



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 402 OF 2001

BETWEEN

GEORGE NJUNGE THAIRU.....APPLICANT

AND

MARY NJERI NJAU FIRST RESPONDENT

JAMES KARIUKI THAIRU..... SECOND RESPONDENT

LOISE WANJIKU THAIRU.....THIRD RESPONDENT

**(An application for extension of time to file Notice & Record of
Appeal in an intended appeal from a judgement of the High Court
of Kenya at Nairobi (Etyang J) dated 30th June, 1999**

in

H.C.SUC. C. NO. 747 OF 1997)

RULING

The applicant, **George Njunge Thairu** , is dissatisfied with the Ruling of the superior court (Etyang, J) whereby the learned Judge rectified a grant of letters of administration issued to **James Kariuki, George Njunge and Lois e Wanjiku** which grant was to administer the Estate of the Late Thairu Mukirai also known as **Paul Thairu Mukirai** . The rectification of the grant was ordered with a view to adding the first respondent, Mary Njeri Njau , as being entitled to be a beneficiary of the said estate. The second and third respondents did not oppose the rectification application before Etyang J. Only the applicant objectTehde toa pitp. licant did not lodge his notice of appeal in time but on 25th November, 1999 (some 5 months after the date of rectification of the grant) obtained leave to file a notice of appeal and lodge the appeal out of time.

Those orders were made by Kuloba, J . Obeying those orders the applicant lodged his notice of appeal and record of appeal in time as ordered. On 23rd day of October, 2001 when the appeal (Civil Appeal No. 92 of 2000) came up for hearing it was struck out as James Kariuki and Loise Wanjiku (the second and

third respondents) were not served with the notice of appeal or the record of appeal although they were parties to the proceedings in the superior court.

This application therefore comes before me for extension of time to enable the applicant to lodge a fresh notice of appeal and a fresh record of appeal. The ground upon which the application is based simply is that the names of the second and third respondents were inadvertently omitted in the first notice of appeal and the record of appeal. Mr. Wamae who appeared for the applicant added that his mistaken view was that as those respondents were not interested in the appeal they need not have been served.

As I see it the blunder is on the part of Mr. Wamae. He ought to have considered rule 76(1) of the Rules of this Court. He obviously did not consider the same. Now that he is wiser he wants to put his client's house in order as to enable him to have his say in this Court. The doctrine of res judicata does not apply. There first objection to the application, as taken by Mr. Enonda for the first respondent is that the issue of extension of time to lodge a notice of appeal and record of appeal is res judicata, Kuloba J having extended such time on 25th November, 1999. The appeal filed as a result of orders of Kuloba, J was struck out. The Notice of appeal went with it. The application has to start all over again and he can do so only by coming to this Court for extension of time under Rule 4 of the Rules of this Court. The doctrine of res judicata does not apply here.

The second objection by Mr. Enonda is that no plausible reasons have been demonstrated to enable this Court to exercise its discretion in favour of the applicant. The mistake of counsel, he said, ought not to be a reason to entitle Mr. Wamae to get the extension sought. Mr. Wamae ought to have seen the 'deficiency' earlier. That may be so but the applicant has already been punished for the counsel's error. His appeal was struck out. Counsel, some of them, at times, are lackadaisical and that is how, I feel, Mr. Wamae has behaved. There appears to be no seriousness on part of the counsel towards reading of Rules of this Court. But do I punish his client for that? I think not. I will exercise my unfettered discretion to allow the application but in doing so I must protect the interests of the first respondent by awarding to her the costs of this application. She will suffer no further prejudice.

The orders that I make are that the applicant do file his fresh notice of appeal within the next 10 days and his record of appeal within 30 days after lodgment of the Notice of Appeal. The Notice of Appeal as well as the Record of Appeal must be served on all respondents within seven days of filing. The applicant will pay to the first respondent her costs which I assess at Sh.6,000/= within the next 30 days failing which execution may issue.

Dated and delivered at Nairobi this 28th day of June, 2002.

A.B SHAH

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JUDGE OF APPEAL