



IN THE COURT OF APPEAL
AT NYERI
(CORAM: SHAH, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAL158 OF 2001 (NYR.8/2001)
BETWEEN

JAMES MWANGI KIHARAAPPLICANT

AND

MARGARET WAMBUI GICHOYARESPONDENT

**(An application for extension of time to file and serve
Notice of Appeal and Record of Appeal out of time
from the decision of the High Court of Kenya at
Nyeri (Mr. Justice J.V. Juma) made on 15th day of
December, 2000**

**in
H.C.C.C.NO.300 OF 1997)**

RULING

This is an application brought under rule 4 of the Rules of this Court whereby the applicant seeks leave to lodge his notice of appeal and record of appeal out of time. The judgment which is sought to be appealed against was entered on 15th December, 2000. The superior court (Juma J.) awarded a total sum of shs.4,222,249/75 to the respondent who, as a result of an accident involving the applicant's 'matatu' in which vehicle she was a passenger, suffered severe degree of paralysis of all 4 limbs and other injuries. She is confined to a wheel-chair existence.

The application is based on the following grounds:

- 1.The applicant's previous advocates failed to call defence witnesses when the trial was going on.
- 2.The said advocates ceased acting without notifying the applicant.
- 3.The intended appeal has 'strong' chance of success.
- 4.The delay in filing this application is unintentional, not inordinate and excusable.

Mr. Kasamani who acts for the applicant says that the delay in filing "the appeal" was occasioned by the applicant's insurers who instructed him only after the applicant's previous advocates M/s. V.T. Awori & Company had ceased acting.

I find some difficulty in assessing what Mr. Kasamani says. Were M/s. V.T. Awori & Company acting on the instructions of the applicant or were they acting on the instructions of his insurer? It would appear that the previous advocates were not acting on the instructions of the insurer and that they were acting on the

instructions of the applicant himself. This I gather from the tone of the replying affidavit filed by Mr. Jeremiah Ndung'u Mbutia, advocate for the respondent.

The tone of the letter of 26th March, 2001 addressed by the insurer so M/s. Kasamani & Company Advocates suggests that the insurer was not aware of the result of the suit in the superior court until such time it was served with copies of summons and plaint in the declaratory suit filed by the respondent against the insurer. It was then that the insurer briefed M/s. Kasamani & Company to "protect its interests."

I conclude therefore that the insurer, who now wishes to appeal, under its subrogation rights, was not aware of the result of the original suit (H.C.C.C. No.300 of 1997 at Meru) until late March, 2001. That would explain the four month delay in lodging of this application.

I see no sustainable argument when Mr. Mbutia says that the applicant has not given any instructions to M/s. Kasamani & Co. to lodge the intended appeal. An insurer is entitled to step into the shoes of the insured to protect its interests. See Shah v. Mbogo [1967] E.A. 116 with particular reference to the case of Windsor vs. Chalcraft [1939]1KB 279. I also see no substantial argument when Mr. Mbutia says that the previous advocates were still on record in the superior court as acting for the applicant and as such M/s. Kasamani & Company had no mandate to lodge this application. It transpired that the previous advocates are no more on record. I would not use this anomaly to deny the insurer a hearing.

All told I am satisfied that the insurer has given an acceptable reason for the delay in lodging this application and I see no impediment in letting it exercise an undoubted right of appeal. The intended appeal may be arguable, at least, on quantum of damages.

I grant the application and order that the applicant do lodge his notice of appeal within the next seven days and the record of appeal within 30 days of lodgment of the notice of appeal.

The respondent will have costs of this application which I assess at shs.10,000/=. This sum must be paid within the next 30 days failing which execution may issue.

Dated and delivered at Nyeri this 25th day of October, 2001

A.B. SHAH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR