



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 110 OF 2000

A.H. NURANI.....APPLICANT

AND

1. B.H. LALJI.....1ST RESPONDENT

2. D.H. NURANI.....2ND RESPONDENT

3. SAMVIR MANAGEMENT SERVICES LIMITED.....3RD RESPONDENT

4. ATTA (KENYA) LIMITED.....4TH RESPONDENT

(An application for extension of time to file Record of Appeal out of time in an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Lady Justice Aluoch) dated 19/2/98

in

H.C.C.C. NO. 3484 OF 1995)

RULING OF THE COURT:

The applicant's *Civil Appeal NO. 52 of 1998* was on 7th April, 2000 struck out by this Court for the reason that the order appealed from contained an amendment that was unauthenticated rendering the same incurably defective. Six days later, on 13th April, 2000, the application the subject-matter of this reference was made the pertinent part of which was in these terms:

"**TAKE NOTICE** that on.....day of....., 2000 at 9.00 O'clock in the forenoon or as soon thereafter as he can be heard A.A.K. Esmail Esq., Advocate for the above named Applicant will move a Judge of the Court for orders that the time for lodging and serving the Memorandum and Record of Appeal by the Applicant against the aforementioned order of the superior court be extended **AND** the costs of this application be provided for."

It was supported by the affidavit of Akbar Abdullah Kassam Esmail sworn by him on 13th April, 2000. In paragraph 8 of his replying affidavit of 3rd July, 2000, the first respondent, Bahadur Hasham Lalji, deponed as follows:

"8.**THAT** I am advised by my Advocates on record and verily believe the same to be true that the Application as a whole is fundamentally defective and should be dismissed with costs."

When the application came up for hearing before a single judge of this court (Kwach, J.A.) on 6th July, 2000, counsel for the applicant applied to amend the application so as to include in it the prayer for extension of time within which to lodge the notice of appeal. This was resisted by counsel for the first respondent who pointed out to the learned judge that this point had already been taken up in paragraph 8 of the first respondent's replying affidavit. Without allowing or dismissing the application for the amendment sought by the applicant, the learned judge made an order that he will rule on the objection to the amendment sought as part of his ruling on the main application. He, however, inserted in the said application the amendment sought and continued with the hearing of the same. In his ruling on the main application, the learned judge had this to say in regard to the objection taken by counsel for the first respondent to the amendment sought by counsel for the applicant as is referred to above:

"I reject Mr. Ochieng' Oduol's objection because I believe that such an application can be made in the course of a hearing under **rule 42(3)** of the Rules where the Court is satisfied that no prejudice will result to the other side."

The learned judge then proceeded to deliberate on the applicant's main application and granted the same with costs in the intended appeal so that the time for lodging the notice of appeal was extended by 7 days from the date of the ruling and the time for lodging the record of appeal was extended by 14 days from the date of lodging the notice of appeal within the extended time. This reference is the product of that ruling.

At the hearing of this reference on 3rd May, 2001 counsel for the first respondent submitted that the learned single judge of this Court was in error when he exercised his discretion in favour of the applicant as from the nature of the application before him it was manifestly defective to the extent that an informal application to amend the same could not cure it without occasioning prejudice to the first respondent. Much more so when the latter had in paragraph 8 of his replying affidavit as is set out above raised the issue of fundamental defectiveness of the applicant's main application. Indeed, according to counsel, the delay of 84 days in making the application for amendment to the aforesaid application remained unexplained. The non-explanation of this delay by the applicant was prejudicial to the first respondent, counsel concluded.

According to counsel for the 2nd, 3rd and 4th respondents, however, the granting of the amendment informally sought by counsel for the applicant was within the discretion of the learned judge and his exercise of the same in that regard was correct. Indeed, according to counsel, the issue of 84 days delay in making the application to amend the applicant's main application was never brought to the attention of the learned judge.

The submissions of counsel for the applicant, like that of counsel for the 2nd, 3rd and 4th respondents, was in the main that the delay of 84 days in making the application for the amendment to the applicant's main application was never brought to the attention of the learned judge. In any event, in granting the amendment sought by the applicant, the learned judge was exercising his discretion under **rule 42(3)** of the Court of Appeal Rules. According to counsel, there was no prejudice to the first respondent in the learned judge granting the amendment now complained of by counsel for the first respondent.

It may be inappropriate in the circumstances of this reference to discuss the applicability or otherwise of **rule 42(3)** of the Court of Appeal Rules in exercising the discretion to substantively amend an application such as was before the learned single judge of this Court and in particular when one of the grounds of attack was that it was fundamentally defective and warranted being dismissed with costs. But one thing we are certain about is that any exercise of judicial discretion must give effect to the will of the law. To this end, the first respondent having deponed and taken the point, as is indicated earlier in this ruling, that the applicant's application was fundamentally defective and should be dismissed with costs, this aspect of the said application deserved to be addressed by the learned judge in his ruling before exercising his discretion in favour of the applicant. This was not done. Had it been done, it would have become clear how the unexplained delay of 84 days in making the application to amend the applicant's main application had been dealt with in the exercise of discretion in favour of the applicant. In the circumstances, we are unable to say that the granting of the informal application to amend the applicant's main application was

not prejudicial to the first respondent consequent to which the effect of the will of the law may not have been given. On account of this, we allow this reference and set aside the order of the learned single judge of this Court extending time within which to lodge the notice of appeal and the record of appeal with the costs occasioned by the applicant's main application being in the appeal. The costs of this reference and of the application before the learned single judge of this Court are awarded to the first respondent.

Dated and delivered at Nairobi this 11th day of May, 2001.

J.E. GICHERU

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR