

**IN THE COURT OF APPEAL
AT NAIROBI
(Coram: Gicheru, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 248 OF 2000 (UR. 116/2000)**

BETWEEN

SHAKHALAGA K. JIRONGO.....APPLICANT

AND

TRUST BANK LIMITED.....RESPONDENT

(An application for amending notice of appeal and extension of time for filing and service of a notice of appeal out of time in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Honourable Commissioner Ransley) dated 18th July 2000

in

H.C.C.C. NO. 1428 OF 1999)

R U L I N G:

Under rule 85(2A) of the Court of Appeal Rules, hereinafter called the Rules, the notice of appeal is not one of the documents that can be included in the record of appeal in an supplementary record of appeal filed under rule 89(3) of the Rules. Hence, an amendment to the notice of appeal would be against the provisions of rule 85(2A) of the Rules. Foreseeing this hurdle, the applicant sought to amend his original notice of motion to include an alternative prayer to prayer one in the said notice of motion which alternative prayer was to the effect that this court "be pleased to extend time for filing and serving a notice of appeal." Prayer one of the applicant's notice of motion read as follows:

"1. THAT the Notice of Appeal dated 24th of July, 2000 and lodged in this Court on 25th July, 2000 be amended to indicate the date of the ruling as 18th July, 2000 rather than 25th July, 2000 and the time for its filing and service be extended by this honourable court."

Counsel for the respondent had no objection to the amendment sought by the applicant. The application for amendment had been filed in this Court on 24th November, 2000 and served on the respondent on 29th November, 2000. Consequently, on 7th December, 2000 the amendment sought was granted and the motion proceeded to hearing as amended. In the course of hearing the amended notice of motion, counsel for the applicant sought to have the defective notice of appeal as referred to in prayer one, supra, deemed to have been withdrawn under rule 82(a) of the Rules. This was simply for the reason that so long as that notice of appeal subsisted, no extension of time to file and serve another notice of appeal was possible. Indeed, that was the stand taken by counsel for the respondent.

In **Kibunja v. Noordin Construction (K) Ltd.**, Civil Application NO. NAI. 172 of 1988 (NYR 3/88) (unreported) by a majority decision of this Court it was held that rule 82(a) of the Rules makes it mandatory for the notice of appeal to be deemed withdrawn by the intended appellant if the appeal is not instituted within the prescribed period so that after the expiry of 60 days from the date of filing the notice of appeal the same by automatic operation of the aforesaid rule stands withdrawn as if by the intended appellant and thereafter it becomes a worthless piece of paper in the relevant record. However, in **Dolphin Palms Limited v. Al-Nasibh Trading Company Ltd. and 2 Others**, this Court, without reference to the Kibunja application, supra, which I presume was not brought to its attention, made the following observation in relation to the provisions of rule 82(a) of the Rules:

"We concede there is no express provision requiring a party to move the Court in that regard.

However, a careful reading of rule 82 clearly reveals that such an application is necessary. The phrase "unless the Court otherwise orders-----," clearly shows that a court order is necessary and such order can only be validly made by a full bench in an application brought under rule 80 of the Court of Appeal Rules."

The phrase "unless the Court otherwise orders" in rule 82(a) of the Rules is without more a clear indication that this Court has a role in deeming the notice of appeal to have been withdrawn if an appeal has not been instituted within the appointed time. A division of this Court comprising of a full bench in **Civil Application NO. NAI 112 of 1999**, (unreported), supra, held as is set out above that only a full bench of this Court can make an order deeming the notice of appeal as having been withdrawn under rule 82(a) of the Rules. Having observed that this Court has a role in deeming the notice of appeal to have been withdrawn if an appeal has not been instituted within the appointed time under the aforesaid rule which means that I am in agreement with the decision of this Court in **Civil Application NO. NAI 112 of 1999** in contradistinction with the majority decision in **Civil Application NO. NAI 172 of 1988 (NYR 3/88)** cited earlier in this ruling, I am, however, not so sure whether the deeming can only be validly made by a division of this Court comprising of a full bench in an application brought under rule 80 of the Rules. Rightly or wrongly, however, as a single judge of this Court I am bound by the decision of a division of this Court comprising of a full bench. That being so, unless and until the applicant's defective notice of appeal has been deemed to have been withdrawn under rule 82(a) of the Rules in accordance with the decision of this Court in Civil Application NO. NAI 112 OF 1999, no extension of time to lodge and serve a fresh notice of appeal can be validly granted. Consequently, I am unable to exercise my discretion under rule 4 of the Rules in favour of the applicant. Accordingly, the applicant's notice of motion is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 11th day of December, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR