



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 242 OF 2000 (113.2000 UR)

BETWEEN

ATTORNEY GENERAL.....APPLICANT

AND

SIMON QUIGGREY OGILA.....RESPONDENT

(An application for extension of time to lodge notices of appeal and appeals against the ruling and order of

the High Court of Kenya (Aluoch, J) dated 14th October, 1997 and the ruling and orders of the High Court of Kenya (Sheikh Amin, J) dates 4th April,

respectively

in

H.C.C.C. NO.421 OF 1990)

RULING

The Attorney General, who is the applicant here, seeks leave to lodge his notices of appeal and records of two appeals out of time. The application is expressed to be brought under rules 7, 17, 20 and 42 of the Rules of this Court (the Rules). The application was lodged and now comes up for hearing as a result of consolidated Civil Appeals numbered 83 of 1999 and 140 of 1999 having been withdrawn, with leave of this Court, on 24th day of May, 2000. The said two appeals arose out of the following facts.

On or about the 17th day of August, 1990 the respondent, Mr. Simon Quiggrey Ogila, filed a suit against the Attorney General who was sued on behalf of the Ministry of Agriculture. The respondent was at the material time employed by the said Ministry and was allegedly retired under the 50 year retirement rule. The suit he filed against the Attorney General is H.C.C.C. No. 4218 of 1990. On 12th October, 1995 he obtained judgment for Shs.55,680/- plus interest which as at the date of the decree amounted to Shs.28,912/=. He was, in addition to the decretal sum, granted costs of the suit. The total decretal sum was Shs.84,592/=. Mr. Ogila some two years or so later applied for review of the judgment delivered on 12th October, 1995. He lodged a chamber summons at first for such review under Order VI rule 13 of the Civil Procedure Rules. It is not quite clear to me as to what the fate of that chamber summons was. Later

still he lodged a notice of motion seeking a review of "the decree of Honourable Lady Justice Aluoch, J in Civil suit Number 4218 of 1990 delivered on 14th October, 1997" and dated his application as of "16th July, 1997". There appears to be something drastically wrong with that notice of motion which is exhibited at page 31 of Mr. Ogila's replying affidavit before me. Mr. Ogila could not have asked for review of an order made on 14/10/97 by an application dated 16th July, 1997. I would presume that the date "14/10/97" ought to have read "14/10/95"

The date stamp (of the superior court) on the said notice of motion is not quite legible to me. Mr. Ogila said it was lodged on 16/7/97. It could be so because his affidavit sworn in support of that notice of motion is 16th July, 1997. I called for the superior court file to ascertain the correct date of lodgment of the said notice of motion. Alas that file, despite searches, was not available -so I am told- and I have not been able to ascertain the true state of affairs.

According to the typed proceedings in the superior court, in H.C.C.C. No. 4218 of 1990, Mr. Ogila appeared before Aluoch J on 8/10/97 when the application was stood over to 14/10/97 for mention. On 14/10/97 Mr. Ogila appeared before Aluoch J. The Attorney General's representative did not appear though served with the mention notice. Aluoch J proceeded to hear the application for review on 14/10/97 despite the fact that she had listed the same for mention. She said:

"In my judgment dated 12th October, 1995, I found that the plaintiff's termination (sic) was irregular, i.e. wrongful, and I found that he was entitled to six months pay in lieu (sic) notice. This being so the plaintiff is entitled to be paid his last salary before termination from the date of letter of termination which was 28th August, 1989 to the date of judgment i.e. 12/10/95.

The plaintiff's pension should now be calculated to reflect the above order. To this extent therefore, my judgment is hereby reviewed."

I cannot help noticing and pointing out that the learned judge proceeded to hear a review application on a "mention" date and that the requirements of Order 44 rule 6 of the Civil Procedure Rules were ignored totally.

