



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT KISUMU
(CORAM: KWACH, J.A.(IN CHAMBERS))
CIVIL APPLICATION NO.NAI.24 OF 2002
BETWEEN

**KARILUS ODONGO MGENI (suing by his next friend,
ANTHONY MBAI MGENI)APPLICANT**

AND

TOWORO INDUSTRIES LTDRESPONDENT

(An application for the extension of time to file and serve Notice of Appeal and Record of Appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Kisumu (Honourable P.K.K. Arap Birech, Commissioner of Assizes) dated the 19th April, 2001

in

H.C.C.C. No.40 of 1999)

RULING

Karilus Odongo Mgeni by his next friend Anthony Mbai Mgeni (the applicant) brings this application under rule 4 of the Court of Appeal Rules (the Rules) for extension of time to file and serve the Notice of Appeal and the Record of Appeal.

The decision against which the applicant wishes to appeal was given by Commissioner of Assize arap Birech on 19th April 2001. The learned Commissioner of Assize upheld a preliminary objection raised on behalf of the respondent that the suit was instituted in contravention of the mandatory provisions of **Order XXXI rule 1(2)** of the Civil Procedure Rules and struck out the suit filed by the applicant. The applicant wished to appeal against that order but he required the leave of the superior court. Leave could have been given informally at the time the decision was given but it would appear that neither the applicant nor his Advocate was in court at that time. A formal application for leave was made and leave was granted on 15th May 2001. On the same day the applicant's Advocates lodged a Notice of Appeal. It was not served on the respondent as required by **rule 76(1)** of the Rules.

Mr Okoth, for the applicant, says that he did not lodge the appeal because the Notice of Appeal he lodged on 15th May, 2001 lapsed under **rule 82(a)** of the Rules. As for failure to serve the respondent he says this was caused by delay on the part of the Deputy Registrar of the superior court to sign it.

Under rule **74(2)** of the Rules, the Notice of Appeal should have been filed within 14 days from 19th April 2001, that is to say on or before 3rd May 2001. Mr. Okoth says that he could not file the Notice of Appeal before obtaining leave to appeal but I must reject that submission because under **rule 74(4)** of the Rules when an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal. So the notice of appeal filed on 15th May 2001, was filed out of time and without leave. If this was the only obstacle, I would have been inclined to exercise my discretion in favour of the applicant.

One of the orders sought on the motion is for lodging a fresh notice of appeal on the ground that the original notice filed on 15th May 2001 has expired under **rule 82** of the Rules.

As I understand the law a notice of appeal cannot be deemed to have been withdrawn under **rule 82** except by the order of the Court to that effect. It must follow from this that the Notice of Appeal filed on 15th April 2001 is still extant.

The applicant therefore cannot be given leave to file a second notice of appeal while the first one is still in existence.

Since I cannot extend the time to file a fresh notice of appeal, there is no point in granting the extension to lodge a record of appeal. In the circumstances I have no alternative but to dismiss this application with costs assessed at Shs.5,000/= to be paid by the applicant within 30 days and in default execution to issue.

Dated and delivered at Kisumu this 11th day of June 2002.

R.O. KWACH

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JUDGE OF APPEAL

I certify that this is a copy of the original.

DEPUTY REGISTRAR