



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL APPLICATION NO. 115 OF 2001

BETWEEN

**CHARLES NGEENE T/A NETWAY
AGENCIES.....APPELLANT/APPLICANT**

AND

**MWEA RICE GROWERS MULTIPURPOSE COOPERATIVE SOCIETY
LIMITED.....RESPONDENT**

(An application for extension of time to restore the Appeal from the ruling of the High Court of Kenya at Nairobi (Hewett, J) dated 1st December, 2000

in

H.C.C.C. NO. 492 OF 2000)

RULING

The applicant (who was the appellant in Civil Appeal No. 115 of 2001) by an application dated 24th November, 2002 seeks an order for extension of time to enable him to lodge his application for restoration of the said appeal to hearing. His appeal was dismissed with costs under *rule 99(1)* of the Rules of this Court for non-attendance on his or his advocate's part. That was on 23rd April, 2002.

On the 4th day of June, 2000 the applicant's advocate Mr. Njoroge filed an application in the appeal seeking setting aside of the dismissal order made on 23rd April, 2002 and reinstatement of the appeal itself to hearing. *Rule 99(3)* of the Rules of this Court provides specifically that such an application "shall be made within 30 days of the decision of the Court". Mr. Njoroge was some 9 days out of time in so applying and hence that application was struck out. I note that he did not apply for extension of time to lodge that application prior to lodgment thereof.

He is here now seeking the extension of time as earlier stated by me. His reasons for not applying within the aforesaid 30 day period are that the delay was occasioned by matters beyond his control, that the delay is not inordinate and that his client has an arguable appeal and his client ought not to suffer on account of counsel's mistake.

The reading of rule 99(3) does not require any acumen. It is as clear as daylight. Mr. Njoroge was aware

on 23rd April, 2002 that the appeal was dismissed for want of attendance. Yet he took some 39 days to lodge the application for restoration of the appeal to hearing. That application suffered the fate that was indeed bound to suffer. The striking out of that application did not yet put Mr. Njoroge on guard. It took him some one month and four days to lodge the present application and no explanation is offered for such delay.

Mr. Njoroge talked about the merits of his client's appeal. His client had sued the respondent for recovery of a sum of Shs.2,100,305/= being allegedly the balance due to him in respect of "agreed" cost of erecting a semi-permanent modular storage shed at the request of the respondent. Having filed the suit the applicant proceeded to serve the summons on the respondent by registered post despite the clear provision in Order V rule 2(a) of the Civil Procedure Rules. Despite the defective service the deputy registrar of the superior court entered judgment against the respondent for want of entering an appearance.

Personal service provision was introduced by the Rules Committee by Legal Notice number 5 of 1996 to circumvent the mischief that was played by alleged service on a corporation by registered post.

The respondent applied to have the ex-parte judgment set aside. It was set aside by consent of counsel then on record for the applicant. The applicant sought to have that consent set aside. That application was withdrawn. The applicant then applied to have the defence and counterclaim lodged by the respondent, struck out. On 1/12/2000 Hewett, J had no hesitation in saying that the defence and counterclaim was deemed to be filed on 27/9/2000. It is against that ruling that the applicant lodged Civil Appeal No. 115 of 2001.

It is trite that a defence and counterclaim can be filed any time before judgment is entered. As yet there is no judgment (since it was set aside) for the applicant. I really fail to see what the applicant is attempting to achieve.

I am not at all satisfied about the bona fides of the applicant. I do not see why he does not want to get on with the hearing, on merits, in the superior court. I dismiss this application with costs.

Dated and delivered at Nairobi this 8 th day of April, 2003.

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.