



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI.69 OF 2001 (UR.42/2001)**

BETWEEN

- 1. DAVID MAINA**
- 2. SUSAN WAMBUIAPPLICANTS**

AND

- 1. NAIROBI CITY COUNCIL**
- 2. JOHN WAWERU KINYANJUIRESPONDENTS**

(An application for extension of time to file Notice of Appeal and Record of Appeal in an intended from a judgment, decree of the High Court of Kenya at Nairobi (Justice Osiemo) dated 14th February 2000

in

H.C.C.C. No.2240 of 1995)

R U L I N G

Following the dismissal of their suit for, inter alia, an injunction to restrain both the respondents herein, from evicting them from their respective kiosks along Kamunde Road, Nairobi, David Maina and Susan Wambui, the applicants, filed, in person, separate notices of appeal, within time, declaring their desire of appealing against the dismissal. They, however, did not serve those notices on City Council of Nairobi and John Waweru Kinyanjui, the respondents. Nor did they file any record of appeal within the time stipulated in Rule 81 of the Court of Appeal Rules (the Rules).

In the application before me, expressed to be brought under rules 4 and 42 of the Rules, the applicants seek an order extending the time within which to file fresh notices of appeal and records of appeal. They contend that they did not take the next essential step because when they sought legal advice they were informed that the notices of appeal they had filed were defective as they did not include in the notices the addresses of service of the respondents, and that it was necessary and essential to file fresh ones. But as the time for doing so had long expired, there was a need for seeking an extension of the time within which to file fresh notices of appeal and records of appeal, and hence the present application. They also contend further, that because the applicants did not have the benefit of legal advise, they could not appreciate the need to include in the said notices the respondents' addresses for service, and on that account asked me to exercise my wide judicial discretion under rule 4, and gTrhaen t atphpel iceaxttieonnsi orna ipsreasy ead fjourr.isdictional point.

In view of the fact that the applicants' respective notices of appeal are still on record, can this court properly grant an extension of the time within which to file fresh notices of appeal? Mr Kahonge for the applicants submitted before me that the notices the applicants filed in person are deemed to have been withdrawn under rule 82 of the Rules, when the applicants did not lodge their records of appeal within the time stipulated in the Rules for doing so. It was further his view that any of the parties or the court is entitled to deem the notices as withdrawn without any formal order from the Court. Mr Thuo for the respondents thought otherwise. In his view an order of the court is necessary.

Rule 80 of the Rules provides that a person affected by an appeal may, at any time, either before or after the institution of an appeal, apply to the Court to strike out the notice of appeal, for among other grounds that an essential step in the proceedings has not been taken or has not been taken within the prescribed time. A careful reading of the rule implies that the deeming provisions under rule 82 apply after an order to that effect has been made by the Court on the application of a person affected by it.

Besides, the wording of rule 4 presupposes that the jurisdiction of this Court to extend time may only be invoked if the time:

"... limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules ..."

has expired before that act is done and therefore needs an extension to facilitate the doing of that act. If as in this matter the act or acts envisaged by rule 4 has been done, it would, in my view, be an abuse of the process of Court for any person to want the Court to do what is not necessary. The Court will by doing so be engaging in an exercise in futility which is contrary to the policy of the law.

For the foregoing reasons I decline to exercise my discretion under rule 4 to grant an extension of the time within which to file a notice of appeal.

There is a second part of the application. The applicants pray for an extension of the time within which to file a record of appeal. The applicants concede that on the basis of the notices of appeal which they filed they cannot possibly mount a competent appeal as the notices are themselves invalid. I may not competently rule on the validity or otherwise of the said notices as that can only be competently done by a bench of at least three Judges. In view of the fact that the applicants themselves have disowned the notices of appeal any order extending the time within which to lodge a record of appeal will serve no useful purpose.

In the result, I decline to grant an order extending the time within which to file records of appeal and dismiss the application with costs assessed at Ksh.3000/=

Dated and delivered at Nairobi this 20th day of July, 2001

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR