



IN THE COURT OF APPEAL
AT NAIROBI
CORAM: SHAH, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 189 OF 1998

BETWEEN

JACOB MWANGI H. MURIRA

JOHN WAMBUGU HADAD (AS ADMINISTRATORS OF THE ESTATE OF

THE LATE HADAD MURIRA KARUKWA & WAWERU KARUKWA).....APPLICANTS

AND

JOHN MWAGE KARIUKI.....RESPONDENT

(An application for extension of time to file and serve notice of
appeal and record of appeal out of time in an intended appeal
from the judgment of the High Court of Kenya at Nairobi
(Owuor, J) dated 9th June, 1998

in

H.C.C.A. NO. 380 OF 1992)

R U L I N G

The learned Judge in the superior court (Owuor J, as she then was) concluded the hearing of **Civil Appeal No. 380 of 1992** on 24th June, 1996. She did not deliver judgment until 9th June, 1998. The advocates for the respondent, M/S Gakuru & Company complained to the Law Society of Kenya, by their letter of 4th June, 1997, that the judgment in question was one of those not delivered. The said Society wrote to the learned Judge pointing out the long delay requesting her to deliver the judgment. By his letter of 23rd October, 1997 **K.M. Maini Esq.**, the then advocate for the present applicant, complained to Law Society of Kenya of and concerning the delay in delivery of judgment pointing out that one of his clients had died in the interim period. Further letters followed. Finally the judgment was delivered on 9th June 1998.

It appears that **Mr. K.M. Maini** was not interested any further in the matter. Whilst he appeared before the learned Judge at the time of the delivery of judgment he did not inform his client **Waweru Karukwa** of the result. Waweru Karukwa went to inquire of the result on 24th June, 1998 when Mr. Maini told him to pay his fees and take the file of the appeal away, to another advocate. Mr. Maini said so after he was asked to appeal against the decision. **Mr. Karukwa** was able to collect the file from Mr. Maini on 10th July, 1998. He handed the same over to M/s Ndumu Kimani & Company, Advocates with instructions to take steps to lodge and prosecute the intended appeal.

This application was lodged in this Court on 31st July, 1998. I am not able to say that there was any inordinate delay in lodging this application. It was filed with due despatch. By the application the applicants seek extension of time to lodge a notice of appeal and the appeal out of time.

Hadad Murira Karukwa died on 11th July, 1997. On 19th July, 1999 M/s Ndumu Kimani & Company Advocates filed a notice of motion in this application seeking to substitute the late H.M. Hadad with **Jacob Mwangi H. Murira** and **John Wambugu Hadad** who had both obtained letters of administration to administer the estate of late H.M. Hadad. The order in that regard was made by Tunoi JA on 8th May, 2000.

The substitution having taken place the applicants now seek extension of time as pointed out hereinbefore.

Mr. Gakuru for the respondent objects to the application on the ground only that Mr. Maini ought to have lodged the notice of appeal even if he had no instructions to do so, so as to protect the interests of his client. In support of his argument he relied on two rulings of Kwach JA in the cases of **Mbui & 5 others vs. Esso Kenya Limited & Another** (Civil Application No. Nai. 185 of 2000) (unreported) and **Kobi Katua v. Michael Mutisya Kithome** (Civil Application No. Nai. 342 of 2000) (unreported). The ratios decidendi of these two cases are that an advocate does not need instructions to lodge a notice of appeal which costs - by way of court fees - Shs.450/= only. In the Mbui case there was a two month gap between the date of delivery of judgment and date of lodgment of the application for extension which the learned single Judge considered as unacceptable. In the Kathua case the judgment was delivered on 28th September, 2000. The advocate did not notify the client of the fact of delivery of judgment until 18th October, 2000. The counsel for the applicant did not annex a copy of notice of appeal he allegedly lodged in time that is on 18th September, 2000.

Each case must be dealt with in accordance with its own peculiar facts. Here the position was that with the two year delay in the delivery of judgment Mr. Maini probably got fed up. He had complained seriously about the delay. Do I place Mr. Maini's reluctance to lodge a notice of appeal at the door of the applicant? I should think not. I keep in mind the fact that as soon as the applicant who was still alive became aware of the judgment he took expeditious steps to get on with the process of appeal. He should not be punished for that.

What has weighed on my mind is the delay in the delivery of judgment in the superior court. With the greatest of respect to the learned Judge, the delay is inexcusable. This has prompted me to consider the application before me in somewhat different manner.

In the two cases relied upon by Mr. Gakuru there was no issue of such delay as to lead a counsel to throw in the towel and say, enough is enough. In the exercise of my discretion I allow this application and order that the notice of appeal be lodged within the next ten days and that the record of appeal be lodged within 30 days of the lodgment of the notice of appeal. Costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi this 29th day of March, 2001.

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.