



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KWACH, AKIWUMI & KEIWUA, J.J.A.)

CIVIL APPLICATION NO. NAI. 41 OF 1999

BETWEEN

SCENERRIES LIMITED

GEORGE KANGETHE WARUHIU

GRACE WANJIKU GITHU

SAMUEL KAMAU MACHARIA

JOSEPH GILBERT KIBE

SOLOMON WILSON

KARANJAAPPLICANTS

AND

NGENGI

MUIGAIRESPONDENT

**(Application for extension of time to file Notice of
Appeal and Record of Appeal out of time from the
Ruling of the High Court of Kenya at Nairobi
(Justice O'kubasu) dated 31st July, 1998**

in

H.C.C.C. NO. 4232 OF 1991 CONSOLIDATED WITH 6542 OF 1991)

RULING OF THE COURT

This is a reference to this Court brought under Rule 54 of our Rules by the Applicants who are dissatisfied with the Ruling of a single Judge of this Court, Lakha JA., delivered on 9th August, 1999, dismissing the Applicant's Notice of Motion dated 18th February, 1999, for the extension of time to file a Notice of Appeal and Record of Appeal out of time.

The background to this reference is as follows. The Applicants had appealed from the judgment of

O'Kubasu J. (as he then was) given in High Court Civil Suit No. 4232 of 1991 (O.S.) Consolidated with High Court Civil Suit No. 6542 of 1991, in which the Respondent herein, was the respondent therein.

The appeal was struck out on 18th February, 1999, by this Court on the procedural ground that the appeal was incompetent since the record of appeal did not include the pleadings in the matter that was heard in the superior court. The composition of this Court on this occasion, did not only, include Lakha JA.; he was also the author of the Order of the Court which was signed by all the Judges sitting with him.

On the same day after the appeal was struck out, Messrs Machira & Co. Advocates the Advocates on record for the Applicants in the appeal, filed as one would have expected, an application under Rule 4 of our Rules, for the extension of time to file a Notice of Appeal and Record of Appeal out of time from the said Ruling of O'Kubasu J. This application was supported by an affidavit sworn by John Patrick Machira by then, the new advocate appearing for the Applicants. The relevant part of his supporting affidavit are as follows:

"1.THAT when the Applicants filed the said Appeal (i.e. Civil Appeal No. 180 of 1998), they were being represented by Messrs Mohammed & Muigai Advocates and I took over the matter when the Record of Appeal had already been filed sometimes in November 1998. 2.THAT when the Appeal came for hearing as aforesaid, the same was struck out as being incompetent on the ground that the pleadings in respect of HCCC NO.55 OF 1998 (O.S.) in respect of which we had exhibited the Order of the Superior Court was not included in the Record. 6.THAT the omission to include the pleadings was unfortunate, regrettable and the Applicants had no hand in it."

These first three paragraphs alone, we think, depone an explanation which the single learned Judge of this Court, should have considered in the exercise of his unfettered discretion whether to grant the extension of time sought or not. But did he do so? We are constrained to say from his ruling, that he did not do so.

Having dwelt at length on authorities supporting the well established legal proposition that a breach of rules of procedure could be excused if there existed sufficient exculpatory material for that purpose, the learned single judge of this Court, then went on, to say:

"There is no material before me on which I can exercise my discretion. The only material before me is the supporting affidavit with annexures thereto. But I do not know the reason of non-compliance with the rule requiring inclusion of pleadings in a record of appeal. As a matter of common sense, though not making it a condition precedent, the Court will want to take into account the explanation as to how it came about that the applicants found themselves with an appeal that was incompetent. If the omission was deliberate and not due to accident or mistake (and here no mistake is pleaded or relied upon) the Court would, in my view, be unlikely to grant an extension.

But, again, there is no material before me on this. Nor is there any material before me to show that the omission was the result of any inadvertence or accident to enable me to exercise my discretion."

This observation is unsupportable having regard to the supporting affidavit. This affidavit which we have already referred to, contains sufficient material, at least an implicit mistake, as to how the breach of the rules of procedure occurred and which should not be visited on the Applicants. This material should certainly have been considered by the learned single Judge of this Court and he erred in not doing so at all. Again, this observation of the learned single Judge of this Court, we are also constrained to remark, is inconsistent with a subsequent Ruling of this Court consisting of Kwach, Lakha and Keiwua, JJ.A. in *First America Bank of Kenya Limited and Andrew Douglas Gregory v Grandways Venture Limited*, Civil Application No. NAI. 173 of 1999 (67/99 UR) (unreported) where, after considering the very same authorities and dicta contained therein, that had been considered by the learned single Judge of this Court in the application which is the subject matter of the present reference now before us, it was held whilst dismissing the said Civil Application No. NAI. 173 of 1999 (67/99 UR), by now familiar language, that:

"In the instant case there is no affidavit in support by the advocates who allegedly committed the

mistake. Nor is there any material by way of any explanation (Underlining supplied). As a matter of common sense, though not making it a condition precedent, the Court will want to take into account the explanation as to how it came about that the applicants found themselves with an appeal that was incompetent."

Indeed, where it is likely that an applicant, like those in the reference now before us, is likely to be punished twice on account of one misdeed, his application should not be dismissed out of hand like was done by the learned single Judge of this Court. The following similar sentiments were echoed by Omolo JA. in his Ruling in Muchugi Kiragu v James Muchugi Kiragu and Henry Thariki Nganga, Civil Application No. NAI. 226 of 1998 (unreported), which we agree with:

"In his replying affidavit, Mr. Gachoka contends that no sufficient reason has been given as to why the applicant had not included in his previous record of appeal the documentary exhibit which led to the previous appeal being struck out. Mr. Gachoka repeated this contention in his submissions before me.

I do not think this would be a good reason for refusing to exercise my discretion in favour of the applicant, if I think it is right for me to do so. The applicant was punished for his failure to include the document and the punishment took the form of his previous appeal being struck out. To refuse him an extension on that basis would, in my view, amount to double punishment over one fault."

We have considered the submissions and the authority proffered by Mr. Gathenji, counsel for the Respondent and have no choice but to allow this reference for the reasons set out above. The order made by the learned single Judge of this Court is set aside and substituted by an order extending time to file and serve a Notice of Appeal by 14 days from today and for filing and serving the Record of Appeal by 21 days from the date of filing of the Notice of Appeal. The costs of this reference will be in the intended appeal.

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

R. O. KWACH

JUDGE OF APPEAL

A. M. AKIWUMI

JUDGE OF APPEAL

M. KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.