



IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 157 OF 2000

BETWEEN

B.N. MUCIRA T/A MUCIRA & CO. ADVOCATESAPPLICANT

AND

KENYA COMMERCIAL BANK LTD.RESPONDENT

(An application for leave to file Notice of appeal and record of appeal out of time in an intended appeal from an order of the High Court of Kenya at Nairobi (Gacheche, Commissioner of Assize) dated 7th October, 1999

in

H.C. MIS. APPLICATION NO. 74 OF 1999)

R U L I N G

This application has been brought by way of Notice of motion under the provisions of **rule 4** of the Court of Appeal Rules (the Rules). The orders that the applicant, B.N. Mucira t/a Mucira & Co. Advocate seeks are:

"1. That this Honourable Court be pleased to grant leave to the applicant to file notice and record of appeal against the order of the Hon. Miss Gacheche, Commissioner of Assize granted on 7th October, 1999 out of time and extend such time within which to file a record of appeal.

2. That this Hon. Court be pleased to find that the notice of appeal filed on 25/10/99 was within the prescribed time and reinstate the struck out Civil Appeal No. 251 of 1999 for hearing and determination on merits and/or in the alternative the appellant be exempted from paying any other filing/court fees in the other appeal to be filed".

Wambugu Kariuki, Counsel for the applicant filed an affidavit in support of the application and in which he laid out the grounds upon which the application is based. They are stated as follows; on 7th October, 1999 Commissioner of Assize Miss Gacheche gave an order against the applicant. The applicant was desirous to appeal against that order and on 25th October, 1999 he filed a Notice of appeal. On 7th June, 2000 this Court struck out civil appeal No. 251 of 1999 filed by the applicant on the ground that the Notice of appeal had been filed outside the prescribed time. More important:

"3.That the applicant reasonably believes that the Notice of appeal as duly lodged in the superior court on 25/10/99 was within the prescribed time though the civil appeal No. 251 of 1999 was struck out which is apparently erroneous.

4.The applicant has acted reasonably fast to remedy the striking out of his appeal on 7th June, 2000.

5.The applicant pleads with this Honourable Court that he be given a chance to be heard on merit as his former appeal but now intended or to be reinstated raises very pertinent arguable issues to be determined at the hearing on merit."

On the same day the appeal was struck out the applicant filed a fresh Notice of appeal, without any leave, together with this application. Mr. Njeru, Counsel for the respondent has opposed the application on two main grounds namely that this Court sitting as a single Judge has no jurisdiction to revive, reinstate the Notice of appeal that was filed in the struck out appeal, and secondly that there is already a Notice of appeal on record and in that regard leave cannot be granted to file yet a second Notice of appeal in this same matter.

I am fully in agreement with Mr. Njeru in as far as my jurisdiction under rule 4 of the Rules is concerned, sitting as a single Judge of this Court.Once the appeal, CA No. 251 of 1999 was struck out by the Court that was the end of that appeal. All the orders and steps taken in that appeal went with the appeal. The jurisdiction of this Court in terms of **rule 4** cannot for any reason whatsoever be invoked to do an act on appeal that no longer exists. I have no jurisdiction to revive the Notice or the appeal and thereby give the applicant a chance to argue any matter that he does not agree with. It is neither here nor there that he did not agree on how the court computed the time and came to the finding that the Notice of appeal had been filed out of time and without leave. The sentiment expressed by Kwach, J.A in Attorney General vs. Kamlesh Mansukulal Danji Pattin & 2 others C.A 59 of 1999 are in my view very relevant herein.

"As a single Judge, I have no power to validate an invalid Notice of Appeal. Nor do I have Jurisdiction to strike it out even if it is potentially defective as is in the present case".

That being the case, the prayer to this Court to revalidate or resurrect a Notice of appeal in Civil Appeal No. 251 of 1999 lacks any merit.In as far as prayer (1) is concerned, Mr. Njeru has urged me to find that the applicant has not given any explanation as to why he filed the Notice of appeal out of time and secondly that there is no prayer before me to validate the Notice of appeal already filed herein on 8th June, 2000.

The alleged Notice of appeal was also filed without leave being obtained. Hence this application. Furthermore, the applicant has not applied informally or otherwise to amend its Notice of motion to include the prayer for validation of the Notice filed on 8th of June 2000.

The applicant has requested me to validate the Notice he has already filed herein and extend the time for filing the Notice of appeal. There are problems with this course of action that counsel urges me to take. Upon CA No. 251 of 1999 being struck out, another Notice was filed without leave.That cannot be a valid notice, but the same is still on record. As pointed out by Mr. Njeru, there is no application for the withdraw of that Notice. Nor can I, sitting as a single Judge, strike out that Notice. What makes the applicant's position even more complex is that should I deem the Notice already filed properly filed, he would still be caught up with the limitation of time in **rule 81(1)**. In that the prescribed time for filing an appeal after the filing of the alleged Notice of appeal has already expired.

To my mind, granting leave to the applicant to file a fresh Notice of appeal would amount to the filing of yet another Notice when the other Notice is still alive on record, and in existence. On grounds alluded to above, I refuse to exercise my discretion and grant the leave as sought. This application is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 15th day of December, 2000.

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR