



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NO. 142 OF 2001

PETER SIMON OPIYOAPPLICANT

AND

MADISON INSURANCE COMPANY LIMITED.....RESPONDENT

**(Being an application for extension of time to file an intended appeal from a
judgment of the High Court of Kenya at Nairobi (Khamoni, J) dated 24/11/2000**

in

H.C.C.C. NO. 1040 OF 1999)

R U L I N G

I have before me an application for extension of time to lodge a record of appeal out of time. The judgment sought to be appealed against was delivered on 24th November, 2000. The notice of appeal was lodged on 28th November, 2000. A letter bespeaking a copy of proceedings and certified copy of judgment was filed in the superior court Registry on 28th November, 2000 by M/s J. Ngaii Gikonyo & Company, Advocates for the applicant. This letter was copied to M/s Kimotho & Maiyo, Advocates for the respondent.

I note that the applicant's advocates sought a certified copy of the judgment to enable them to lodge the intended appeal. Such a copy is not necessary for the purposes of record of appeal. Despite the fact that a certified copy of the judgment or order appealed against is not necessary for inclusion in the record of appeal, advocates, in many instances, keep on seeking such copies to enable them to lodge an appeal. This Court has pointed out on several occasions that an intending appellant does not need such (certified) copies for inclusion in the record of appeal. When I pointed this factor out to Mr. Opiyo who appeared for the applicant he stated that the same was applied for erroneously.

By a letter dated 7th March, 2001 the applicant's advocates were notified that copies of proceedings and judgment would be supplied on payment of court fees. This letter was apparently received by J. Ngaii Gikonyo & Company advocates on 21st March, 2001 and on that very day they paid the court fees in the sum of Shs.1,260/= whereafter, on 17th April, 2001 they received an uncertified copy of the proceedings and a certified copy of the judgment. If one takes into account the fact that a certified copy of the judgment was not required (as opposed to an uncertified copy) the applicant did not probably have the benefit of the proviso to rule 81(1). Be that as it may, by 21st March, 2001 requisite copies for mounting an appeal were available and the appeal could have been lodged by 20th May, 2001. The applicant's

advocates instead waited for certification of judgment and then applied for extension of time which application is now before me.

To enable me to appreciate what the intended appeal is all about, I asked Mr. Opiyo the reason for not annexing a copy of the judgment to the application by way of an exhibit to the affidavit in support of the application. Mr. Opiyo took refuge in the answer to the effect that it was a slip on his part. Despite objection by Mr. Kinuthia I allowed Mr. Opiyo to hand over to me a copy of the judgment to enable me to appreciate what the intended appeal was all about. I have perused the judgment. I am not able to say that the intended appeal is frivolous.

The problem that I have to solve is: Do I let the applicant suffer for errors and slips of his advocate?. The applicant is not aware, probably, of what is happening. He certainly desires to appeal and he has a right to appeal. His advocates have been lax. They have not taken the trouble to read the rules which are clear. Instead of lodging the appeal by 17th April, 2001, they lodged the present application for extension of time. This application was lodged on 11th May, 2001. At least the application has been lodged without undue delay. I do not wish to deprive the applicant of his right of appeal by refusing to grant this application as he himself is quite probably an innocent by-stander hoping that his appeal would be lodged in time. Mr. Kinuthia argued that the applicant's advocates did not need a certificate of delay to lodge the appeal. That is not correct. If requisite copies are applied for and are not available until after the time to lodge the appeal expires, a certificate of delay is certainly necessary. Otherwise the intending appellant does not have the benefit of the proviso to rule 81(1). Mr. Kinuthia stated that the delay from 24th March, 2001 to 11th May, 2001 has not been satisfactorily explained. It has been explained in a bungling way.

Applicant's advocates awaited a certified copy of the judgment to enable them to lodge an appeal. That took time.

I have considered all that has been argued before me and in the interests of justice and in the exercise of the almost unfettered discretion that I have in considering an application of this nature, I allow this application but on condition that the applicant will pay costs of this application to the respondent which costs I assess at Shs.12,000/=.

The orders that I make are that (1) the applicant do lodge his record of appeal within the next 30 days and (2) that the applicant do pay costs in the sum of Shs,12,000/= to the respondent within the next 20 days and that (3) in default of such payment the record of appeal be rejected by the Registry of this Court. I direct the applicant to include in his record of appeal the receipt for Shs.12,000/- costs as well as a copy of this ruling.

Dated and delivered at Nairobi this 15th day of March, 2002.

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.