



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

(CORAM: TUNOI, BOSIRE & KEIWUA, J.J.A)

CIVIL APPLICATION NO. NAI. 148 OF 2000 (KSM 16/2000)

BETWEEN

KENYA IRON MONGERS LIMITED APPLICANT

AND

MUHORONI SUGAR COMPANY LIMITED RESPONDENT

**(Appeal from the decree of the High Court of Kenya at
Kisumu (P.K Arap Birech, Commissioner of Assize)
dated 24th November, 1999**

in

H.C.C.C NO. 241 OF 1998)

RULING OF THE COURT

The applicant before us, Kenya Iron Mongers Limited, is the holder of a decree in Kisumu High Court Civil Case No. 241 of 1998, from which Civil Appeal No. 56 of 2000 has been lodged in this Court by Muhoroni Sugar Company Ltd., which was the defendant in the suit. The applicant has applied before us under rules 80, 82, 84 and 104 of the Court of Appeal Rules (the Rules), that the aforesaid appeal be struck out on three main grounds, the first one being that the memorandum and record of the appeal were filed out of time. Secondly, that the order appealed from does not accord with the provisions of Order XX rule 6 of the Civil Procedure Rules, nor was it first approved by its counsel before it was submitted to the court for approval and signature. Thirdly, that the memorandum of appeal, apart from it being addressed to the Deputy Registrar of the High Court instead of to the Judges of this Court, it does not conform with the form prescribed by the Rules of this Court.

The decision appealed from was given on 24th November, 1999, and on 7th December, 1999, the appellant filed its Notice of Appeal declaring its intention of appealing against it. It was required to file its memorandum and record of appeal within sixty days, thereafter, which period was to expire on 29th February, 2000, if the Christmas vacation, which by reason of the provisions of rule 3(b) of the Rules is excluded time, is excluded from computation. But the appellant did not file its memorandum and record of appeal until 3rd March, 2000, which then means that its appeal was filed at least two days out of time. The appellant has included in the record of appeal a certificate of delay suggesting that it intended to rely on the proviso to rule 81 of the Rules. However, the applicant contends that it is not entitled to do so

because, in its letter bespeaking copies of proceeding and the ruling appealed from dated 8th December, 1999, the appellant did not copy it to the applicant as is mandatorily required by rule 81, aforesaid and cannot therefore take advantage of the proviso. Mr. Kasamani for the appellant conceded before us, quite properly so, that as counsel for the appellant did not comply with that proviso, his client is for that reason disentitled to rely on it. In view of that, it is quite clear that in the absence of leave of the court to file the appeal out of time, the appeal is incompetent.

Besides, the decision appealed from is a judgment and it gave rise to a decree and not an order. Apart from the fact that the decision is misdescribed as an order, it does not comply fully with the provisions of Order XX rule 6 of the Civil Procedure Rules. Mr. Kasamani having conceded the fact that he did not also comply with the requirements of Order XX rule 7(2) of the Civil Procedure Rules, the defects taken together render the order fatally defective, the decree or order being a primary document.

As regards the memorandum of appeal, by dint of the provisions of rule 85 of the Rules it is not one of those documents which must be included in a record of appeal. We suppose that it can be filed separately and if there be a defect either in its content or form such defect may be regularised with leave of the court by the filing of an amended copy thereof.

In the result and for the foregoing reasons we agree with Mr. Karanja for the applicant that the aforesaid appeal is incompetent and we accordingly allow the application and order that the appeal be struck out with costs both of the application and the appeal to the applicant.

Dated and delivered at Kisumu this 21st day of June, 2000.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR