



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 270 OF 2001 (149/2001 UR)**

**BETWEEN**

**Lt. COLONEL JOSEPH MWETERI IGWETA.....APPLICANT**

**AND**

**MUKIRA M'ETHARE..... 1ST RESPONDENT**

**ATTORNEY GENERAL .....2ND RESPONDENT**

(Being an application for extension of time within which to file

and serve Notice of Appeal and Record of Appeal from the

Ruling of the High Court of Kenya at Nairobi (Shields, J) dated

25th October, 1990

in

H.C. MISC. APPLICATION NO. 269 OF 1989)

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**RULING**

This application before me has given me some anxious moments. The litigation leading upto this application has had a long and chequered history beginning way back in the early eighties. In fact the litigation is in respect of about 12 acres of land. The exercise of consolidation in regard thereto started in the late sixties. Mukira M'Ethare, the first respondent claimed in the superior court that he was "the proprietor as successor under Customary Law" of 11.96 acres of land comprised in fragments numbered 2,3,7,9,13 and 14 of Kiyharena Adjudication Section (the suit land). In 1983 Mrs. Kagwiria M'Thirua lodged a claim against the first respondent claiming some portion of the suit land. The Adjudication Committee awarded to her some 7.96 acres out of the suit land. The first respondent was unhappy with that award and appealed against it to the Arbitration Board established under the Land Adjudication Act, Cap. 284, Laws of Kenya. The Board overruled the Adjudication Committee and the said 7.9 acres of land reverted to the first respondent. That was on 4th April, 1984. On 4th September, 1984 the Land Adjudication Officer allegedly unilaterally purported to alter the decision of the said Board. Upon complaint by the first respondent the Director of Land Adjudication overruled the Adjudication Officer's

unilateral decision of 4th September, 1984. The Land Adjudication Officer summoned the first respondent to attend before him on 16th February, 1988. This was after the Director of Lands Adjudication had written to the Land Adjudication Officer, Meru, advising him to reinstate the Board's decision. The first respondent was unable to attend the hearing scheduled for 16th February, 1988 for the reason that he was otherwise engaged in Nairobi and that the "summons" did not give him sufficient time to attend. However the Land Adjudication Officer proceeded to hear the matter and decided that the suit land belonged to the Joseph Mweteri Igweta, the applicant here, as successor by inheritance from the late Mrs. Kagwiria M'Thirua.

The first applicant challenged the re-adjudication *vide Misc. Civil Application No. 269 of 1989*. On 25th October, 1989 the first and second respondents appeared before the superior court (Dugdale, J) and the following consent orders were recorded:

- "1. The decision of the Arbitration Board dated 3rd April, 1984 be and is hereby re -instated.*
- 2. The subsequent decision of the Adjudication and Settlement Officer, Meru be treated as null and void.*
- 3. The applicant (the first respondent here) be awarded one -half of the scale fees to be agreed or taxed."*

I note that the applicant was not a party to the aforesaid consent orders. He was a party affected thereby and he applied to have those orders set aside on the grounds (inter alia) that he had the possession of the suit land by virtue of the same having been left to him per the last will and testament of Kagwiria M'Thirua who had died on 20th August, 1984, and that the consent orders affected him whilst he was not a party to the suit. Shields J in his characteristic manner dismissed the application on 25th October, 1990 saying:

*"The applicant's rights if any are protected by section 30(f) of the Registered Land Act. I refuse to set aside the consent Order at his behest. Application is dismissed with costs."*

The applicant appealed against the decision of Shields J. That was by *Civil Appeal NO. 53 of 1993*. That appeal came up for hearing on 5th July, 1996 when it was dismissed for non-attendance on the part of the appellant. The applicant sought reinstatement of the dismissed appeal. That application was struck out as it was not lodged within 30 days of the dismissal.

The applicant then applied for extension of time to bring a further application for reinstatement of the dismissed *Civil Appeal No. 53 of 1993*. That application was heard and allowed on 3rd March, 1997. *Civil Appeal No. 53 of 1993* was thereafter fixed for hearing on 29th July, 1999 when it was struck out as some primary documents were not in the record.

The applicant thereafter filed an application for extension of time to lodge a fresh notice of appeal. That was *Civil Application No. Nai. 196 of 1999*. It was dismissed on 9th August, 1999. The applicant sought a reference to full Court against that dismissal which reference was allowed on 22nd December, 1999. Whilst allowing to reference to full Court said:

*"The subject matter of the intended appeal is a parcel of land measuring 12 acres or thereabouts situated at Katharene adjudication section of Meru. The applicant has been in possession and occupation of it for well over 12 years. It is manifestly clear that if we were to decline the reference his rights as to its possession would be adversely affected. In effect it would amount to depriving him of the land without the applicant being given a right to hearing. These facts were candidly admitted by Mr. M'Inoti, counsel for the respondent.*

*It was also made clear to us that the missing documents could not be traced in the superior court's file at the time of the lodging of the appeal which was eventually struck out. However, these documents have now been traced."*

Later during the course of that ruling (of 22nd December, 1999) the Court said further:

*"With respect to the learned single Judge, it is impossible for any party to explain why and how a document in the Registry cannot be traced unless that party is privy to its disappearance. In our view, the applicant had proffered sufficient explanation as to why the documents could not be traced. They were simply not in the court file at the material time.*

*In the circumstances, to shut the applicant out of court and to deny him the right of appeal for a fault not of his own making would be tantamount to denying him justice. Moreover, the respondent would not at all be prejudiced if the application had not been granted."*

As I see it, at least until the end of the year 1999 the applicant was on the right track. His earlier appeal had been struck out for no fault of his own and the full Court said so in the ruling I have quoted from; it said so by clear implication.

