



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OWUOR, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 51 OF 2003 (28/2003 UR)**

BETWEEN

JAYANTKUMAR VRAJLAL SHAH

MRS. SHIKSHA DEVIDASAPPLICANTS

AND

MIDCO HOLDINGS LIMITED

SUMMIT TEXTILES (E.A) LIMITEDRESPONDENT

RULING

This application brought under rules 4 and 44 amongst other rules, of the Rules of this Court seeks two main substantive orders namely, that the two applicants Jayantkumar Vrajlal Shah and Mrs. Shiksha Devidas be granted leave to file and serve a Notice of appeal and record of appeal out of time. The decision against which the applicants wish to appeal against was given by Hewett, J. (as he then was) on 3rd April, 2001. It was a consolidated Judgment in respect of **H.C Winding-up Causes Nos. 51 and 52 of 1998.**

According to his ruling, the learned Judge had been asked by the parties in the proceedings before him to make a determination as to what date an arbitrator should be asked to assess the value of the shares in the companies (Respondents) for the purpose of the majority buying out the minority shareholders. Mr. Hira, counsel for the applicants, contended that the effective date should be 31st December, 1997 when the alleged agreement for sale of the shares was reached, while the respondent's contention was that no agreement had ever been reached at all. The learned Judge's finding was that since there was no specific agreement to back date the valuation, he would, and did fix the current date of 31st March, 2001 as the effective date. The applicants were dissatisfied with this decision and forthwith filed a Notice of appeal on 9th April, 2001 and thereafter a record of appeal on 6th June, 2001.

The appeal (Civil Appeal No. 118 of 2001) was struck out by this Court on 28th October, 2002 because the record of appeal did not contain one of the primary documents in contravention of Rule 85(1) of the Rules of this Court.

Immediately after this, the applicants filed a Notice of Motion for extension of time to file and serve notice and record of appeal out of time. The application was granted by Kwach, J.A on 12th November, 2002 on the ground that the application had been brought without any delay and that the applicants had been sufficiently punished by having their appeal struck out. That led to the filing of C.A No. 299 of 2002

on 15th of November, 2002 by the applicants. This appeal suffered the same fate as the previous one when it was struck out by this Court on 24th of February, 2003 counsel for the appellant having conceded that there were several fatal defects in the record of appeal one of them being that once again the record of appeal was incomplete as it did not contain some primary documents. The applicants still desirous to mount their appeal have once again made the present application. In the short affidavit sworn by counsel in support of the Notice of Motion filed without delay on 5th March, 2003, apart from laying out the history of the matter as I have done, two reasons were given as to why the application was urged namely that:

"5.No prejudice will therefore be caused to the respondents.

6.The Appeal involves points of public interest as a decision is a matter of public and judicial importance".

Those are the grounds upon which the applicants urge me to exercise my discretion in their favour and extend time for them to file both the notice of appeal and record of appeal.

Mr. Wangara, counsel for the respondents, has strenuously impressed on me that I should not exercise my discretion in favour of the applicants because they were in default. They have not despite the default satisfied the court that the default notwithstanding, my discretion should be exercised in their favour. In that no explanation has been given to the court for the default, no mistake on the part of the counsel has even been alleged in the affidavit. What has instead happened according to Mr. Wangara is that there has been a repeated blatant refusal or omission to obey the procedural rules in instituting an appeal before this Court. In that regard, I have been urged to adopt the view taken by Tunoi, J.A in **Yashvin A. Shretta vs. Vadag Establishment Civil Application No. Nai. 111 of 1999** where the learned Judge stated that:

"It suffices to say, that in considering this application to grant an extension, the predominant consideration is not whether there was an omission to serve the party affected with the notice of appeal, but, I think, the reason why there was such an omission. If the omission was deliberate and not due to accident or mistake, the court would in my view, be unlikely to grant an extension."

As mentioned before, the applicants herein did not rely on any of their own part or the part of their counsel's mistake. There was no explanation why and yet for the third time after being granted an indulgence by this Court, the appeal had to be filed with all the defects that led to it being struck out again. In absence of any genuine explanation of what actually happened and why the omission, this Court finds it difficult to arrive at any other decision other than to agree with counsel for the respondent that, no material has been put before me to enable me to decide whether I should or should not exercise my discretion in favour of the applicants. **See Sceneries Limited & others vs Ngengi Muigai Civil Application No. Nai 41 of 1999.**

I am not oblivious to the fact that it is in the interest of justice that a party should be accorded an opportunity for its case to be heard by this Court on merit. But, if the party chooses to ignore or misuse the opportunity given to it, I see no manifest injustice in not offering that party a third chance particularly in a situation as pertained in this application, where the omission or default was deliberate and not due to any accident or mistake. Nor am I convinced that the respondents, being trading companies are not likely to suffer any prejudice in view of the long period that the Winding-up Cause has been hanging over them, while they waited for the matters to be determined.

Considering all other factors urged before me, I am of the view that this is not a fit case for me to exercise my unfettered discretion in favour of the applicant. The interests of justice do not require that in this case an extension of time be granted.

This application therefore fails. The same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 11th day of April,2003.

E. OWUOR

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JUDGE OF APPEAL