



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAKHA, BOSIRE & KEIWUA, J.J.A.)

CIVIL APPLICATION NO. NAI. 292 OF 1998

BETWEEN

KENYA SHELL LIMITEDAPPLICANT

AND

JAMES G. K. NJOROGERESPONDENT

**(Application for extension of time to file record of
appeal in an intended appeal from the Ruling of the
High Court of Kenya at Nairobi (Justice Hayanga)**

dated 7th October, 1997

in

H.C.C.C. NO. 3452 OF 1995)

RULING OF THE COURT

A single Judge of this Court (Shah JA), by his ruling dated 12th October, 2000, granted Kenya Shell Limited, the applicant, an extension of time within which to lodge a record of appeal. James G. K. Njoroge, the respondent, was aggrieved, and as he was entitled to do, he brought a reference to the Court complaining that the learned single Judge did not consider the issues which were raised before him, more specifically, whether the superior court has the power under **section 7** of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, to validate a notice of appeal filed out of time without leave; whether in the absence of a valid notice of appeal, the superior court could grant a stay under **Order 41 rule 4** of the Civil Procedure Rules, and whether the notice of appeal was valid or not was res judicata.

The respondent as plaintiff in Nairobi High Court Civil Case No. 3452 of 1995, successfully applied for a prohibitory injunction to restrain the applicant from preventing him from operating a petrol station known as Baraka Service Station situated on L.R.209/8224, Waiyaki Way, Nairobi, in any manner. The order of injunction was made on 7th October, 1997, by Hayanga J. Following the making of that order, the applicant filed a notice of appeal declaring its intention of appealing against that decision. The said notice was lodged timeously, but in it the applicant erroneously indicated that the decision against which

an appeal was intended was given on 8th October, 1997, instead of 7th October, 1997. By an order of this Court dated 7th July, 1998, made pursuant to an application by the respondent, the said notice of appeal was struck out for being incurably defective and invalid.

The applicant immediately applied to the superior court, by a Chamber Summons dated 8th July, 1998, expressed to be brought under **Order 41 rule 4**, of the Civil Procedure Rules, and **section 7** of the Appellate Jurisdiction Act, basically seeking two orders. First, that the time for filing notice of appeal against the order of the superior court made on 7th October, 1997, be extended. Second, that execution of the said order be stayed pending determination of an intended appeal against it. Filed on the same day was a fresh notice of appeal. The application was heard by Mulwa J. who then reserved his ruling which he delivered on 14th October, 1998.

In that ruling he granted the applicant an extension of the time up to 10th July, 1998, and a stay of execution of the order of 7th October, 1997, for a limited period. The learned Judge in granting a limited extension overlooked the fact that as at the date of his ruling the time stipulated for lodging a record of appeal had already expired. It was for that reason that the applicant took out the motion before us, under rule 4 of the Rules of this Court (the Rules). The application was filed, about 34 days after the said ruling, and has one main prayer, namely, that the time for lodging the record of appeal against the ruling dated 7th October, 1997, be extended. But when the application was eventually heard, the learned single Judge did not consider the delay inordinate.

In the mean time, the respondent was aggrieved by the order of stay granted by Mulwa J. and lodged Civil Appeal No. 223 of 1998, complaining, inter alia, that the learned Judge lacked the jurisdiction to grant the stay when in fact there was no valid notice of appeal in existence; that the applicant's notice of appeal having been struck out, it was not open to it to seek from that Court an extension of the time within which to file a fresh notice of appeal, as the jurisdiction of that court was already exhausted and it was therefore functus officio; and that to the extent that in extending the time within which to file a fresh notice of appeal, the learned Judge purported to validate a notice of appeal which was filed out of time he acted without jurisdiction. The same arguments were in effect rehashed before us, but we will come to them later on in this ruling.

The respondent's appeal was heard by a bench comprising of Kwach, Tunoi and Lakha, JJ.A. who rendered themselves in pertinent part as follows:

"When a notice of appeal is struck out by this Court, it is no more. It is as if there was no notice of appeal lodged at all. In the case of the struck out notice of appeal lodged by Kenya Shell there was in fact no notice at all as there was no such ruling as stated therein, that is, a purported ruling delivered, allegedly, on 8th October, 1998. We hold that the superior court had the jurisdiction to extend time for lodging a fresh notice of appeal. The position would be different when an application is in respect of extension of a time to lodge a record of appeal, as opposed to a notice of appeal, as section 7 of the Act does not specifically cater for filing out of time, a record of appeal. But it follows that once a notice of appeal is filed, rules of this Court come into play. ... A notice of appeal, when properly filed, gives the superior court jurisdiction to grant an order of stay under Order 41 rule 4 of the Civil Procedure Rules."

The issue of the validity of the notice of appeal filed on 7th October, 1998, was thus finally dealt with. But it would appear to us that the respondent does not think so. Through his counsel on record, Mr. Wamalwa, he contended before the learned single Judge and before us too, that the superior court lacked the jurisdiction under **section 7**, aforesaid, to validate a notice of appeal filed in court out of time without the leave of the Court; and too, that in absence of a valid notice of appeal that Court could not properly grant a stay of execution under **Order 41 rule 4**, aforesaid. In short the respondent's case is that this Court was wrong in its decision in Civil Appeal No. 223 of 1998.

We wish to categorically state that whether or not this Court came to a right decision is neither here nor there. This is the final Court. The decision it came to in that appeal binds the parties and one bench of this Court cannot sit on appeal against another bench of the same Court. That decision could, we think, be the

subject matter of a fresh scrutiny in later decisions, not in this matter.

But the learned single Judge did express his opinion about the decision. This is what he said about it.

"I am unable to agree with Mr. Wamalwa when he says that the Court erred in ruling the way it did in Civil Appeal No. 223 of 1998. I have no hesitation in saying that the decision is correct and quite clearly distinguishable from those in the cases of Muriithi v Murithi & Another (Civil Application No. Nai. 300 of 1996) (unreported and Gabriel Kigi & Others vs. Mwaura & Another (Civil Application No. 197 of 1997) (unreported).

The validity or otherwise of the notice of appeal filed on 8th July, 1998, was not an issue in the application before the learned single Judge. Even if it was made an issue, as a single Judge, he lacked the jurisdiction to judicially determine the issue. So the arguments which were addressed to the learned single Judge on the issue were clearly superfluous and irrelevant to the application before him. Happily he did not address them as he was not obliged to. If that is what the respondent is complaining about in this reference then, with due respect to him and his counsel, the complaint is unjustified and misconceived. It is merely an attempt to reopen through the back door a matter which has already been adjudicated upon. We also observe that Mulwa J. did not deal with an application for enlargement of time within which to lodge a record of appeal. What he did would not properly be the subject matter of submissions before the learned single Judge. That being our view of the matter, the decisions in the cases of Muriithi v Muriithi & Another, (supra), Gabriel Kigi & Others v. Mwaura & Another (supra) which were cited by Mr. Wamalwa, and a line of other cases dealing with the jurisdiction of this Court to extend time to lodge a notice of appeal despite the provisions of section 7 of the Appellate Jurisdiction Act and rule 41 of the Rules before the latter was amended, are totally inapplicable to the facts and circumstances of the matter before us.

The jurisdiction of the Court under rule 4 of the Rules being discretionary, the respondent had the duty of showing that the learned single Judge erred in principle or otherwise. The respondent has not discharged that duty. In the result, we have no basis for faulting the learned single Judge in the decision he came to.

Accordingly, we dismiss the reference with costs.

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

A. A. LAKHA

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR