



IN THE COURT OF APPEAL

AT NAKURU

CIVIL MISC. APPLI. 132 OF 1999[1]

1. GEOFFREY MAKANA ASANYO

2. JOSEPH MANYONCHO ONCHONGA.....APPLICANTS

AND

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING OF THE COURT

This reference arises from a decision of a learned single Judge of this court (Shah, JA) which he delivered on February 25, 2000 rejecting the application by the 1st applicant herein to be granted an extension of time within which to lodge and serve the notice of appeal and also the record of appeal out of time. The reason for the delay had been fully explained to the satisfaction of the learned single Judge and he did not therefore reject the application on that ground.

The application was also made on the other ground that the 1st applicant's and the 2nd applicant's intended appeal raised serious issues of law on whether a court order can serve as a statutory notice under section 74 of the Registered Land Act. We also draw attention that the application before the learned single Judge was made jointly by the two applicants and in our judgment could only stand or fall as such. In our view, the learned single Judge was wrong in dissecting that application in the manner that he did by considering the individual strengths of each applicant's intended appeal. Moreover, the application was only supported by the affidavit of the 1st applicant who had the authority of the 2nd applicant to swear it on the belief that the intended appeal will raise issues of law.

It should also be noted that in the ruling of the superior court (Rimita, J.) which was being appealed from, the learned Judge had this to say, regarding the application for injunction and the affidavits filed by the applicants in support thereof:-

"Both plaintiffs have sworn affidavits in support of the application. The affidavits raise substantive issues for determination at the main trial. But none of the parties made available to the court the contentious guarantees."

The learned single Judge did not in his ruling even consider the matters adverted to by the learned Judge of the superior court in the ruling he delivered on April 13, 1999. If it is assumed for a moment that an aspect to be taken into account by a single Judge in an application for enlargement of time, is whether an intended appeal was frivolous, then in our judgment the learned single Judge with respect, had erred because his holding to the effect that he saw nothing of substance which the 1st applicant could argue on appeal, is not supported by the material before him. However, it is clear to us that a learned single Judge has no power to reject an application on the basis that it lacked merit or substance. In Civil Application No. Nai. 70 of 1998 Daniel Nganga Kanyi vs. Sosphinaf & Co. Ltd and James Gatuku Ndolo (unreported)

Kwach, J.A said:

"The only reason Mr. Sheth, for the respondent, has advanced why I should decline to exercise my discretion in favour of the applicant is that the appeal was struck out because of negligence on the part of an advocate who drew a defective notice of appeal. That may well be so but in this application all I have to determine is whether the applicant has brought it without delay and he has completely satisfied me in this regard".

In the circumstances, we are of the view that the learned single Judge of this court wrongly exercised his discretion and we are bound to interfere. We allow the reference and extend the time for filing a notice of appeal by 7 days from today, and for lodging the record of appeal by 14 days from the date of filing the notice of appeal. The applicants will pay the respondent costs of Kshs.10,000/= within 7 days and in default execution to issue.

Dated and delivered at Nakuru this 29th day of September,

2000.

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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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.