



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 164 of 2000

**JOGINDER AUTO SERVICE LTD.
APPLICANT**

AND

**MOHAMMED SHAFFIQUE 1ST
RESPONDENT**

**MOHAMMED PARVEZ SAROYA 2ND
RESPONDENT**

(Application for extension of time to file a Notice of Appeal and Record of Appeal in an intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Hon. Mr. Justice Moiyo Ole Keiwua) dated the 28th day of May, 1999

in

H.C.C.C. NO. 1126 OF 1995)

R U L I N G

Yet once again there is before me a motion on notice expressed to be brought under **rule 4** of the Court of Appeal Rules (the Rules) by Mr. K'Owade for orders that the time for the filing of the notice of appeal and the record of appeal be extended.

The intended appeal is by the unsuccessful defendant in the superior court in which judgment was entered on 28 May 1999 whereby Moiyo Ole Keiwua, J., (as he then was) ordered the defendant to pay to the plaintiffs the sum of K.Shs.3,110,000/= and interest and costs. An appeal from that judgment being Civil Appeal No. 221 of 1999 was on 7 June 2000 struck out as being incompetent as:-

- (i) the record of appeal did not contain a certified copy of the decree;
- (ii) page 10 of the proceedings being part of the trial judge's notes was omitted; and
- (iii) a party joined in the superior court

as Second Plaintiff was not named as one of the respondents in the notice of appeal and/or record of appeal.

There is a supporting affidavit in which the mistake of the advocates is deponed to and is a ground of the omissions aforesaid.

As I said in **Major Joseph Mweteri Igweta v. Mukira M'Ethare & Attorney General, Civil Application NO. NAI. 8 of 2000, (unreported):-**

"The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them."

There is in fact no delay in the instant case as the present application was made within seven days of the appeal being struck out. Mr. Nagpal, advocate for the respondents, did not contend that any of the factors was present that might be a hindrance to the grant of the application save that in an able argument he contended that he would have asked the Court on 7 June, 2000 not to strike out the appeal but to dismiss it and that the present application was an attempt to obtain an amendment of a notice of appeal which was incurable and invalid and since it was a primary document it could not be amended: see **PARSI ANJUMAN V. M.A. Ali, Civil Application No. NAI. 328 OF 1998 (unreported).**

I now turn to consider these objections. In the first place, the Parsi Anjuman case was specifically a case in which an application to amend a notice of appeal was made. Secondly, the effect of the present application cannot be one to achieve an amendment of the notice of appeal because there is more than one authority of this Court that once the appeal was struck out the notice of appeal also went with it leaving no notice of appeal behind capable of an amendment. Thirdly, if an appeal is incompetent can it be dismissed or should it be struck out? In **NGONI-MATENGO CO-OPERATIVE MARKETING UNION LTD. V. ALIMAHOMADE OSMAN** [1959] EA 577, Sir Ralph Windham, J.A. of the then Court of Appeal for Eastern Africa, delivering what was in effect a judgment of the Court stated at p. 580 as follows:-

"..... In the present case, therefore, as in Bhogal's case, (20 EACA 17), when the appeal came before this court, it was incompetent for lack of the necessary decree, as in Bhogal's case for lack of the necessary order. This court, accordingly had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used; and since neither the appeal in Bhogal's case, nor the present appeal was in fact capable of being dismissed, that is to say of being treated as something properly before the court, each must be treated as if it had been struck out, which in effect it was. It seems to me that the reasoning, in the passage from the judgment on the application in Bhogal's case, which I have set out, is based upon the inadvertent assumption that what the court had previously dismissed was a competent appeal, so that a subsequent attempt to restore it would, or might, be met by a plea of res judicata. But since, both there and in the present case, the earlier appeal was incompetent, there was no res before the court capable of becoming judicata. The ruling in Bhogal's case, should not, therefore, now be followed."

For all these reasons I hold that the objections taken on behalf of the respondents fail. I consider this is a fit and proper case for the exercise of my discretion in favour of the applicant. Accordingly, the notice of motion succeeds and I order that the notice of appeal shall be filed within ten days from the date hereof and the record of appeal within twenty-one days thereafter with costs of this application to abide the

appeal.

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

A.A. LAKHA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR