IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 115 OF 2002

BETWEEN

GEORGE ITOTIA NG'ANG'A.....APPLICANT

AND

MARY WANJIKU KIMARU.....RESPONDENT

(An application for extension of time to file and serve a notice of appeal and record of appeal out of time for an intended appeal from a judgment and order of the High Court of Kenya at Nairobi (K.H. Rawal, J) dated 31/10/00

in

RULING

I have before me an application stated to be brought under rule 4 of the Rules of this Court whereby the applicant seeks to lodge his notice of appeal and the record of appeal out of time. The facts briefly are that the judgment of the superior court, in its original jurisdiction, was delivered on 31st October, 2000 by Rawal, J. The advocates then on record for the applicant did not file any notice of appeal despite being allegedly instructed to do so by the applicant. There is nothing on record to show that such instructions may not have been given. It was not until 22nd March, 2001 that the applicant's present advocates applied for copies of proceedings and judgment to enable them to lodge an appeal. Having done so they waited until 16th May, 2002 (almost 14 months) to lodge this application. Whilst the delay in lodging the letter bespeaking copies of proceedings and judgment is excusable I have nothing before me to satisfy myself that the 14 month delay in lodging this application is excusable. That delay is, by any standards, inordinate.

Before I go any further I must deal with an issue taken up by Mr. Kinuthia for the respondent. Relying on section 50 of the Law of Succession Act, cap 160, Laws of Kenya Mr. Kinuthia urged that leave to appeal not having been obtained by the applicant he has no business coming before the court seeking extension of time as it would be an exercise in futility. That proposition is not correct. The judgment of the superior court will result into a decree which is appealable as of right. This was decided in the of Margaret Makhangu John v. David John Kibwana (Executor) (Civil Appeal No. 84 of 1995) (unreported). This Court said:

The position here, however, is that the appeal is from an order and not a decree. But in our view the use of the two words "decrees" and "orders" in section 47 of the Act (that is Cap 160) is significant. Had a word such as the "decision" or "adjudication" been used in place of those two distinct words then clearly the High Court's decision or adjudication would have been non - appealable altogether . The effect of the use of word "decree" as Hancox J.A. (as he then was) very correctly pointed out in the Income Tax decision (supra) was that the decision of the High Court was appealable as of right under Section 66 of the Civil Procedure Act."

The effect of the decision in the case of Margaret Makhangu John (supra) is that if what emanates fromt he High Court is a decree (as opposed to an 'order') in its original jurisdiction in a Succession Cause, the decree is appealable as of right. Reference can be made here and I do so to the case of

Commissioner of Income tax vs. Ramesh K. Manon [1982-88] I KAR 695. There is no need to quote therefrom. In these circumstances I do not agree with Mr. Kinuthia that the judgment of the High Court is appealable only with leave.

However, as I have pointed out earlier, the unexplained delay of 14 months is inordinate. It disentitles the applicant the exercise of my discretion under rule 4 of the Rules of this Court.

Another factor that has weighed on my mind is that the intended appeal is really not arguable but I say no more on this as it does not fall within my province, as a single judge, to decide the point.

In the circumstances I am constrained to dismiss this application which I do with costs. I assess these costs at Shs.6,000/=.

Dated and delivered at Nairobi this 3rd day of October, 2002.

A.B. SHAH

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JUDGE OF APPEAL