



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: KWACH, TUNOI & BOSIRE J.J.A)

CIVIL APPLICATION NO. NAI.284 OF 2001

BETWEEN

MESHACK OMARI MONYOROAPPLICANT

AND

1. DAVID KINYANJUI IST RESPONDENT

2. PETER CHEGE 2ND RESPONDENT

3. FRANCIS MAINA3RD RESPONDENT

**(In the matter of an intended appeal from the judgment of the High Court of Kenya at Nairobi
(Mr. Justice Mbogholi-Msagha) dated 5th June, 1998**

in

H.C.C.C. NO.5155 OF 1992)

RULING OF THE COURT

This is an application, principally brought under rule 80 of the Court of Appeal Rules (the rules), for an order that two notices of appeal respectively dated 5th June, 1998 and 9th September, 1998 which were filed in Nairobi High Court Civil Case No.5755 of 1992, be struck out.

Meshack Omari Monyoro, the applicant was the successful party in that suit in which he was awarded judgment in the sum of Kshs.1,608,036/= with costs and interest against David Kinyanjui, Peter Chege and Francis Maina, the respondents. The respondents were aggrieved and successfully applied to this Court under rule 5(2)(b) of the rules for an order staying execution of the decree pending determination of an intended appeal. The decision of this Court was given on 23rd October, 1998. To have entertained the respondents' application it means that the Court must have been satisfied that the respondents had lodged in the appropriate court registry, a valid notice of appeal. It is not possible to say why they had to file two notices of appeal, since they have all along been represented by one firm of advocates. As we have no evidence as to why the respondents filed the second notice of appeal it follows that it is invalid and liable to be struck out as the respondents had no right of filing another notice of appeal while the first one was still on record. Besides the second notice of appeal having been filed out of time without leave it is invalid.

Since the respondents got a stay they have not taken any steps to lodge a record of appeal. Mr. Peterson Githinji Mwangi, an advocate in the firm of Mungai & Gakuru Advocates, who are on record for the respondents, has sworn an affidavit to explain the delay in taking the essential step on record. He says that the respondents' file in the firm's chambers was misplaced by their registry clerk and was not found until January 2002. Consequently, the file could not be traced during routine bring-up of files. He denied that a letter to them from the court Registry, dated 12th July, 1999, has ever been received by his firm. In the said letter Messrs. Mungai & Gakuru advocates were being notified by the High Court Civil Registry that copies of proceedings and judgment were ready for collection.

A copy of the letter dated 12th July, 1999, is part of the record of this application. The respondents' advocates were served with the application on 16th August 2001. That notwithstanding the respondents' advocates have not taken any steps to date, either to comply with the request made in the said letter or to take what in the circumstances of this matter would be the most logical step to take. Mr. Mungai, who appeared for the respondents conceded that his firm took part in the fixing of hearing dates for the present application and that they have not taken any steps so far to pursue their clients' intended appeal. In view of that we cannot but agree with Mr. Bw'Omote, for the applicant, that from their conduct, the respondents have shown that they do not wish to pursue their intended appeal.

Even if we were to accept that the respondents' advocates have not to date received the letter of 12th July, 1999, in the normal course of postage, it would appear to us that it is not the non-receipt of the letter which has prevented them from taking the next essential step in the intended appeal. One would have expected that when they were served with the present application they would become aware of the said letter and then taken urgent steps to go for copies of proceedings and judgment. Having not done so, we have no reason to believe that had they received the letter immediately it was sent to them by the High Court Registry, they would have acted promptly to lodge a record of appeal. We cannot help thinking that the notices of appeal, and even the application for stay of execution were filed to delay the payment to the applicant of the decretal sum, more so considering that, as stated from the bar by Mr. Mungai, the intended appeal was being pursued by an insurance company in exercise of its right of subrogation. Most insurance companies are not known to satisfy promptly their respective insured's liabilities.

In the result we are minded to allow the present application. Accordingly we order that the notices of appeal dated 5th June 1998, and 9th September, 1998, be and are hereby struck out. The applicant shall have the costs of the application assessed at Kshs.8,000/=.

Dated and delivered this 8th day of February, 2002.

R.O. KWACH

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR