appeal process. That is what the applicant has done here. Additionally, this Court has often held that as a general rule mistakes by the applicant leading to the striking out of his appeal are sufficiently punished by the striking out of the appeal, and should not as a general rule be revisited on the said appellant. There are however certain limited cases where that can and should be done. Miss Nduati submitted that the conduct of the applicant before its earlier appeal was struck out was despicable as would entitle this Court to deny the applicant any indulgence. She raised two aspects on the matter, the first one being the omission of parts of the lower court's proceedings. I have already held that mere omission of those proceedings is not sufficient to disentitle the applicant to the exercise of my judicial discretion in its favour. I cannot read improper motive into it without evidence or sufficient evidence in that regard.

The second aspect is that the copy of the decree in the record of the struck out appeal did not fully accord with the judgment which gave rise to it. Miss Nduati was in the appeal and did not raise the issue when the appeal came up for hearing. It was not one of the grounds upon which the said appeal was held to be incompetent. Her affidavit in reply to this motion is clear on that and so is the order striking out the said appeal.

Those being my views on the matter, I do not think the applicant's motion can be rejected merely on the basis of its conduct before its earlier appeal was struck out.

This application was filed under 10 days after the applicant's appeal was struck out. The filing was therefore prompt. I can find no reason to deny the applicant the opportunity of restarting the appeal process against the decision I earlier on alluded to. In the result I will allow the application, extend the time within which to file and serve a notice of appeal against the decree dated 27th June, 2002, in High Court Civil Case No.619 of 2000 by 10 days from today's date, and for a further 30 days from the date of filing of the notice of appeal within which to lodge and serve a record of appeal. I, however, award the costs of the application to the respondent assessed at Kshs.8,000/= to be paid within 14 days, failing which execution to issue.

Dated and delivered at Nairobi this 7th day of February, 2003.

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR