



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

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

CIVIL APPLICATION NO. NAI. 156 OF 1999

BETWEEN

- 1. JOSEPH KAMAU MUSA**
- 2. JAMES KARIUKI MUCHIRI**
- 3. DAVID MUCHIRI**
- 4. RUIGU NJIRIRI**
- 5. JOSEPH NJEHU BORO**
- 6. MWANGI KARIGI**
- 7. KIRUKI MUCHINA**
- 8. MBURU MUCHINA**
- 9. MBUGUA NDUGO**
- 10. HANNAH W. KIBUNJA**
- 11. THUTHRUIKI CO. LTD**
- 12. KIMANI KAHIRO**
- 13. GACOHU NJUGUNA**
- 14. WANJIRU KANYOKO**
- 15. S.M. NJUGUNA**
- 16. DORCAS WANJIRU**
- 17. NGUGI KAMAU**
- 18. GEORGE KIARIE WARUI**

19. KIGATHI GACARA
20. KIMANI CUMBI
21. JOSEPH KURIA
22. CHEGE KARUMBA
23. KANIKA MUCHINA
24. KARANJA MBAYA
25. NGURE THARUA
26. ROBERT KARARI
27. RUIGU KABUCO
28. SAMUEL MUKIRI NGOTHO
29. DANIE KAGO
30. ALOSE NJOROGE
31. ELIZABETH M. MIRINGU
32. JOHN NJENGA KIBUNJA
33. MACHARIA CHEGE
34. WARUI MWAURA
35. NDUNGU THUO
36. NJIHIA

MUCHAI.....APPLICANTS

AND

1. ERERI COMPANY LTD
2. GIKONYO NDIRANGU
3. RUIGU KABUCO

4. DR. GEORGE KAMAU GIKANGA.....RESPONDENTS

(Application for leave to file notice of appeal out of time from the judgment of the High Court of Kenya (Mr. Justice Mbiti) dated 19th November, 1997

in

H.C.C.C. NO. 3746 OF 1988

as consolidated with

R U L I N G

On 9th June, 1999 this Court dismissed an application filed on 4th March, 1998 by Ndungu Kiiru, Joseph Kamau Musa, James Kariuki Muchiri, Kamau Kunga, Boniface Mwangi Ndegwa and Mwangi Kiraga, on behalf of themselves and 44 other shareholders of **Ereri Company Limited**, those 44 not having been named. The application was for an injunction pending appeal from the judgment of the superior court (Mbitio, J) delivered on 19th November, 1997.

The court said that there was "considerable disparity in the persons who gave the notice of appeal and those who filed the notice of motion; that there was also variance with the plaintiffs in the amended plaint". Having said so this Court concluded that that disparity and uncertainty rendered the notice of appeal filed by Ndungu Kiiru invalid. As there was no valid notice of appeal the court did not grant the injunction sought under rule 5(2)(b) of the Rules of this Court. 36 applicants are now before me seeking leave to lodge their notice of appeal out of time. The ground they are advancing for obtaining such leave is that the applicants' counsel was of a mistaken view that a notice of appeal lodged without all names of the proposed appellants, but with the words "and others" was proper; of course it was not and the Court rightly rejected the same as not being a valid notice of appeal.

The "and others" are now before me, therefore, seeking extension of time to lodge a fresh notice of appeal whereas Ndungu Kiiru says through his counsel that his notice of appeal as lodged can remain and will become a part of the record of appeal when the said record will be lodged.

This application was lodged within two weeks of the date of the ruling of the Court dated 9th June, 1999. This application has been lodged, therefore, without undue delay and I will consider it.

Mr. Ochieng Oduol who appeared for the respondents objected to the application on the ground that as the original notice of appeal does not stand struck out this application is premature. He also objected to the 36 present applicants coming now, after some 29 months, seeking extension of time to lodge their notice of appeal. He also took issue with the delay in the lodgment of the record of appeal itself, judgment sought to be appealed against having been delivered on 19th November, 1997. He argued also that no explanation was given as to why the words "and others" were used.

The applicants probably believed that their intended appeal was in the process of being lodged. Little did they know that the notice of appeal lodged on their behalf was defective. In fact "and others" being included in the notice appeal means nothing. There was no notice of appeal for those 36 persons and this enables me to consider whether such error on part of their counsel is excusable enough to enable me to allow the 36 persons to lodge their notice of appeal now.

Counsel's error in saying "and others" ought not be visited, in my view, on the applicants who, as I said earlier, probably believed that their intended appeal, filing of which is their statutory right, was in the process of being lodged.

The notice of appeal still on record, in my view, is applicable only to Ndung'u Kiiru, and I see no impediment in the way of the 36 applicants now before me to lodge their notice of appeal in one document.

The alleged delay in the lodgment of the record of appeal is being attributed to delay in obtaining copies of proceedings and judgment. I know there are delays in the High Court with regard to typing out and checking of proceedings.

Sitting as a single Judge, I cannot decide that the delay is such as not to entitle the present applicants leave to lodge their notice of appeal. That is in the province of the full bench when seized of an

application to strike out a notice of appeal on account of an essential step not having been taken.

Having considered all the circumstances appertinent to the matter which is now before me I do exercise my discretion in favour of the applicants and order that they do lodge their notice of appeal within the next 10 days.

The respondents would however have costs of this application as it is not their fault that the notice of appeal in the first instance was ineffective so far as the applicants are concerned. I assess these costs at Shs.7,500 and I order that unless these costs are paid within the next 30 days execution may issue.

Dated and delivered at Nairobi this 14th day of March, 2000.

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.