



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, AKIWUMI & SHAH, J.J.A.)
CIVIL APPLICATION NO. NAI. 246 OF 1999**

**BETWEEN
GITAU NGANGA APPLICANT
AND
JOHN MWANGI KINGORI RESPONDENT**

**(Application for extension of time in an intended Appeal
from the Judgment of the High Court of Kenya at
Nairobi (Justice Mulwa) dated 17th December, 1998
in
H.C.C.C. NO. 820 OF 1998)**

RULING OF THE COURT

The matter before us arises out of the refusal by the single Judge of this Court, Tunoi JA, to extend time for the Applicant to file a Notice of Appeal in an intended appeal; for the sending of the Applicant's application for a copy of the proceedings in the superior court to the Respondent; and for the lodging of the intended appeal. Tunoi JA had refused to exercise his unfettered discretion to extend time as prayed under Rule 4 of our Rules for the following reasons: Even though the Notice of Appeal had been lodged within time after judgment was entered against the Applicant, a copy as required by Rule 76(1) to be served on the Respondent within seven days thereafter by the Applicant, was for no good reason, not served upon the Respondent until some three months after the prescribed period; the Applicant had not under Rule 81 (2), which he must first comply with before he can be eligible to apply for the extension of time for the taking of an essential step in this case, the lodging of the record of appeal, sent a copy of his application for a copy of the proceedings in the superior court to the Respondent; and lastly, that the Applicant's allegation that the superior court's file on the matter had been missing for nearly two and half months - 22nd February, 1999, to 14th May, 1999, and which had caused the delay in the signing by the Principal Deputy Registrar of the superior court of the Certificate of Delay, was not supported by any evidence. And by the way, the Certificate of Delay whose contents are inappropriate and unacceptable, was unaccountably, not signed by the Principal Deputy Registrar for nearly three months after the supposed resurfacing of the missing superior court's file.

Tunoi JA on the basis of the foregoing had no difficulty in concluding that the Applicant had been "gravely indolent and guilty of inordinate delay" in the pursuance of his intended appeal, which had not been satisfactorily explained.

He consequently, refused to exercise his discretion in the matter in favour of the Applicant.

In the present reference to the full Court before us, Mr. Rumba Kinuthia for the Applicant has rehashed the same submissions that he made before Tunoi JA. The sending on the part of the Applicant of a copy of his application for a copy of the proceedings in the superior court to the Respondent, as is clear from

the following provisions of Rule 81(1) and (2), is a vital step which the Applicant must comply with before he can even seek the extension of time to lodge the record of appeal:

"81.(1) Subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- (a) a memorandum of appeal, in quadruplicate;
- (b) the record of appeal, in quadruplicate;
- (c) the prescribed fee; and
- (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent."

Apart from the fact that there was no supporting affidavit of the process server who it is alleged, had failed to send a copy of the application to the Respondent, and which even if so, cannot automatically, change the state of affairs, it is clear from a copy of that application annexed to Mr. Rumba Kinuthia's affidavit in support of the Applicant's application for extension of time, that it was not even endorsed as copied to the Respondent. This is acceptable evidence that the letter was not meant to be served on the Respondent and was not so served on him, and on this ground alone, in our view, the learned single Judge of this Court, exercised his discretion properly in dismissing the Applicant's application then before him.

With respect to the other submissions, we do not, like the learned single Judge of this Court, find that the Applicant has given any acceptable evidence for the delay that he indulged in, in the pursuit of his intended appeal, or any evidence at all, to support the allegation of the disappearance of the superior court's file.

In the result, the Applicant's reference to the full Court must fail, and is dismissed with costs to the Respondent assessed at 10,000/- to be paid within fourteen days from today otherwise, execution to issue.

It is so ordered.

Dated and delivered at Nairobi this 26th day of May, 2000.

R. O. KWACH

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.