



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

CORAM: OMOLO, SHAH & BOSIRE, J.J.A.

CIVIL APPLICATION NO. NAI 203 OF 1999 (NYR 15/99)

BETWEEN

ITHAGI GITONGA
APPLICANT

AND

CONTINENTAL CREDIT FINANCE LTD JOSEPH KAHUTHIA KIBUI
RESPONDENTS

(Application for extension of time to file notice of appeal from an order of the High Court of Kenya at Nyeri (Juma J) dated 17th May, 1999

in

H.C.C.C. NO. 279 OF 1991)

RULING OF THE COURT

We have before us an application by Ithangi Gitonga (the applicant) whereby he seeks to reverse the decision of a single Judge of this Court. The learned single Judge declined to grant to the applicant an order for extension of time to lodge a notice of appeal out of time and this reference to the Court is against that refusal to grant the extension of time. The applicant was desirous of lodging an appeal against the ruling of the superior court (Juma J) given on 17th May, 1999 in H.C.C.C. NO. 279 of 1991 whereby he refused to set aside an order of dismissal of the suit. The last day to lodge the relevant notice of appeal was 31st May, 1999. The applicant's then advocates drew up the notice of appeal and handed it over to the applicant himself, at Nyahururu, instructing him to go to Nyeri and lodge the same in the registry of the superior court there.

The applicant instead went to Ol-Joro-Orok to see his sister and stayed with her until 2nd June, 1999. He returned to Nyeri only to realise that he had "inadvertently" left the notice of appeal at his sister's house in Ol-Joro-Orok. He returned to Ol-Joro-Orok to collect the same and lodged it on 4th June, 2000. He was by then four (4) days out of time. Having done that he did not go to his advocates until 21st June, 1999. The learned single Judge was not impressed with the explanation proffered by the applicant for the delay in question. On our part we think that the learned single Judge was quite right in not being satisfied with the conduct of the applicant.

The applicant knew he was out of time in lodging the notice of appeal, yet he took 17 days to go to his advocates to inform them of the delay in lodging the notice of appeal. The motion itself was not filed until 7th July, 1999.

But the factor that obviously weighed quite heavily on the mind of the learned single Judge was that the letter bespeaking copies of proceedings and ruling to enable the applicant to lodge the appeal was not copied to the advocates for the respondent. The time limited for lodging the appeal itself had already passed and there was no application for extension of time to lodge the record of appeal. Quite obviously any order for extension of time to lodge the notice of appeal would have been futile in the absence of an application for extension of time to lodge the record of appeal out of time.

Mr Akhaabi for the applicant, argued that the learned single Judge ought not to have considered the issue of absence of an application for extension of time to lodge a record of appeal as it could have been done within two weeks. That argument does not hold water. The Court does not act in vain. The order for extension as sought, if made, would have served no purpose. We cannot but agree with the learned single Judge in this regard.

We find no fault with the manner in which the learned single Judge exercised his undoubted discretion and we have no basis for interfering with him. In the result, this reference is dismissed with costs.

Dated and delivered at Nyeri this 27th day of October, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR