REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CORAM: SHAH, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 72 OF 1999
BETWEEN

CECILIA GATHONI

HARUN THAIRU.....APPLICANTS

AND

GEORGE KARIUKI KABUGU.....RESPONDENT

(An application for leave to file a Notice of appeal out of time in an appeal from a judgment and decree of the High Court of Kenya (Mr. Justice Keiwua) dated 7/6/95
in
H.C.C.C. NO. 307 OF 1995 (O.S.))
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R U L I N G

The applicants, Cecilia Gathoni and Harun J.M. Thairu seek leave to file a notice of appeal and record of appeal out of time. The original appeal lodged by the applicants, being Civil Appeal No. 126 of 1996 was struck out by this Court on 11th May, 1998 as the record of appeal did not contain some of the exhibits produced in the superior court.

The applicants then filed an application for extension of time to lodge a fresh notice of appeal and record of appeal. That application was granted by Tunoi, JA on 2nd November, 1998. In obedience to that order the applicants lodged their fresh notice of appeal on 10th November, 1998. They did not however lodge the record of appeal within the time allowed by TunoiT,h eJ .Aa.pplication is based on the ground that Mr. Gacheche wa Miano, counsel for the applicant, after the lodgment of the notice of appeal got 'enmeshed' in great domestic problems beyond his control. He stated that he was unable to attend his office on account of domestic problems and had kept himself mostly in hiding.

Miss Juma for the respondent opposes the application on four grounds as follows:-

1.That the notice of motion does not contain in its body the grounds upon which the application is based in contravention of rule 42 of the Rules of this Court.

2.'Mistake' of counsel is no reasonable ground to re-open an appeal; that the applicants can seek redress in damages against the advocate.

3.That the applicants' advocate has not shown what exactly is the nature of his domestic problems; no police report (if any report was made) has been produced.

4.That all told there has been inordinate delay in lodging the record of appeal and that the delay of 143 days in filing this application is also inordinate.

I will deal with the issues raised by the respondent in order they were raised.

It was decided by the predecessor of this Court in the case of Castlelino v. Rodrigues [1972] E.A. 223 that "as a general rule, a reference in a document to an annexure has the effect of incorporating the contents of the annexure in a document." It is now settled that so long as the grounds on which the notice

of motion is based are set out in the affidavit annexed to the motion, the application (motion) is not fIant alg.eneral, mistake of counsel in understanding or interpreting a complicated rule or a point of law provides good ground for extending time. It is plain misreading of a rule by an advocate that does not qualify for extension of time. Even this aspect is to a certain extent arguable. Should the litigant suffer for employing a counsel who is wanting in brightness? If no real prejudice is suffered by the other side a chance ought to be given to the litigant to have his final say in the highest court in the country.

Although the applicant's advocate has not deponed to the exact nature of his marital problems, I am minded to believe that he had problems which probably kept him away from his office. I would not want an advocate to suffer the indignity of parading his matrimonial problems in detail in an application like this.

The issue that has weighed on my mind is the delay in preparing and filing this application more so after the applicant had already obtained one extension from a learned single Judge of this Court. The application was ready for filing on 11th February, 1999 but was not filed until 25/3/99. The delay was attempted to be explained by saying that by the time the applicant's counsel was able to prepare it (during his periods of hiding) there was already a delay which was further compounded by the fact that the counsel instructed to lodge it took his time. In ordinary circumstances such a delay would be termed inordinate but given the peculiar circumstances in existence, in this case, I am not prepared to say that the delay is not excusable.I called for the struck out record of appeal and I was surprised to learn that an application for a permanent injunction and eviction was brought by an originating summons under Order XXXVI rule 3 of the Civil Procedure Rules which rule is totally unapplicable. Suits for permanent injunction and eviction can only be filed by registered owners of suit properties by way of plaint. No one seems to have considered the issue whether the superior court had jurisdiction to entertain a "suit" brought in that manner. Nor did the court consider the defence of adverse possession raised by the applicants.

Taking an overall view of the matters canvassed before me, keeping in mind the fact that the applicants have been in possession of suit property since 1982, that the "suit" for possession was not lodged until 1995, that the parties are ordinary folk who have no knowledge of the intricacies of the procedure or law I allow this application and order that the record of appeal be lodged within the next 30 days. I do not make any order for lodgment of a fresh notice of appeal and direct that the notice of appeal lodged on 10th November, 1998 be included in the record of appeal. The applicants will pay to the respondent costs of this application which I assess at Shs.6,000/= within the next 30 days failing which execution may issue.

Dated and delivered at Nairobi this 10th day of February, 2000.

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.