



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & O'KUBASU, JJ.A.)

CIVIL APPLICATION NO. NAI. 295 OF 1999

BETWEEN

ARMSTRONG CLEARING & FORWARDING AGENCY LTD APPLICANT

AND

TENWEK HOSPITAL RESPONDENT

**(Application for extension of time to file record of
appeal out of time in an intended appeal from a
ruling of the High Court of Kenya at Nairobi (Mr. Justice Khamoni) dated 23rd June, 1997**

in

H.C.C. NO. 4447 of 1989)

RULING OF THE COURT

Armstrong Clearing & Forwarding Agency Ltd, the applicant, as the judgment debtor in Nairobi High Court Civil Case No. 4447 of 1989 to the extent of US\$98719.89, unsuccessfully applied for the judgment giving rise to the decree to be set aside. The judgment had been entered against it as defendant in the suit after an ex parte hearing of the same under Order IXB rule 1 Civil Procedure Rules. The order dismissing his application to set aside judgment was made on 23rd June, 1997. Being aggrieved with the decision it promptly lodged a notice of appeal, and thereafter an appeal which appeal was struck out as incompetent because it was filed O no ut1 9otfh tOicmteo bweirt,h ou1t9 9I9e atvhee. applicant took out a motion under rule 4 of the Court of Appeal Rules (the Rules) seeking an order extending the time within which to lodge and serve a fresh notice of appeal and a record of appeal, which application was, on 28th day of April 2000 dismissed by Ole Keiwua, JA sitting as a single Judge. In dismissing the application the learned single Judge held that the applicant had failed to show, firstly, that its intended appeal is arguable; and secondly, that it had failed to show that public interest required that cases could pend as long as one party wished.

This is a reference from that decision. The power to refer a decision by a single Judge of this Court to the full bench is given by rule 54 of the Rules which provides as follows:

"Where under the proviso to section 5 of the Court of Appeal for East Africa Act, any person being dissatisfied with the decision of a single Judge -

(a)...

(b) In any civil matter wishes to have any order, direction or decision of a single Judge varied, discharged or reversed by the court, he may apply therefor informally to the Judge at the time when the decision is given or by writing to the Registrar within seven days thereafter."

The Court of Appeal for East Africa Act, was repealed and replaced by the Appellate Jurisdiction Act (Cap 9 Laws of Kenya). But the proviso to section 5 does not make provision for references. Rule 54, above, derives its authority and force from the provisions of section 5(2) of the Appellate Jurisdiction Act. This is an anomaly which the Rules Committee should rectify by amending the rule to cite the correct section under which it was made.

The decision from which this reference arises appears to us to have been based on the decision of this Court in the matter of Belinda Murai & Others v. Amos Wainaina Civil Application No. NAI.9 of 1978 (unreported). As at the date of that decision the law was slightly different from what it is today. Different because by then rule 4 of the Rules had not been amended by Legal Notice No.80 of 1984. Before the rule was amended the main principle to guide the court was, whether the applicant had shown "sufficient" reason to enable the court to extend time. The rule, in pertinent part, read as follows:

"4. The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court..." But as amended, the rule provides, in pertinent part, as follows:

"4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court ..."

The main factors to consider in an application under rule 4, as amended, are, firstly, whether the applicant has sufficiently explained the delay in lodging a notice or record of appeal as the case may be, and secondly, whether his application for extension of time was brought without any unreasonable delay. Except in very rare cases, more particularly where a question as to the competence of the intended appeal or the jurisdiction of the Court to entertain such appeal, the merits or otherwise of the intended appeal is not, as a general rule, a factor for consideration in an application under rule 4, aforesaid. So when the learned single Judge stated in his ruling that:

"I am not concerned with any delay in that regard and the application will stand or fall on whether or not the applicant has an arguable appeal against the learned Judge's decision."

We think he went too far. That is the more so because it is now well settled that an appellant whose appeal has been struck out as incompetent may restart the appeal process by seeking an extension of time to file a fresh notice and record of appeal provided that he makes his application promptly and there is no other impediment to stop him from doing so.

The learned single Judge having found as a fact that the applicant made its application promptly, and also having held that in his view, the applicant and its counsel on record had been punished sufficiently when the applicant's earlier appeal was struck out, should not have refused the extension. By refusing the extension on the ground that the intended appeal was not arguable he in effect, rejected the appeal in a summary manner, a jurisdiction which vests with the full bench of the Court.

In the result we think that this is a fit case in which we should interfere with the learned single Judge's discretion in the matter as we think that he erred in principle. Accordingly, we set aside his order dismissing the applicant's application and substitute therefor an order allowing the motion dated 19th October, 1999, and extend the time within which to lodge and serve a notice of appeal by 10 days from the date hereof, and also, the time within which to lodge and serve a record of appeal by a further 21 days from the date the notice of appeal is lodged. The applicant shall bear the costs of the application but we make no order as to the costs of the reference.

Dated and delivered at Nairobi this 16th day of November, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR