



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, OWUOR& O'KUBASU J.J.A)
CIVIL APPLICATION NO.NAI.342 OF 2000

BETWEEN

**KOKI KATUA (representative of the Estate of
Philip Nthenge Katua (deceased)).....APPLICANT**

AND

MICHAEL MUTISYA KITHOMERESPONDENT

(An application for extension of time to serve a Notice of Appeal in an intended appeal from a judgment of the High Court of Kenya at Nairobi (Lady Justice Aluoch) dated 28th September, 2000 in

H.C.C.C. No.2524 of 1989)

RULING OF THE COURT

On 13th February, 2001, a single Judge of this Court, Kwach JA, declined to extend the time to enable the applicant, Koki Katua, as personal representative of the Estate of Philip Nthenge Katua (deceased) to lodge and serve a Notice of Appeal out of time. This is a reference from that decision.

In declining to grant the extension of time the learned single Judge remarked, inter alia, that the applicant not only failed to place any material before him upon which he would exercise his unfettered judicial discretion under rule 4 of

The Court of Appeal Rules, but also that the explanation which was given by the applicant's counsel then on record as to why a Notice of Appeal was not lodged timeously, namely that he had no instructions to do so, was flimsy.

The learned single Judge gave another reason for declining to extend time. In her affidavit in support of her application for extension of time, the applicant deposed that a Notice of Appeal had been lodged by her counsel on 18th September, 2000 out of time. She did not however, annex a copy of the same to her affidavit. On this, the learned single Judge, said that even if he were minded to exercise his discretion in the applicant's favour, the fact that she did not produce any evidence to prove that a Notice of Appeal was in fact lodged as alleged, he was not satisfied as to the bona fides of the applicant. He referred to the reference on behalf of the applicant properly conceded that in absence of an explanation as to why the applicant's counsel did not notify her in time, of the results of her case in the superior court, there would

be no proper basis for faulting the learned single Judge in the decision he came to. We too are of the same view. Besides as the learned single Judge pointed out and there is ample authority in that regard, to wit James Arthur Mbui v. Esso Kenya Ltd & Another (Civil Application No. NAI 185 of 2000) (unreported) and Attorney General v. Geoffrey Ndungu Theuri [1982 - 88] 1 KAR 929, an advocate does not need his client's instructions to file a Notice of Appeal, it being a simple document whose filing does not constitute an irrevocable commitment by a party to file an appeal.

We also think, as the learned single Judge did, that a failure by the applicant to include in the record of her application either a copy of the decision against which she intended to appeal or the proceedings giving rise to it or both the documents, was imprudent as that denied the court essential material in the exercise of its judicial discretion under rule 4, aforesaid.

In the result we agree with Mr Gakuru for the respondent that this reference has no merit. We are satisfied that the learned single Judge did not err in principle or at all in the decision he came to. The reference is accordingly, dismissed with costs.

Dated and delivered at Nairobi this 2nd day of October, 2001.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR