



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 123 OF 2001

BETWEEN

KIRINYAGA COUNTY COUNCILAPPLICANT

AND

KIMMI HOUSING CO-OP. LIMITEDRESPONDENT

(An application for extension of time to file a notice of appeal and record of appeal out of time in an intended appeal from a judgment of the High Court of Kenya at Nairobi (O'Kubasu, J) dated 29th September, 1998

in

H.C.C.S. NO. 6815 OF 1991)

RULING

On the 29th day of September, 1998 the superior court (O'Kubasu, J, as he then was) entered summary judgment against ***Kirinyaga County Council*** (the applicant here) in the sum of Sh.1,630,899/15 with interest and costs. That judgment was in favour of ***Kimmi Housing Co -operative Society*** (the respondent here). The respondent had claimed the said sum against the applicant as being the amount expended by the respondent by way of professional fees, that is, fees for professional surveyors, architects and quantity surveyor who all had rendered professional services to the respondent after the respondent was allocated, by the applicant, a five acre plot. The fees were presumably in respect of plans etc drawn up by the said professionals to enable the respondent to develop the said plot. Whether or not it was prudent on part of the respondent to incur such expenses prior to its being registered as a proprietor of the said parcel of land is not for me to say at the moment. Suffice it to say that the applicant may have had an arguable appeal.

The applicant was earlier represented by the law firm of M/s Muguku Muriu & Company, Advocates. According to Ms. Roselyne W. Miano the acting Clerk to the applicant, the firm of M/s Muguku Muriu & Company was instructed to lodge an appeal against the judgment in question. She goes on to say further, that not being conversant with the "technical procedure" the applicant believed that it's instructions were acted upon. Those instructions were obviously not acted upon as no notice of appeal was lodged in time or at all. Ms. Miano goes on to say further that it was only when the applicant's attention was drawn to a newspaper report indicating that the respondent was in contempt of court that it made inquiries and instructed its present advocates to "vigorously pursue" the matter and that it "took a bit of time" before it

could retrieve the file from M/s Muguku Muriu & ComIp anyyo.te, firstly, that I am not told when the said newspaper report appeared and, secondly, when was the file retrieved. It is incumbent upon a party seeking the exercise of a court's discretion to make available to the court particular material upon which the court can act. A court cannot act upon bland statements. The applicant is a County Council. It acts through its officers. A Town Clerk is supposed to be knowledgeable in law. I do not see why the Ag. Clerk did not inquire of M/s Muguku Muriu & Company, soon after issuing instructions to lodge the appeal, the progress of the intended appeal.

This application was filed some two and a half years after the date of judgment. The material placed before me does not explain such inordinate delay. It is not enough to say what is stated in paragraph 8 of Ms. Miano's affidavit. It is time the municipal authorities stopped issuing letters of allocation when they cannot fulfil their part of the obligations. It is time the Municipal authorities are told that issuance of a letter of allocation is not a joking matter. It is time such authorities are told that they are the custodians of the lands they hold and that they must not dish out or attempt to do so at their whim or whims and that if they do so they do so at their own peril.

It is also time to tell applicants such as one before me that it is no use simply blaming their advocates for inaction or non-action. If the advocates do not act per their clients' instructions, the clients have remedies against errant advocates if indeed errant they are.

I am obliged to consider the interests not only of the applicant but also of the respondent. The respondent has had a judgment in its favour since 29th September, 1998. It has executed the decree arising from that judgment. The applicant is paying by instalments as it cannot pay the whole sum at once. Mr. Wanjau says that the instalments are being paid without prejudice to the applicant's right to appeal. The record does not bear out that statement.

Mr. Wanjau argued that if I grant this application the respondent will suffer no prejudice. That argument is fatuous. The respondent is a Co-operative Society. It spent the moneys it claimed as is clear from the judgment. I see no reason why it should be kept out of its moneys which it can use for other purposes. Justice must look at both sides.

Mr. Wanjau tried to impress upon me the fact that what will go to the respondent is public money. It is so. But that is not a ground for granting such a belated application. Mr. Wanjau talked of this being a land dispute and as such time ought to be extended. It is not a land dispute. Even if it was a land dispute, such a dispute, per se, is no panacea for extension of time.

Lodging a notice of appeal and sending out a letter bespeaking copies of proceedings and judgment are the simplest of matters any advocate can and ought to be able to do. A litigant who sits back hoping the advocate will do what he was instructed to do can be termed as lax.

Several authorities have been referred to me. I have studied the same. Each case must be decided on its own peculiar facts and in this particular application I see no saving grace whatsoever to enable me to exercise my unfettered discretion under rule 4 of the Rules of this Court. This application can meet only one fate and that is to dismiss it with costs. I so order.

Dated and delivered at Nairobi this 1st day of February, 2002.

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.