



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Hancox, JA (In Chambers))**

**CIVIL APPLICATION NO NAI 83 OF 1985 (KMU 15/85)**

**BETWEEN**

**BERNARD MAGOHA ..... APPLICANT**

**AND**

**1. LAND REGISTRAR**

**2. LEONARD MASIME ..... RESPONDENTS**

**3. ISAYA ODIT**

**4. BERNARD OKIYA**

(Application for extension of time to lodge the record of appeal in an intended appeal from a judgment of the High Court of Kenya at Kisumu (Schofield, J) dated March 12, 1985.

In

High Court Civil Case No 31 of 1978)

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**RULING**

It is now emerged that there is another difficulty in the path of the applicant, Mr Bernard Magoha, in that his notice of appeal does not contain the name of the 5th defendant in the High Court, namely Mr Osodo Obuny, who is clearly a person directly affected by the appeal under rule 76(1) of this court's Rules. Then there is the doubt as to the date of filing, which was heavily emphasised by Mr Gumba, on behalf of the respondents 2 and 3 to this application. He pointed out that the date of the fee receipt was April 1, 1985, 5 days out of time, and, curiously, the original of the notice of appeal cannot be traced. We are left with copies, one of which shows the court stamp as dated "March 2, 1985" and another on which the figures "26" were written in front of the stamped words "March 1985".

It does therefore appear, that this notice of appeal was bad at its inception, but, even if that were not so, as Mr Gumba says, the appellant is shown demonstrably to have lied about sending the copies of the notice of appeal to the sub-chief. When the evidence was taken. Mr Magoha was under no disadvantage or disability, for he was by then represented by Mr Ndegwa, who cross-examined the Chief and who has now pressed the application for an extension of time to file the record of appeal on his behalf. The Chief was cross-examined at some length, and, refutes Mr Ndegwa's present submission that the applicant may have mistaken the document in this case for that is some other case, or vice-versa, because the chief clearly says:-

"I have never served any summonses or processes of court on anyone in my capacity as chief. Such processes are served by the police. If the applicant had given me notices to serve I would have sent them for actual service through the Administration Police working under me."

The evidence really disposes of any questions of a mistake on the part of the applicant, and, in view of this, he cannot come to this court, and seek indulgence, which is now additionally sought in respect of the service of the Notice of Appeal for 14 days more. All this is quite apart from the question of the omission of the 5th defendant's name from the notice of appeal.

Accordingly I must, with great reluctance, strike out the notice of appeal, which I hereby do, under rule 80 of the rules on the grounds that at least three essential steps were not taken, namely (a) compliance with rule 74(2), and (c) service of the defective and late notice of appeal has manifestly not been effected as required by rule 76(1). I cannot do other than award the costs of today's proceedings to all the respondents.

This leaves the notice of motion dated July 11, 1985 extant and in vacuo, as it were. It is well settled that a striking out order is not a dismissal of the appeal, and the applicant may well wish to re-apply by notice of motion for a fresh notice of appeal to be filed and served properly. Accordingly I will leave the Notice of Motion on the file, and not dismiss it, as an act of mercy to the applicant as Mr Ndegwa put it in case as fresh application to file a notice of appeal out of time is made and is successful.

Dated at Kisumu this 19th day of March, 1986.

**ARW Hancox**

**Judge of Appeal**

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

**DEPUTY REGISTRAR**



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