



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: SHAH, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 241 OF 1999

BETWEEN

LONTEBES GROUP

RANCH.....APPLICANT

AND

LIPKEMOI ARAP

MENDERA.....RESPONDENT

RULING

I have before me, an application for extension of time, for lodgment of a notice of appeal and record of appeal out of time. The application arises as a result of various factors which I will first set out.

The judgment of the superior court was delivered on 25th day of July 1994 when the learned Judge (Nambuye, J) dismissed the applicant's suit with costs. The applicant was seeking orders to the effect that the respondent was not lawfully on the group Ranch in question; that he was a trespasser.

The applicant lodged an appeal against the decision of the superior court. That was in time and it was Civil Appeal No. 99 of 1995. That appeal was struck out on 27th September, 1996 as the record of appeal did not contain certain exhibits. The applicant then filed an application for extension of time to lodge its notice of appeal and record of appeal and out of time. That application came up for hearing before a learned single Judge of this Court who declined to grant the same as there was no fresh notice of appeal filed. This is what I was told by Mr. Mirugi Kariuki, Counsel for the applicant. Reference to full Court against the ruling of the learned single Judge was withdrawn, properly, as pointed out by this Court on 25th September, 1997.

Mr. Kariuki informs me that in view of the decision of the then Chief Justice Cockar in the case of Afro-Meat Company Limited vs. Syprose Ageke Owuor Civil Application No. Nai. 95 of 1997, (unreported) he applied for extension of time to lodge the notice of appeal and the record of appeal out of time. In view of the then conflict of Judicial opinion as regards the jurisdiction of this Court to extend time the learned Judge of the superior court (Rimita, J) kept on adjourning the hearing of that application when finally in April, 1999 he simply stood it over generally. It was thereafter that the applicant prepared this application, in May, 1999 for lodgment in this Court. It was however not lodged until 31st August, 1999.

The delay in mounting this applicant until May, 1999, on account of the conflict of Judicial opinion, has been satisfactorily explained and I accept that explanation.

What has weighed on my mind is the delay in lodging this application. Mr. Kariuki attempted to explain that delay by stating from the Bar that his unsophisticated clients took time to collect fees for lodging this application. I took the liberty of asking Mr. Joseph S. Cheres (who was present) if such was indeed the case. He confirmed what Mr. Kariuki said.

Although the delay after May, 1999 is quite substantial I am bound to consider the explanation given. At this stage I ought to point out that the respondent's counsel thought fit not to appear to oppose this application on the ground that he had no instructions any more from his client (the respondent).

I said in the case of Jeremiah Kariuki vs. National Bank of Kenya Ltd Civil Application No. Nai. 138 of 1995 (unreported):

"He (the applicant) is exercising his undoubted statutory right of appeal which is his first as well as last appeal and my own view is that so long as an applicant is not dilatory and is seeking to exercise his statutory right to be heard on a proper appeal and so long as he has an arguable appeal, he ought not to be shut out"

I will still go by what I said in the Jeremiah Kariuki case but I must consider, yet, if there was dilatoriness on part of the applicant in paying fees to Mr. Kariuki. In the Kenyan society that I grew up I can well believe that there could be problems of and concerning collection of moneys to pay to an advocate. Our people are simple folk, often unable to understand the intricacies of procedure and law and I will give benefit of doubt to the applicant so that it have its final say in this Court.

I allow this application for the reasons I have stated and I order that the applicant do file its fresh notice of appeal within the next seven days and its record of appeal on before 30th day of March, 2000. I make no order as to costs as the respondent's counsel thought fit not to appear.

Dated and delivered at Nairobi this 22nd day of February,

2000

A.B. SHAH

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JUDGE OF APPEAL