



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(Coram: Keiwua, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 163 OF 2000 (UR.71/2000)**

**BETWEEN
SOUTH NYANZA SUGAR CO. LTD. APPLICANT
AND
HESBORN ONYURO RESPONDENT**

**(In the matter of an application for leave to file and
serve the Notice of Appeal and Record of Appeal out of
time from the Ruling and Order of the High Court of Kenya at
Kisumu (Wambilyangah, J.) dated 11th April, 2000**

in

H.C.C.C. NO. 254 OF 1999)

RULING

This is an application for enlargement of time within which the Notice of appeal and appeal may be filed from the ruling of the superior court (Wambilyangah, J.) delivered on April 11, 2000, in its Civil Case No. 254 of 1999. The present counsel for the applicant came on record on May 2, 2000, when the time for filing a Notice of appeal against the said ruling had expired. There was a Notice of appeal filed by the previous counsel acting for the applicant and which omitted therefrom to include the date on which the ruling appealed from was delivered. The discovery of the omission was followed with the filing of the present application which is brought under rule 4 of this Court's Rules "the Rules", which of course, confers unfettered discretion to the court to grant time extension to file a Notice of appeal or memorandum and record of appeal out of time. The error in the Notice of appeal was discovered on June 6, 2000, when the applicant's counsel appeared before the superior court on an application for stay of proceedings. That mistake is purely attributable to the applicant's previous counsel.

The applicant has an arguable appeal because the ruling is founded on an alleged compromise contained in correspondence exchanged after the suit had been instituted in the superior court. It is contended that the judgment in the sum of KShs. 8 million is wrong because all judgments must have root in the pleadings filed in court and not otherwise. There is a replying affidavit filed on behalf of the respondent which the applicant submits to be based on a consent order which stayed the payment of the decretal sum for some sixty days from the date when the application for stay of execution was dismissed by the superior court. The applicant's view of the matter is that, an agreement to pay the decretal sum later, does not bar the right of appeal by one of those who were parties to the agreement to postpone payment of the decretal sum.

The respondent is opposing the application because there is a valid notice of appeal filed on April 3,

2000, and was served on the respondent on April 14, 2000, though did not contain the date of the ruling appealed from and that omission, the respondent's counsel had contended, does not invalidate the notice of appeal which once filed can only be struck out by a bench of three Judges of this Court or may be withdrawn with the leave of the court. The respondent's counsel relies for this submission on the ruling of my learned brother Omolo, J.A. in Civil Application No. NAI. 109 of 1998 ROSE NYABOKE OTONDI VS. TODI MURUNGA (un reported) which was an application for extension of time within which to file notice of appeal out of time together with the record of appeal thereto and which Notice of appeal, the learned single Judge of this Court, found to have been filed within time and still held that even if such a notice of appeal was contended to be defective, a single Judge of this Court would not have had jurisdiction while dealing with an application for leave to extend time, to ignore or strike out an already filed notice of appeal which is existing on record and irrespective of the validity or otherwise of any such notice of appeal. It is also my view therefore, that because the notice of appeal, filed in court herein, is still on record, I have no jurisdiction to ignore it and extend the time within which the applicant may duplicate its efforts and bring another notice of appeal on the record of the court. As to whether, time is ripe to consider an application to extend time for the applicant to file the memorandum of appeal and record of appeal out of time, the respondent here contended and I accept that contention that the period for filing the appeal and the record of appeal; and assuming that a valid appeal can be filed without more; has not run out because the applicant still has upto the end of July, 2000, to do so. It is not for me to tell Mr. Kasamani, counsel for the applicant, the next step to take in view of his pleas that "on the face of an invalid notice of appeal no appeal would lie and would not wish to meet his fate of having the appeal struck out." For the foregoing reasons, I dismiss the application with costs to the respondent.

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

M. KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR