



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. NAI. 36 OF 2000**

GICHANA GITHUKU.....APPLICANT

VERSUS

DAVID KOMU

KINYANJUI WATHIARI

KANGETHE GATHEGE

MUTURI MUIRU.....RESPONDENT

(An application for leave to file and serve Notice of Appeal in an intended appeal from a Judgment and decree of the High Court of Kenya at Nairobi (Mrs. Lady Justice E. Owuor) dated 27th May, 1998

in

H.C.C. APPEAL NO. 105 OF 1993)

R U L I N G

I have before me an application for extension of time to lodge a notice of appeal out of time stated to be brought under rules 4 and 42(2) of the Rules of this Court. The applicant, Gichana Gahuku, was the plaintiff in Civil Case NO. 170 of 1992 in the Chief Magistrate's court at Kiambu. His complaint there was that the respondents caused their names to be registered as co-owners of a parcel of land known as L.R. GITHUNGURI/IKINU/657 for some share in it. He sought order for rectification of the Register. He succeeded in obtaining the prayers he was seeking. The respondents appealed against the decision of that court to the High Court. The High Court "heard" the appeal by way of written submissions despite the requirements of Order XLI rule 13 of the Civil Procedure Rules. I was told by Mr. Kanyi that the appeal was heard partly orally and partly by written submissions. Not being sure of the factual situation as to the actual hearing of the appeal I called for the superior court file and the record there shows as follows:

"Cor: Owuor, J Mr. Gogo for the appellants

Mr. Kanyi for the respondent

Clerk.....(not legible)

Court. By Consent. Appeal to be argued by way of

written submissions. Mr. Gogo do hand over the

submissions to Mr. Wanjao on or before 19/3/97

Mr Wanjao do reply and serve his reply to Mr. Gogo

on or before 27/3/97.

Mr. Gogo be at liberty to reply to the points of Law. Mention on 10/4/97 for handing in written submissions."

On 10th April, 1997 the learned Judge stated that she would deliver judgment on 19/5/97. The judgment was not in fact delivered until 27th May, 1998.

The applicant being desirous of appealing against that judgment lodged a notice of appeal on 4th June, 1998, through his then advocates M/s Wanjao and Wanjau, who also applied for copies, of proceedings by their letter of 29th June, 1998 filed in the superior court on 4th June, 1998. They had the copy of the judgment already by then. The month of June referred to in that letter is, and this is common ground, mistakenly typed. It ought to have been May. Be that as it may the copy of proceedings was applied for in good time. The letter on the face of it is copied to M/s Kanyi Koge & Company. Mr. Kanyi says he never received that letter. Mr. Omotii who now appears for the applicant cannot confirm or deny what Mr. Kanyi says.

The notice of appeal lodged on 4th June, 1998 was struck out by this Court on 8th February, 2000 as a copy thereof was not served on Mr. Kanyi's office until 30th June, 1998 some 19 days out of time. The applicant lays the blame for that at the door of his previous advocates. That I accept as it is not for the applicant (party) normally to serve a copy of the notice of appeal on advocates for the intended respondent.

The applicant has had the misfortune of his notice of appeal having been struck out. He moved this Court with 8 days thereafter. There is no delay on that score.

Mr. Kanyi however objects to the application saying that a copy of the letter bespeaking the copy of proceedings was not served on his office. That is now past and nothing turns on it as the notice of appeal stands struck out. Again, if indeed a copy of the said letter was not served on Mr. Kanyi's office the blame can only be laid at the door of the applicant's previous advocates. I am not minded to punish the applicant for misdeeds of his previous advocates. At any rate by 30th June, 1998 Mr. Kanyi was aware of the fact that the applicant wished to appeal against the judgment of the superior court.

The delays and misdeeds are explained to my satisfaction and I am not able to say that the intended appeal is a frivolous one.

As I pointed out earlier, I called for the superior court file to ascertain certain matters. The letter bespeaking copy of the proceedings is on the court file but no action at all has been taken thereon. I regret this position. It appears to me that the Registry of the superior court has been remiss on that score. A humble litigant is entitled to as much expeditious service as a powerful litigant is entitled to.

Another point that has bothered me is that the appeal was 'heard' by the superior court in an irregular manner. Written submissions are a dangerous short-cut for hearing an appeal and the result of such a 'hearing' may well be a nullity. I am, of course, not deciding this point as I am not supposed to. I will only draw the attention of counsel to the case of Charles Gichina Mwangi vs. Henry Mukora Mwangi, Civil Appeal No. 180 of 1999 (unreported).

Considering all the circumstances that I have gone into including what I have ascertained from the record of the superior court, in the exercise of my discretion, I allow this application and grant leave to the applicant to lodge his notice of appeal on or before 23rd July, 2000. I direct the superior court registry to supply a copy of proceedings to the applicant's advocates as soon as possible. The record of appeal may be filed within 60 days of the receipt of the copy of proceedings. I order further that the costs of this application be paid by the applicant to the respondents, within the next 30 days and I assess the same at Shs.5,000/=. If the same are not paid within the time limited, execution may issue.

Dated and delivered at Nairobi this 13th day of July, 2000.

A.B. SHAH

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.



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