The applicant's advocates had in the application for extension of time omitted to seek leave to lodge a record of appeal out of time. He had leave to lodge only the notice of appeal out of time. The applicant yet again came to Court seeking extension of time to lodge the record of appeal out of time. That application, Civil Application No. Nai. 8 of 2000 was heard on 10th May 2000 and was dismissed on 29th May, 2000. The applicant sought reference to full Court against that dismissal and the reference was allowed by consent. The applicant was given 14 days, from 18th October, 2000 to lodge his record of appeal which he lodged on 26th October, 2000, in time, as extended. That was Civil Appeal No. 278 of 2000. When that appeal came up for hearing the court of its own motion struck the same out as the order or ruling extending the time was not included in the record of appeal. That was on 16th July, 2001. This application was filed on 8th August, 2001.

It is the striking out of Civil Appeal No. 278 of 2000 that has caused me a lot of anxiety. It is not in dispute that that appeal was lodged in time as extended. It is not in dispute that the ruling (order) granting extension of time was in existence. The only problem was that that ruling (order) was not included in that record of appeal. It is not in dispute that the respondents did not seek striking out of that appeal. It is not also in dispute that the order granting extension of time is not a primary document. It could come under rule 85(1)(k) of the Rules of this Court, Mr. M'Inoti for the first respondent submitted before me. Sitting as a single judge of this Court, I cannot question the correctness of the Court decision striking out that appeal. I may have allowed the applicant time to lodge the ruling (order) by way of a supplementary record of appeal or I would have allowed the applicant simply to produce a copy of the said ruling (order) as it is a part of the record of this Court in Civil Application No. Nai. 208 of 2000.

So the situation as now obtaining is that the applicant who as yet has had no proper hearing either in the High Court or this Court is once again seeking indulgence of this Court to file a fresh notice of appeal and record of appeal. I echo the sentiments of the full court in Civil Application No. Nai. 196 of 1999 and say that if I were to shut out the applicant from going any further through no fault of his own I would be denying him justice.

True, Mr. M'Inoti has pointed out that so far the applicant has committed a "litany of blunders." For that reason he submitted I ought not to exercise my discretion in favour of the applicant. He urged further that enough is enough and the applicant must bear the burden of his advocate's many blunders. Here I must bear in mind the fact that the applicant is not the architect of the "litany of blunders". Do I punish him by dismissing this application? Mr. M'Inoti relied on several authorities of this Court to support his arguments. The first one was the case of Kuwinda Rurinja & Ors vs. Kuwinda Holdings Ltd & 3 others, Civil Application No. Nai. 243 of 1996, (unreported) a decision of a learned single Judge of this Court. In that case, Lakha, JA took into account the question of prejudice to the respondent but he did not say what that prejudice was (see page 3 of this ruling).

Furthermore, having said that he could not properly consider the prospect of success of the intended appeal as laid down in the case of The Attorney General vs. Theuri (1982-88) IKAR 929, he proceeded to say that as the applicant was less than candid in the superior court he was not minded to exercise his discretion. That is how I understand his ruling. I bear in mind that it was Mr. M'Inoti's partner Mr. Kamau Kuria who was seeking exercise of such discretion on the grounds that the previous appeal was struck out

on account of counsel's error. In that case Mr. Kuria had urged that the intended appeal raised important questions of law and that it concerned 25 acres of land in Karen and that the application was lodged without undue delay. *Lakha JA* very properly considered all the factors for the granting or non-granting of that application but eventually dismissed the application (as pointed out earlier by me) on the basis that the intended appeal could not succeed as the applicant was less than candid in the lower court. Although the applicant sought a reference to full court and paid the fees therefor it appears the reference has not been heard. However, *Lakha JA* did say that counsel's error is not necessarily a bar to his obtaining an extension of time.

The case of *Kenya Cannery Ltd v. Doge* (Civil application No. Nai. 200 of 1995) (unreported) which was relied upon by Mr. M'Inoti does not help him. In that application *Kwach JA* very properly pointed out that if an appeal is struck out for want of a primary document in the record of appeal the intending appellant has to go back to the starting line for a fresh start. Counsel for the applicant in that application was seeking leave to file a fresh record of appeal on the assumption that a notice of appeal was deemed to be on record even when a record of appeal was struck out. *Kwach JA* pointed out that he could not inject life into a struck out appeal. True, *Kwach JA* lamented the delay in mounting a proper appeal some eight years after the superior court delivered judgment. The distinguishing feature in this application is that the struck out appeal was probably struck out per incuriam.

