



IN THE COURT OF APPEAL

AT NAIROBI

(Coram; Platt, JA (In Chambers))

CIVIL APPLICATION NO NAI 130 OF 1986

(In the matter of an intended appeal)

BETWEEN

LOISE WAINARO WAMITI APPLICANT

AND

1. PETER WAINARO WAMBUNYU)

2. ALICE NJERI WAMITI) RESPONDENTS

3. JOHN KINUTHIA

(Application for extension of time to file the record of appeal from a

judgment of the High Court of Kenya at Nairobi (Sachdeva, J)

dated December, 1985

IN

H C Probate Admin Case No 885 of 1984

RULING

This application for leave to lodge the record of appeal within extended time was contested, as well as it might be.

Sachdeva, J gave judgment on December 5, 1985. On December 10, 1985 the notice of appeal was filed and it was also served. Unfortunately, the request for copies of proceedings and judgment of the same rate was not served. Mr Ngwiri for the respondent has confirmed this fact, about which Mrs Khaminwa was unsure. After that the clerk dealing with appeals in the chambers of Khaminwa and Khaminwa fraudulently misappropriated the appellant's money paid as fees. The copies were ready by February 17, 1986 and this became known to Mrs Khaminwa office on February 26, 1986. It appears that the charges for the copies were paid to the court. The date is unknown. Mrs Khaminwa had thought that the applicant had not brought the fees. The fraudulent activities of this clerk became known in May 1986 and the papers were received by Khaminwa & Khaminwa on May 23, 1986. Then it was found that the time to lodge the record of appeal had expired. It had expired on February 9, 1986 or thereabouts. But after May 23, 1986 it still took until August 11 to apply. The application has been heard in vacation.

Several aspects call for special mention-

1.As the copy of the letter requesting proceedings was not served on the respondent the proviso to rule 81(1) of the Court of Appeal Rules does not apply (See Rule 81(2) of the rules.) Hence, it is immaterial that a certificate of delay was acquired during the course of the hearing of this application. The Registrar should be more careful in certifying delay. His certificate covers the period from December 10, 1985 to May 23, 1986. It should surely have ended on February 26, 1986 at the latest. It did not take the court from February 26, 1986 to May 23, 1986 to prepare the copies. It is therefore with relief that I do not have to deal with the certificate of delay.

2.If a clerk is fraudulent and conceals his dealings with a client there is not much a senior partner can do until the fraud is discovered. This is not the first time that this has happened. The period of the fraud cannot be held against the lay client. I would excuse the period up to May 23, 1986. It may be that this clerk also failed to serve the request for proceedings.

3.It is at this point that the application becomes very difficult. The time for lodging the appeal had expired over three months earlier in February 1986. Yet another three months expired before this application was made. The explanation by Mrs Khaminwa is that her client did not bring her the fees for this application. Why was that" It may be implied that her client was financially hard-pressed. The respondent has sworn no affidavit to this effect, and there is therefore no explanation for this delay. I would have thought that after this firm of advocates had found that a clerk had prejudiced the appeal, that the firm would have made good the lost time as far as possible and if necessary advanced the fees. No one knows how much the respondent had advanced the fraudulent clerk in any case. The firm had also not served the request for the proceedings. That had prejudiced the appeal as well. I am not sure what a lay client would think about all of this, but I consider he or she would at least expect the firm to put things right. I find that the advocates ought to have moved strenuously to save their client in May, 1986 as soon as they had found out what had happened, and they did not do so. I put this delay down to the advocates as they ought to have shouldered the burden fully, without blaming their client for not bringing further fees.

Mr Ngwiri has, however, pointed out that the subject matter of the appeal ought to be *res judicata*. The respondent did not appeal at an earlier stage. She has had a good deal of attitude from the courts. I see that, but I was not sure I can say clearly that there could be no appeal. I have to weigh this with the

effect of the fraud and failure to serve the request for proceedings. It is my view that the latter outweighs the earlier indulgence. I do not know of any lay client from whatever walk of life that the client might come, who would not feel bitter at being cheated out of an appeal substantially by the fraud of this firm's clerk and the lack of initiative of this firm to put things right when the fraud had been discovered. It is on this basis, the fault of the advocates, that the application succeeds.

I will grant an extension of 30 days from today's date for the record of appeal to be lodged. The advocates should pay the costs personally unless they wish to show cause why they should not. If they do, I will hear them.

Dated at Nairobi this 18th day of September, 1986.

H.G PLATT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR



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