Based on the review of the judgment Mr. Ogila proceeded to draw a decree (which appears at page 37 of Mr. Ogila's replying affidavit bundle) which amended the decretal sum payable to him to Shs.2,526,217.80. It is not for one to say, at this stage, whether that decree accords in any manner with the review order granted by Aluoch J save to say that none of the figures (sums) mentioned in the "decree" are in the ruling on review.

The Attorney General's office drew a draft decrees purportedly to accord with the review order and sent a copy thereof to the Deputy Registrar of the superior court to approve. The correctness of the decree drawn by Mr. Ogila was the subject-matter of an application before Aluoch J, who, on 1st October, 1998, declined to interfere with the decree as drawn by Mr. Ogila on the basis that it was not objected by the Attorney General in time. The only comment that I have on this issue is that even if a draft decree/order is not challenged in time by the party asked to approve the same, it must accord with the judgment/ruling and the Deputy Registrar who is called upon to approve the same is duty bound to see to that.

The "decree" which was therefore signed and sealed was the one as drawn by Mr. Ogila. The Attorney General appealed against that "decree" resulting from the review application which application was 'heard' on 14th October, 1997. That was Civil Appeal No. 140 of 1999. That appeal stands withdrawn as already pointed out and the Attorney General now seeks leave to lodge a fresh notice of appeal as well as a fresh record of appeal to challenge the ruling on review delivered by Aluoch J on 14/10/97.

Civil Appeal No. 140 of 1999 was incompetent as the formal order appealed against bore a wrong date, that is, 12th October, 1995, and was not included in the record of appeal, or so I am told.

Having ascertained or having come to realize that the order appealed against bore wrong dates Mrs. Madahana, who appears for the Attorney General, set about to put the same right or extracting it properly.

She stated that the registry of the superior court took time over drawing a correct Order. I have seen what has been drawn by the superior court. Even now it is not correct. The Order appearing on pages 34 and 35 of the application before me bears wrong dates. The date of presentation to court should read 16th July, 1997 and date of "hearing" should read 14/10/97. I say so because Mr. Ogila informed me that his earlier application (chamber summons undated) under Order VI rule 13 was not proceeded with. The state of affairs is most unsatisfactory. None of the Orders make sense.

The delay in regard to drawing up of the formal order was caused by the Registry of the superior court. Thereafter this application was filed on 16th August, 2000. The delay in lodgment of this application is not inordinate. The matter cries out loud for justice as substantial review orders were made on a mention date. I therefore grant orders to the applicant to file a fresh notice of appeal against the order of the superior court made on 14/10/97. Such notice of appeal must be filed by 14/1/01. The record of appeal must thereafter be lodged by 14/2/01.

I come now to Civil Appeal No. 83 of 1999. That was against the ruling of Sheikh Amin J delivered on 14th April, 1999. The appeal was withdrawn on 24th day of May, 2000. As stated earlier that appeal was consolidated with Civil Appeal No. 140 of 1999. The learned Judge ordered, inter alia, that unless the Permanent Secretary to the Ministry of Agriculture and Livestock Marketing did not pay a sum of Shs.3,488,630/80 to Mr. Ogila by 4th January, 1999 he be committed to Civil jail. Once again I am of the view that the overall delay in bringing up this application is not so inordinate as to deny the applicant a chance to lodge a fresh appeal. This Court has said in Republic vs. Permanent Secretary, Ministry of Agriculture, Livestock Development and Marketing (Civil Application No. Nai. 87 of 1999)(unreported) that the intended appeal was an arguable one and involves the liberty of an individual. I extend the time to lodge a fresh notice of appeal against the Ruling of Sheikh Amin J delivered on 14th April, 1999. That notice of appeal must be filed by 14th January, 2001 and the record of appeal must be filed by 14th February, 2001. I have given extra time as the Courts are now on vacation.

The respondent will have costs of preparing his affidavit in reply to the application plus his reasonable out of pockets which I assess altogether at Shs.3,000/=. This sum must be paid to the respondent within the next 30 days failing which execution may issue.

Dated and delivered at Nairobi this 22nd day of December, 2000.

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is
a true copy of the original

DEPUTY REGISTRAR