The case of *Baber Albhai Mawji vs. Sultan Hasham Lalji & others* (Civil Application No. Nai. 236 of 1992) (unreported) turned primarily on the fact that although the applicant's counsel was aware of the availability of the copies of proceedings and judgment for nearly 15 months, he still kept on asking for certified copies. I bear in mind the fact that mistakes of counsel in this particular case were looked into by this Court and that this Court did allow him to lodge the struck out appeal which appeal was struck out, as I said, per incuriam.

In the case of *Itute Ingui & another vs. I.M. Mwendwa* (Civil Application No. Nai. 166 of 1994) (unreported) *Omolo JA* did not exercise his discretion under Rule 4 in favour of the applicant as there was no acceptable explanation as regards the reason why the applicant's previous advocate had done nothing, for nine years, to file an appeal and who allegedly kept on cheating the applicant that all was in order. Even the application before *Omolo JA* was not filed until some 16 months after the new advocate took over. I would have taken the same attitude, on those facts, as *Omolo JA* took.

In the present case there is clear evidence that (although in a bungling manner) after the first appeal lodged by the applicant was struck out the applicant kept on taking steps to mount a proper appeal. His intention to appeal was manifest. The respondents knew at all the times that applicant was moving to put his house in order.

In the case of *Kongo vs. Njuguna* (Civil Application No. Nai. 76 of 1994) (unreported) *Omolo JA* was quite properly totally unimpressed by the applicant's non-compliance with the order which gave him the right to lodge the application and that he filed the application some two years after he was given leave to file the same and that too without even attempting to explain that delay of two years. I keep in mind the fact that each case stands on its own facts. No two cases are alike. This Court, even as at 22nd December, 1999, thought that the applicant ought not be denied his right of appeal. It allowed him to file a fresh notice of appeal. He then obtained an order for extension of time to lodge the record of appeal, but that too after first suffering the fate of his application being dismissed. He obtained such order on a reference to full Court, by consent. The applicant exercised that right only to come a cropper for want of inclusion of the order of 18th October, 2000 in the record of appeal.

If I were to dismiss this application there would be one *bona fide litigant* who will blame the system for relying on procedural technicalities to deny him justice. Whilst I do not condone errors on part of counsel I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearings of appeals take. He has no other forum to go to if he is shut out here.

I would want to assert without fear or favour that it should not be possible- in the year 2002 - for a bona fide litigant in the highest Court in the Republic of Kenya to be defeated by any mere technicality,

any slip, any mistaken step in his litigation. I am simply echoing the words of Holroyd Pearce L.J. in Pontin vs. Wood [1962] IQB 594 when he recalled the words of Bowen L.J. in 1887 when he, Bowen L.J., said:

*"It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, a ny slip, any mistaken step in litigation."*

Apaloo JA (as he then was) in his dissenting judgment in the case of Wachira vs. Ndanjeru [1982 -88] IKAR 1062 said at page 1065:

*"At all events it seems to me that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court, must, at least at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules."*

I stand by and adopt with approbation what Apaloo JA said.

I remember appearing (as counsel) in a case where the decree as drawn did not comply with the judgment of the High Court, and I requested the court, although I was for the respondent, to amend the decree during the course of the hearing. Nyarangi JA said in that case, that is, the case of Kigaragari vs. Agripina Mary Aya (1982 -88) IKAR 768, at page 769:

*"Also Mr. Shah pointed out rightly that the decree as drawn did not comply with the judgment of the High Court because interest on damages was from the date of assessment by the court. Mr. Shah suggested suitable deletions as a result of which the amount of Shs.439,324/= reads Shs.301,000/= together with interest thereon."*

The Court then proceeded to hear and dispose of the appeal itself. Now that, to my mind, is justice. But to strike out an appeal for non-inclusion of a document from the record of our Court (and not the superior court) is injustice. Yes if a procedural defect is fundamental to the proceedings a case of nullity may arise and a nullity, of course, is not curable because what is null and void ab initio remains so. Slavish adherence to rules at the expense of justice is what I cannot digest.

Whilst I accept that the first respondent does not know where he stands he would not suffer further prejudice if the applicant is allowed his final say in this Court. I appreciate that the process of adjudication as regards the suit land is held up. It has been held up for 30 years plus. A few more months would not make a difference. At least let the applicant feel that he has had a hearing from this Court.

I grant the application and order that the applicant do file his notice of appeal within the next seven days and his record of appeal within 30 days thereafter. The applicant will pay to the first respondent his costs of this application which I assess at Shs.12,000/= within the next 30 days failing which execution may issue. I make no order as to costs for or against the second respondent as he is not really a willing participant in this application.

There was no appearance for the second respondent before me on 1st March, 2002 when I stood over the hearing to 8th March, 2002. On 8th March, 2002 I had to stand over the hearing to 20th March, 2002 as the second respondent was probably not aware of the hearing on 8th March, 2002.

*Dated and delivered at Nairobi this 8th day of April, 2002.*

**A.B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**