



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NO. NAL327 OF 1999

BETWEEN

JASWINDER

DHINGRA.....APPLICANT

AND

JASWANT

SINGH DHINGRA.....RESPONDENT

(An applicant for extension of time to file and serve a
Notice of Appeal and appeal out of time in the
intended Appeal against the Ruling and Order of the
High Court of Kenya at Nairobi (Hon. Lady Justice E.
Owuor) dated 9th December, 1998

in

SUCCESSION CAUSE NO. 2572 OF 1996)

R U L I N G

There is, before me, an application brought under rule 4 of the Rules of this Court for extension of time to lodge a notice of appeal and record of appeal out of time. The application is brought by the widow of one Arvinder Singh Dhingra (the deceased) who was survived by his parents, wife and two minor children. The father of the deceased applied for grant of letters of administration to administer the estate of the deceased. That was Succession Cause No. 2572 of 1996 filed in the superior court.

The applicant (the widow) apparently objected to the grant sought and the dispute is between the parents of the deceased on one hand and the widow and the children of the deceased on the other hand.

The application by the widow came up for hearing (after some adjournments) on the 2nd day of April, 1998, before Owuor, J (as she then was). The hearing of that application took place in a very unorthodox method. The record shows as follows:

"COURT

After a long discussion it is hereby ordered:-

1. That the estate be divided between the 2 parents of the deceased and his two daughters in equal shares.
2. That the advocates Mrs. Rawal and Mr. Oyatsi be joint administrators; confirmed grant be issued in their names.
3. Matter to be mentioned on 29/4/98 for recording of further order. Order accordingly."

It appears that there was no normal manner hearing of the application and orders were made after "discussions". Whatever merit there or there is not in such a process of hearing is not for me to comment on, sitting as a single judge of the High Court. I was dissatisfied with the said orders and she sought a review thereof. By the time her application came up for hearing the learned judge had been elevated to this Court and the review application was ordered to be placed before her. The record shows that the chamber summons (for review) was fixed for hearing on 9th December, 1998 at 9.00 a.m. On that date Mr. Oyatsi (for the applicant) did not appear and at 2.45 p.m. the learned Judge of Appeal (sitting as a High Court Judge) disposed of the application by saying:

"To-day's mention date was taken by consent. In the morning when the matter was listed for hearing and now (sic) 2.45 p.m. The applicant has not appeared. At counsel's request, I hereby dismiss the application filed herein on 16/4/98 with costs to the respondent.

Orders accordingly."

Although the record shows that the application was listed for hearing on 9/12/99 the learned Judge treated it as a mention. Why she did so is not clear to me. But least there is some doubt in my mind as to whether or not the application was meant for hearing or for mention. It is not clear what it was for.

Mr. Oyatsi filed a notice of appeal with a view to challenge the dismissal of the widow's application for review. The copies of proceedings and judgment were ready for collection, and were collected on 17th March, 1999. So that in the normal course of events the appeal ought to have been lodged on or before 16th May, 1999. But it was not so lodged, as, so Mr. Oyatsi says, a certified copy of the formal order was not available. Mr. Oyatsi drew up the draft formal order and sent it to the respondent's counsel for approval under cover of his letter of 18th March, 1999 but the same was not approved by the respondent's counsel. By his letter of 27th April, 1999 Mr. Oyatsi complained to the Registry of the superior court saying that he was unable to "procure" a certified copy of the Order for three weeks and requested the said Registry to have the court file traced.

Again he complained in a similar vein, by his letter of 3rd June, 1999. The time for lodging the appeal having expired the respondent applied for striking out the notice of appeal lodged by the widow and it was struck out on 16th November, 1999.

Mr. Oyatsi then lodged this application on 23rd November, 1999, some seven days after the first notice of appeal was struck out, so that there is no delay in lodging of this application.

Mr. Oyatsi says that he could not mount an appeal without a certified copy of the order. That is certainly correct. Any appeal without a certified copy of the order appealed against is incompetent. Mr. Ndege for the respondent opposes this application saying (inter alia) that there is no confirmation that the superior court file was missing; that Mr. Oyatsi ought to have had the order drawn up, for approval, much before the time for lodging the appeal expired; that the applicant has done nothing to 'procure' the order of 9th December, 1999 since the letter to the Registrar of the superior court dated 23rd July, 1999; that the delay is inordinate and unexplained; that the applicant has not disclosed the reasons for striking out of the notice of appeal and that the litigation ought to come to an end.

I am not convinced that Mr. Oyatsi was inactive. He was trying his best to obtain a certified copy of the formal order and did not succeed. His belief that the time to lodge a record of appeal did not run until he obtained a certified copy of the order is clearly erroneous. The proviso to rule 81 of the Rules of this

Court is clear and I am not prepared to accept that Mr. Oyatsi could misread such a simple proviso. The fact however remains that without a certified copy of the formal order no appeal can be lodged and there is sufficient evidence before me to show that the same was not available despite efforts made in that regard. The only criticism I can level against Mr. Oyatsi is that he sought approval of the draft order after he obtained copies of proceedings and judgment. If the order had been approved within, say, 10 days of 18th March, 1999 Mr. Oyatsi could still have lodged the appeal. But he did not get a certified copy of the formal order.

After all that has been said. I am most concerned about the manner in which the hearing of the applications proceeded in the superior court and I think that that factor enables me to use my undoubted discretion under rule 4 to extend time so that the parties can be properly heard. Several authorities were quoted to me and lest I be accused of disregarding them I must point out that I have studied all of them. The peculiar facts here do not wholly tally with the facts considered in the authorities quoted.

In the result I allow this application and order that the applicant do lodge her notice of appeal afresh within the next seven days and that the record of appeal be lodged on or before 10th March, 2000. I order that there be no order as to costs of this application, as this is a family dispute.

Dated and delivered at Nairobi this 3rd 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.