REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, TUNOI & OWUOR, JJ.A.)
CIVIL APPLICATION NO. NAI. 171 OF 1999 (66/99 UR)

BETWEEN

JOHN PATRICK MACHIRA

T/A MACHIRA & CO. ADVOCATES ..... APPLICANT

AND

ABOK JAMES ODERA

T/A A. J. ODERA & ASSOCIATES ..... RESPONDENT

(Application for extension of time to file Notices of
Appeal and Record of Appeal out of time in an
intended appeal from the ruling, order and decree of
the High Court of Kenya at Nairobi, (O'Kubasu, J.)
dated 30th July, 1998
in
H.C.C.C. NO. 183 OF 1998)
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RULING OF THE COURT

By this reference brought under rule 54 of the Rules of this Court the applicant, John Patrick Machira, an advocate of the High Court of Kenya practising law in the name and style of Messrs. Machira & Co. Advocates, seeks to have the decision of a learned single Judge of this Court (Kwach, J.A.) given on 3rd August, 1999, reversed.

The application that fell before him for consideration was expressed to be brought under rule 4 for extension of time to file a notice of appeal and an appeal.

The decision against which the respondent, Abok James Odera, wishes to appeal was given by O'Kubasu J. (as he then was) on 30th July, 1999, in H.C.C.C. 183 of 1998. The learned Judge dismissed an application by the respondent to strike out the plaint or grant a stay pending arbitration, and entered summary judgment in favour of the applicant against the respondent for Shs.23,681,581.35 together with interest and costs being in respect of fees for certain professional services allegedly rendered by the applicant to the respondent. The respondent duly lodged an appeal in this Court being Civil Appeal No. 176 of 1998. Before it was heard, the applicant applied by Notice of Motion to strike it out on the grounds that there was no valid notice of appeal and that the record did not contain certain primary documents. By its ruling dated 9th July, 1999, this Court acceded to the application and struck out the appeal.

Promptly, on 12th July, 1999, the respondent sought extension of time before the learned single Judge. The applicant strenuously opposed the application contending, in the main, that in view of a consent order which was recorded in the superior court on 10th November, 1998, by which the respondent was granted an order of stay of execution of the decree pending appeal on terms, the respondent had waived his right of appeal and had no right to appeal to this Court then, following the striking out of his appeal. One of the conditions for granting a stay was that the respondent do deposit Shs.10 million in an interest - earning account in the joint names of the advocates for the parties. This, the respondent complied with. However, the applicant urged that since the respondent's appeal was struck out as incompetent, it was disposed of in his favour within the context of the consent order; and, consequently, the application should be rejected. The applicant also resisted the application on the ground that the respondent was guilty of concealment of a material fact having failed to disclose the existence of the consent order.

However, the learned single Judge did not find favour with these submissions. He held that the appeal not having been determined on merit, the consent order had no relevance to the application before him. He also rejected the submission on concealment. He granted the application and extended the time for filing the notice of appeal by 7 days from 3rd August, 1999 and for lodging the appeal by 15 days from the date of filing the notice of appeal.

Mr. Nowrojee, on behalf of the applicant, in a very persuasive submission, complained of several perceived faults in the learned single Judge's ruling. He submitted that section 66 of the Civil Procedure Act and rule 74 of the Rules were plain, unambiguous and incapable of being misconstrued nor misinterpreted. He urged that the respondent, therefore, had no valid or reasonable explanation as to why he preferred a defective appeal. Mr. Nowrojee complained that the learned single Judge gravely erred in not considering his submission on this point.

He contended further that the respondent was not deserving of the extension sought since he was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts of the consent. On this submission he referred us to Rex v Kengington Income Tax Commissioners: re Princess Edmond de Polignac ex-pate [1971] 1 KB 486 and Tiwi Beach Hotel v Stamm (1990) 2 KAR 198, amongst other authorities.

We have on our part given anxious consideration to Mr. Nowrojee's most forceful submissions in which he meticulously dealt with every aspect of the law in such matters as these. Although there is merit in his submissions, with respect, we think that there are no good grounds for upsetting or reversing the learned single Judge.

The learned single Judge was satisfied that the respondent who was exercising his undoubted right of appeal was not guilty of any laches or inordinate delay. The appeal which he had lodged was struck out on a mistake committed by his Counsel. Moreover, the so-called consent order was raised before the learned single Judge who quite properly considered and ruled on it. The consent order did not purport to take away the respondent's right of appeal. We have not been persuaded that on the whole he was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

In view of the conclusion which we have just reached, it is not necessary for us, in this ruling to consider or express any view on all the other issues urged before us by Mr. Nowrojee.

As we have no reason to interfere with the decision of the learned single Judge it must stand. Consequently, this reference fails and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 11th day of February, 2000.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL