



IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: BOSIRE, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAL309 OF 2000 (UR.150/2000)

BETWEEN

J M M APPLICANT

AND

A W M RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal, the Memorandum of Appeal and a Record of Appeal out of time in an intended appeal from a judgement of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 13th October 1999 in

Judicial Separation No.50 of 1997

RULING

The applicant, J M M, has moved this court by motion under rule 4 of the Court of Appeal Rules for an order enlarging the time within which to file and serve a fresh Notice of Appeal and a Memorandum and record of appeal against the decision of the superior court given on 13th October, 1999, in its Judicial Separation Cause No.50 of 1997.

The applicant's Civil Appeal No.15 of 2000, which had been filed timeously was, on 9th October, 2000 struck out on grounds, firstly, that the purported copy of the order appealed from which formed part of the record of appeal was incorrect and was not certified as required by our rules; and secondly, that the copy of proceedings in the record of appeal was unintelligible. The applicant wishes to restart the appellate proceedings, and hence this application.

It is trite law that an intending appellant whose appeal has been struck out for incompetence may in an appropriate case be granted an extension of time within which to file and serve a fresh Notice of Appeal, Memorandum and record of appeal. The applicant filed this application about 21 days after his appeal was struck out. It cannot be said that such a period was inordinate as to deny the applicant the exercise of my judicial discretion under rule 4, aforesaid, in his favour. His Counsel, Mr Muigai, has deponed in an affidavit in support of this application that necessary steps have been taken to regularise the defects which led to his earlier appeal being struck out. It would therefore appear to me, that the applicant acted with due dispatch and has duly demonstrated that this is a fit case for the exercise of judicial discretion in favour of extending the time as prayed.

But Mr Muthee for the respondent, A W M, said that the respondent opposes the application on grounds that the applicant is in breach of an order made by the Superior Court in the Judicial Separation Cause, aforesaid, in which the order from which an appeal is intended was made. Mr Muthee sought to serve a copy of a replying affidavit to this application on counsel for the applicant. Mr Muigai for the applicant, however, declined service, properly so in my view, because Mr Muthee did not at all bother to serve him with the said affidavit before the hearing commenced. Instead Mr Muthee waited until Mr Muigai had wound up his submissions before presenting him with the replying affidavit.

I wish also to observe that counsel for the respondent without any reason at all, did not file the said replying affidavit before the hearing commenced. Nor did he apply for an adjournment to file the same before the application could be heard. So it was not only Mr Muigai who did not have the said affidavit at the conclusion of his submissions, I, too, did not and do not have it even as of now. It then means that I have no basis upon which to consider the respondent's counsel's objection to the grant of the orders sought. I wish to observe here, that it is the duty of a party who wishes to bring to the court's attention certain relevant evidence in a matter before the court promptly, and where it is not possible to do so it would be imperative for the party concerned to give reasons for his failure to do so. Otherwise the court will not permit any party in a contested matter to ambush the other party with fresh evidence.

The parties to this application are husband and wife. Their marriage was solemnized on 9th September, 1981. They have six issues of the marriage. The respondent, on 18th April, 1997, moved the superior court for an order of judicial separation, custody of the six children and maintenance both for herself and the children. The applicant cross-petitioned for divorce. The Superior Court declined to award custody of the children to her at interlocutory stage, but made an order permitting her to occupy the matrimonial home and to have reasonable access to the children.

However, that last order was varied and substituted with an order that the applicant provide her with alternative accommodation. The respondent was also awarded interim maintenance of Kshs.35,000/= per month. The orders to provide accommodation and to pay maintenance were later confirmed. And so was the order regarding custody of the children of the marriage. The applicant's petition for divorce was however, dismissed.

On the material before me, it is clear that the applicant provided the respondent with a house in South "B" Nairobi, to live in but she went to live elsewhere and let out the house. The intended appeal is intended to challenge, mainly, the order of the superior court regarding the award and quantum of maintenance.

I do not know which part of the order of the superior court the applicant has breached as alleged by the respondent's counsel. Even assuming that the applicant is in breach as alleged, it was upon the respondent either to place evidence before me of such breach or to take such steps as deemed necessary to enforce compliance. There is clearly no proper basis for denying the applicant an extension of time to file and serve a fresh Notice of Appeal, and the memorandum and record of appeal.

I accordingly exercise my judicial discretion under rule 4, aforesaid, and extend the time within which to lodge a fresh Notice of Appeal by 10 days from the date hereof, and a memorandum and record of appeal within 30 days of the date of filing of the Notice of Appeal.

I make no order as to the costs of this motion.

Dated and delivered at Nairobi this 9th day of November, 2000.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR