



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NO. NAI 338 OF 1999

BETWEEN

SURYAKANT BHAGWANJI SHAH APPLICANT

AND

APERIT INVESTMENTS S.A. SATISHCHANDRA BHIMJI
SHAH RESPONDENTS

(Being an application for extension for lodging a memorandum & record of appeal in an intended appeal from the ruling & order of the High Court of Kenya a Nairobi (O'Kubasu J) dated 24th February, 1999

in

H.C.C.C. NO. 3906 OF 1991)

R U L I N G

Suryakant Bhagwanji Shah, the applicant herein, desires and has always desired to appeal from the ruling and order of the superior court (O'Kubasu, J) dated 24th February, 1999 in ***High Court Civil Case No. 3906 of 1991***. That suit was filed against the applicant by ***Aperit Investments SA and Satishchandra Bhimji Shah*** who are the respondents in the motion now before me. The applicant had in fact lodged Civil Appeal No. 143 of 1999, but when that appeal came up for hearing before the Court on 18th November, 1999, the Court held that it (appeal) was incurably defective and ordered the same struck out. The notice on motion before me was lodged in Court on 1st December, 1999. Mr Deverell for the applicant contended that the motion before me was brought without any delay; I did not hear Mr Shah for the respondent say anything to the contrary.

In an application such as this one, I do not think that a single Judge of the Court would be justified in refusing to exercise the unfettered discretion conferred by Rule 4 under which the motion is brought on the ground that the mistakes which made the previous appeal fatally defective ought not to have been made. The mistakes which rendered the previous appeal being fatally defective were "punished" sufficiently by the Court striking out the appeal and while in this application I have to take them into account, I cannot use them as the sole basis for refusing to exercise my discretion in favour of the applicant. I have said that the applicant has always desired to appeal; I have also said that the applicant filed his current motion without any delay. It was not alleged on behalf of the respondents that the

applicant does not have the right to appeal to the Court. I must take these matters into account and they are clearly in favour of my exercising the discretion I possess in favour of the applicant. Mr Shah objected to the motion on the ground that the affidavits in support thereof did not contain an averment by the deponent that the contents of the two affidavits were true to the deponent's knowledge. It is true the affidavits do not have that averment but I agree with Mr Deverell that a casual look at any of the two affidavits must show that the assertions made therein are from the deponent's own knowledge. It was not contended that any of the averments made in each affidavit was false. I am satisfied the affidavits meet the requirements of **Order 18 Rule 3 (1) of the Civil Procedure Rules**, upon which Mr Shah's objection to the affidavits was founded. I would, however, add that it is better to make the usual averment that the contents of an affidavit are true to the maker's knowledge or if based on information, the source of such information and whether the maker believes the truth of the information. That would avoid the kind of objection taken by Mr Shah.

The second objection to the motion was that the record placed before me still contains certain certificates in the Spanish language and that there are no English translations of the said certificates. The short answer to that objection is that the record before me is not a record of appeal. If the applicant were to be still that foolhardy and file another record of appeal without all the relevant and necessary translations, that is a matter which can be taken up if and when the appeal itself has been lodged. I do not think I need to deal with the issue of the amended defence raising the same grounds as those to be argued in the proposed appeal. I have said the applicant has a right of appeal against the order of the superior court and that being so, I cannot refuse to exercise my discretion in his favour on the ground that he ought to argue the grounds in the superior court and if he loses then he can eventually come to this Court. There is a definite ruling of the superior court on the issues raised in that court and if the applicant does not appeal against that ruling now, he might well be barred from raising the same issues in a later appeal. I think I ought to extend the time for the applicant to enable him lodge his intended appeal. Accordingly, I allow the notice of motion dated 30th November, 1999 and lodged in court on 1st December, 1999 and I make the following orders thereon:-

- 1.Pursuant to the leave I granted to the applicant to amend his motion, the notice of appeal shall be filed and served upon the respondents within seven days of the date hereof;
- 2.The memorandum of appeal and the record of appeal shall be lodged in Court within fourteen days from the date the notice of appeal is lodged in Court and the same (i.e. the memorandum and record of appeal) shall be served on the respondents within seven days from the date of their lodgement;
- 3.The costs of the motion shall be in the intended appeal.
- 4.In the event of failure to comply with any or all of these orders within the stipulated period, the applicant's notice of motion shall stand dismissed with costs thereof to the respondents.

These shall be my orders on the motion.

Dated and delivered at Nairobi this 30th day of June, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR