

IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 288 OF 2001

BETWEEN

PAUL N. KANYI

PAUL WAITHAKA MWANGIAPPLICANTS

AND

GEORGE MBUGUA NJOROGE1ST RESPONDENT

SHADRACK OKWACH2ND RESPONDENT

**(Application for extension of time to file Notice of
Appeal out of time in an intended Appeal from the
Judgment of the High Court of Kenya at Nairobi (Mr.
Justice Sheikh Amin) dated 16th July, 2001**

in

H.C.C.C. NO. 73 OF 1998)

RULING

This is an application under rule 4 of the Court of Appeal Rules (the Rules) for extension of time to file a Notice of Appeal. The decision against which Paul Kanyi and Paul Mwangi (the applicants) wish to appeal was given by Sheikh Amin J on 16th July, 2001, in Nairobi. They lodged a Notice of Appeal on 26th July, 2001.

Since filing the Notice of Appeal on 26th July, 2001, the applicants have not taken any steps to institute an appeal.

The reason for this is to be found in paragraph 10 of the affidavit sworn by Mr Tiego dated 8th August, 2001 in support of the application in which he depones:-

"(10)That we have just discovered that we inadvertently omitted to include the name of the 2nd respondent in the Notice of Appeal though in the final analysis he is likely to be affected by the judgment of this court."

What this adds up to and Mr Tiego , for the applicants, concedes as much, is that the Notice of Appeal filed on 26th July, 2001 is defective.

On this Notice of Motion there is no prayer for an order that the Notice of Appeal dated 26th July, 2001 be deemed to have been withdrawn under rule 82 of the Rules, but Mr Tiego submitted that since the applicants failed to institute an appeal within the appointed time, the Notice of Appeal they lodged on 26th July, 2001, is to be deemed to have been withdrawn under rule 82 of the Rules.

That was why he did not consider it necessary to ask for a specific order to that effect in the present application. I must reject that submission as misconceived because this Court has stated in a number of

decisions that a notice of appeal cannot **be deemed to have been withdrawn** under **rule 82** of the Rules except with the oTrhdee rp oosfi ttihoen Cionu rthh.is case therefore is that the Notice of Appeal filed on 26th July, 2001 is still alive and well and as long as it is still extant, there is no room for making an order for filing a second Notice of Appeal.

For this reason, this application must fail, and it is hereby dismissed with costs assessed at Shs 5, 000/-, to be paid by the applicants to the first respondent, George Njoroge , within 14 days from today, and in default execution to issue. The second respondent is not entitled to any costs as he has not appeared though served.

Dated and delivered at Nairobi this 21st day of June, 2002.

R. O. KWACH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR