



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: LAKHA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 200 OF 1999

BETWEEN

THE REGISTERED TRUSTEES OF MOMBASAAPPLICANT
AND
MUSHIN ABDULKARIM ALIRESPONDENT

(Application for extension of time to file and serve Notice
and Record of Appeal from an Order of the High Court of
Kenya at Mombasa (Justice M. Ang'awa) dated 16th October,
1997

in

H.C.C.C. NO. 458 OF 1992)

R U L I N G

On 30 July, 1999, the plaintiff filed an application before a single Judge of this Court seeking an order for an extension of time to lodge and serve a copy of the requisite notice of appeal against the decision of the superior court (Lady Justice Ang'awa) delivered on 15 October, 1997 and for an extension of time to lodge and serve the requisite record of appeal. This application was certified by the Honourable the Chief Justice as urgent and was set down by him for hearing on 24 January, 2000 before me.

Before the hearing, the advocate for the applicant on 22 December, 1999 filed (without leave) an amended application and titled it as a **DRAFT OF PROPOSED AMENDED NOTICE OF MOTION**.

On 21 January, 2000, Mr. Kimani, advocate for the respondent filed a replying affidavit and at the hearing it was agreed that the advocates should first argue whether the proposed amendment should be granted and then consider the merits of the application for extension of time. I heard full arguments on the main application on the understanding that the issue of amendment should be dealt with first.

At the conclusion of the arguments, however, both counsel informed me that there was pending before the superior court, an application for the dismissal of the suit for want of prosecution made by the Respondent on which the superior court was to deliver its ruling on **1 February**. This was not then delivered but was in fact delivered on **15 February** of which I learnt on 22 February 2000. The application was dismissed. I proceed, therefore, to deal with the proposed amendment.

The amendment was prompted (as Mr. Suchak for the applicant submits) solely because of the decision of this Court in Civil Application No. NAI. 143 of 1999 in the case of **Suryakant Bhagwanji Raja Shah vs. Aperit Investment S.A. Civil Appeal No. 143 of 1999 (unreported)**. The Court said inter alia:

"Another defect of similar effect is that the Order does not as required by Order 20 r 6(1) and 7(6) of the Civil Procedure Rules, to be prepared in a like manner as a decree, set out as it should, the particulars of the claim or the relief sought in the application which was the subject matter of the Ruling. We will no longer condone this kind of infringement of the provisions of the Civil Procedure Rules where a primary document is involved."

This called for drawing of an order in the manner the decree is drawn. But there was a subsequent decision of this Court in Civil Appeal No. 140 of 1996 where the Court held on 3 December, 1999 that the decision in the Shah case was per incuriam.

In the circumstances, I am of the view that the proposed amendment is not necessary and I am content to deal with the applicant's substantive application on the basis of the notice of motion filed on 30 July, 1999. The application for extension was argued with admirable brevity on the basis that the appeal was struck out on 29 July, 1999 and the application for extension was filed on 30 July, 1999 involving no delay whatsoever and that the appeal was struck out because of inadvertence on the part of the advocate for the applicant.

Ordinarily, on these facts an extension, in the exercise of the Court's discretion, could readily be given. In the instant case, however, Mr. Kimani, for the respondent, raised several objections which he argued forcefully and with considerable skill. The one that I found most compelling was that the order of the superior court given on 15 October 1997 against which it is intended to appeal is an order that is appealable only with leave and no such leave has been obtained. In addition, the time within which such leave may be obtained had also lapsed.

In these circumstances, it is argued that since there exists no leave to appeal, an appeal does not lie in which case no extension can be granted. I find considerable force in this argument to which Mr. Suchak, for the applicant, has proffered no answer. I have carefully considered the Order against which it is intended to appeal and am satisfied that no appeal therefrom lies as of right but only with leave. No leave has been sought or obtained.

In my judgment, the objection taken succeeds with the consequence that in the event, I am not disposed to exercise my discretion in favour of the applicant. In the result, the application fails and it is dismissed with costs.

Dated and delivered at Nairobi this 17th day of March, 2000.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY
REGISTRAR