



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 77 OF 2001 (48/2001 UR)**

**BETWEEN**

**K.H. OSMOND.....APPLICANT**

**AND**

**DAIMA BANK LIMITED.....1st RESPONDENT**

**AUCTIONEERS (K) LIMITED.....2nd RESPONDENT**

***(Being an application for extension of time to file and serve the Notice of Appeal, the Memorandum of Appeal and Record of Appeal out of time from the Judgment of the High Court of Kenya at Nairobi (Gacheche Esq. Commissioner of Assize) delivered on 12th July, 2000***

***in***

***H.C.C.C. NO. 3052 OF 1997)***

**\*\*\*\*\***

**RULING**

I have, before me, an application brought under rules 4, 41, 42 and 47 of the Court of Appeal Rules (the Rules) whereby the applicant, K.H. Osmond, seeks extension of time to file a notice of appeal, as well as memorandum and record of appeal out of time. The facts leading to the application are that the superior court on the 12th day of July, 2000 entered judgment against the applicant in the sum of Shs.48,618,559/00 with interest thereon at the rate of 48% per annum from the 27th day of November, 1997 until date of payment in full. The amount allegedly originally advanced by the first respondent to the applicant was Shs.14,822,267/00. The applicant lodged a notice of appeal to challenge the decision of the superior court on or about 17th July, 2000 in good time. The applicant also applied for a certified copy of proceedings and a signed copy of the judgment to enable him to lodge the appeal. That was by a letter dated 14th July, 2000 addressed by Miss Quadros to the Deputy Registrar of the superior court. A certified copy of the proceedings and a signed copy of the judgment was made available to Miss Quadros on 27th November, 2000 and she lodged the applicant's appeal on 13th February, 2000.

The notice of appeal lodged on behalf of the applicant on 17th July, 2000 was struck out by this Court on 16th March, 2001. That was in Civil Application No. Nai. 359 of 2000 . This Court said:

***"So that the argument by Miss Quadros that she needed certified copy of the proceedings and a signed copy of the judgment does not hold water. It is clear that uncertified copies of proceedings and judgment were available at the time the respondent (that is the applicant here) lodged Civil Application No. Nai. 251 of 2000 against the applicant on 24th August, 2000. The time to lodge the Record of Appeal expired on or about 23rd October, 2000 so that the appeal lodged on 13th***

**February 2001 has been lodged out of time. That is Civil Appeal No. 23 of 2001.**

**The appeal not having been lodged in time the fate of the notice of appeal in question is clear. It is spent. It is ordered struck out. The applicant will have costs of this application. These are our orders."**

Faced with the situation that arose as a result of the said notice of appeal having been struck out the applicant is here seeking extension of time as already pointed out. The mistake of counsel was her insistence on seeking certified copy of proceedings and signed copy of the judgment. In a ruling to be delivered to-day (and delivered before the delivery of this ruling) in the case of **Karanja vs. Cheriro Ndereba Njiri**, (Civil Application No. Nai. 264 of 2000)

***("uIn rweiplolr tepdo),n t I osuati,d :first, that there is no need for certified copies of proceedings and judgment to mount an appeal. The only document that needs to be certified is the order or decree appealed against. Despite this very clear provision advocates normally always apply for certified copies. I do not know why and how this practice has crept in. I would wish to disabuse the advocates of this notion.***

***I hope they will take heed of this warning. I would ask the advocates to peruse the rulings in: "***

***(1)Daima Bank Limited & another vs. K.H. Osmond (Civil Application No. Nai. 359 of 2000) (unreported)***

***(2)Mawji vs. Lalji & 2 others (Civil application No. Nai. 236 of 1992) (unreported)***

***(3)L.Z. Engineering Construction Limited vs. Trade Bank Limited (In Liquidation) & others (Civil Application No. Nai. 196 of 2000) (unreported)"***

The issue that arises for consideration is: do I extend time as prayed for here when simple reading of the rules, especially rule 85 of the Rules would have put the counsel on notice? As I pointed out earlier most advocates ask for certified copies to mount an appeal. It is now clear beyond peradventure that such copies are not necessary. Mistakes of counsel, even when counsel is acting for an advocate, generally cannot be laid at the door of the party who does not at all times keep an eye on what counsel is doing. I am prepared to accept that Miss Quadros was labouring under the common fallacy that one ought to apply for certified copies of proceedings and judgment in order to mount an appeal and I will give her the benefit of that doubt. Doing so in the exercise of my unfettered discretion under rule 4 of the Rules I am minded to give her a chance to lodge a fresh appeal. Lodgment of a fresh notice of appeal once the previous one is struck out is mandatory in order to lodge the appeal itself. In this case, although the record of appeal lodged on 13th February, 2001 is still there it stands spent in my view, and therefore the counsel is quite right in seeking to lodge a fresh record of appeal.

Counsel for the respondent however, raised an important issue. He urged that it is time his client knew where it stood. Exercise of discretion under rule 4 is a two way traffic. I must be mindful of the interests of both litigants. If I allow this application it would mean that the respondent would have to wait for a few more months to know the fate of the intended appeal. Now that nearly four years have already passed since the filing of the suit in the superior court a few more months will not prejudice the interests of the respondent whilst the applicant will be able to have a full say at the time the intended appeal comes on for hearing. The mortgaged land will still be there. Considering all the circumstances including the fact that this application was filed within a few days of the striking out of the notice of appeal I allow this application. The applicant shall file his fresh notice of appeal within the next seven days and its record of appeal within 21 days of the lodgment of the notice of appeal. The applicant is hereby given the liberty of lifting the copies of his record of appeal from the Registry of this Court to enable him to re-use such portions thereof as he deems fit, if he wishes so to do.

The applicant will however pay the costs of this application which I assess at Shs.12,000/= within the next 30 days failing which execution may issue.

**Dated and delivered at Nairobi this 4th of April, 2001.**

**A.B.**

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**SHAH**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**