



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Owuor JA)

CIVIL APPLICATION NO NAI 321 OF 1999

ATTORNEY GENERAL..... APPLICANT

VERSUS

KAMLESH MANSUKHLAL PATTNI & 2 OTHERS.....RESPONDENT

(Application for extension of time to file Notice of appeal and record of appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Nairobi, Aluoch J dated 11th February, 1999 in H.C Miscellaneous Application No 1296 of 1998)

RULING

On 11th day of February, 1998, the Superior Court (Aluoch J) delivered a ruling in Miscellaneous Application No 1296 of 1998 prohibiting the Principal Magistrate at Kibera or any other magistrate from hearing or further hearing or determining the Principal Magistrate Court, Kibera Criminal Cases No 9438 of 1998, *Republic v Kamlesh Mansukhlal Pattni and Kalove*, Criminal Case No 9605 of 1998 *Republic v Lionel Smith* or the charges relating to High Court Civil Case No 418 of 1998 at Nairobi.

The Attorney General was aggrieved with that decision; consequent to that he filed a notice of appeal on 12th February, 1998. That notice of appeal turned out to contain several errors, so the Attorney General, filed Civil Application Nai 598 of 1999 to be granted leave to amend the notice of appeal. A single judge of this Court, Kwach JA ruled on that application on 30th day of March, 1999. He declined to grant the leave sought for the amendment of the notice of appeal on the ground that the notice of appeal being a primary document it could not be amended. A reference was made to the full Court under rule 54(1) (b); the same was disallowed.

As a result, the applicant filed Civil Application No Nai 321 of 1999 on 12th day of November 1999 seeking basically two orders.

“(1) That time for filing notice of appeal and record of appeal be extended.

(2) The applicant be granted leave to file and serve the said notice of appeal and record of appeal for such time as this court may consider just and in the interest of justice”.

The reason for the delay in filing the notice of appeal was attributed to the mistakes contained in the original notice of appeal and time taken by counsel in trying to rectify the mistakes. A replying affidavit was filed vigorously opposing the application.

That application came for hearing before Gicheru, JA (as he then was) on 12th November 1999, the 3rd respondent had not been served with the notice of motion. The learned judge ordered that service be effected on the 3rd respondent. This matter came up for hearing again with the result that it was once more stood over generally to await service being effected on the 3rd respondent.

The record indicates that the Counsel for the applicant did make an attempt to serve the notice of motion personally to the 3rd respondent in Dubai without much success.

He thereafter returned to this Court and on 11th day of July, 2000 had the following to tell Akiwumi JA (as he then was):-

“On 1st December 1999 the application for extension of time was adjourned by Gicheru JA in order that the 3rd respondent who was not present might be served with the related notice of motion and hearing notice so as to comply with rule 49. By dint of this clear and implied direction that the 3rd respondent be served with these notices, I in pursuance of rule 17 moved that it be ordered that the 3rd respondent who resides outside the country in Dubai be served with the notice of motion and hearing notice by means of the comparable process that applies in such a case in the Superior Court of Kenya.

Order. I agree and it is so ordered”. Signed by Akiwumi

JA

The record indicates that the orders of Gicheru and Akiwumi JJA were not complied with. In other words, the 3rd respondent was never served with the notice of motion and hearing notice as ordered. What has transpired is that counsel for the applicant on 1st day of November, 2001 filed the present application and as ordered by Gicheru JA (as he then was) the same was filed within the substantive application Civil Application No Nai 321 of 1999, under rule 17 of the Rules of this Court and section 3 of the Appellate Jurisdiction Act Cap 9. It sought the following orders:-

“(1) That the Honourable Court be pleased to dispense with the service of the application dated 12th November, 1999 herein to the 3rd respondent.

(2) That the applicant be granted leave to withdraw his application against the 3rd respondents’ application to proceed for hearing with respect to the 1st and 2nd respondent.

(3) That the costs for the application be costs in the course.”

The grounds upon which this application is made were contained in the notice of motion and they were that: the Attorney-General, the applicant, had decided not to proceed against the 3rd respondent because the respondent is now a resident in UAE and there exists no extradition treaty with the said country, with the result that even if the intended appeal succeeded, it would serve no purpose. Secondly that further delays in the hearing of the application is not justifiable since the 3rd respondent would not suffer any prejudice.

Thirdly,

“That it is in the interest that the said dispensation be given as the applicant intends to withdraw the proceedings against the 3rd respondent (Emphasis is mine)”

Finally, no prejudice would be occasioned to the 1st and 2nd respondents by the said dispensation of service and withdrawal of the application against the 3rd respondent.

It was further deponed by counsel for the applicant, that attempts to serve the 3rd respondent through the High Court and the Ministry of Foreign Affairs and International co-operation have not been successful because of what counsel merely refers to as “diplomatic bureaucracy”.

There was no affidavit from the Attorney General as to what efforts have been made and what impediments have been encountered in any attempt, if any, to obey the orders of Gicheru and Akiwumi JJA. Nor and more important has the Attorney General moved to exercise his power under section 26 of the Constitution of Kenya. Therefore, the 3rd applicant is still a party to the case subject matter of the ruling intended to be appealed against.

Counsel for the respondent has submitted that there has been no sufficient material placed before me to warrant me to exercise my discretion in favour of the applicant, even if I was able and minded to consider the merit of the application.

The applicant is in the unenvious position in that since 1999 when the ruling he intends to appeal against was delivered, he has not up to now succeeded in mounting a successful appeal. Numerous applications which

I have alluded to earlier in this ruling were made in order to enable the applicant to file and serve a fresh notice of appeal as clearly ordered by Gicheru JA. When personal service was not possible, Akiwumi JA at the insistence of the applicant made a clear order as to how the service should be effected. These two orders are alive and still subsisting on the record.

They have not been varied or discharged. Although counsel for the applicant has submitted that the applicant is not dissatisfied with these orders, they are the same orders that he has not complied with and are still subsisting on the record. These are the orders that he wants me to dispense with and make yet other orders which have the effect of verifying and dispensing with the orders already in the application.

There is no evidence before me to indicate that the applicant complied with or has indeed taken steps or moved the court under rule 54(1) to have the orders of both Gicheru and Akiwumi JJA

“varied or discharged or reversed by the Court.”

Sitting as a single judge of this court, I cannot and lack the jurisdiction granted under rule 54(1) to have the orders already granted by Gicheru and Akiwumi JJA vacated or varied in any manner. I cannot grant the orders sought in the notice of motion filed herein on 1st day of November, 2001 with the result that the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 18th day of July, 2003

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

