IN THE COURT OF APPEAL

AT KISUMU

(Coram: Platt ,JA(IN CHAMBERS))

(In the matter of an intended appeal)

CIVIL APPLICATION NO, NAI104 OF 1986

BETWEEN

NZOIA SUGAR COMPANY.....APPLICANT

AND

COLLINS FUNGUTUTU.....RESPONDENT

(Application for extension of time to file a. Notice of Appeal and Records of Appeal out ot time in an intended appeal from a judgement of the High. Court of Kenya at Kakamega (Aganyanya,J1) dated - 25th July, 1986 in Civil Case No.70 of 1980)

RULING

On December 2, 1986 this application was presented in Kisumu. It was seriously contested that Mr Minishi did not have authority to bring the application and further if he did, then the prejudice to the respondent must be considered. I allowed both parties to file further affidavits for further hearing on December 5, 1986. It was to take the place of a hearing by theFull Bench, which no longer needed to be heard for stay of execution. The parties were not ready by that date, and the hearing was adjourned to December 15, 1986 in Nairobi. On that day Mr Okwaro appeared for Mr Nakhone but Mr Okwach was involved in the Insurance Commission. I have decided to deal with the matter on the affidavits as they appear on the record now.

The problem in this application is the relation between Nairobi advocates and their colleagues in the rural areas. The application is for leave to lodge notice of appeal and record of appeal out of time. It was brought by Mr Minishi on August 4, 1986. Mr Minishi's affidavit of August 4, (first lodged on July 8, 1986 and sworn earlier still) and his further affidavit of December 22, 1986, reveals that on January 11, 1983 the Nairobi advocates, Hamilton Harrison and Mathews instructed Mr Minishi to conduct the defence case for the Nzoia Sugar Co Ltd; against Collins Fungututu, who had brought Kakamega High Court Civil Case No 70 of 1980. In the event the defence failed and part judgment was given for the plaintiff, the assessment of quantum of damages being left for later. Quantum was decided on July 25, 1985, the total sum of Kshs 97,299.00 being awarded to the plaintiff.

On July 26, 1985, Mr Minishi instructed the Nairobi advocate about the outcome of the suit and

advised them that copies of proceedings and judgment had been applied for in the event that the Nairobi advocates intended to appeal against either liability or quantum. This application was not copied to plaintiff. No Notice of Appeal was lodged. On August 5, 1985 the Nairobi advocates replied asking for the copies. They asked again for the copies on October 16, 1985 and November 15, 1985, December 17, 1986, January 10, 1986, February 27, 1986. On March 17, 1986, Khamati Minishi and Co replied that they had paid fees but the proceedings had not been released. On March 26, 1986, the Nairobi advocates wrote saying that they trusted that Khamati Minishi & Co were pursuing the matter of appeal and taxation of the appellant's bill of costs. On April 1, 1986, Mr Minishi replied that he was attending to the bill of costs and he added:-

"As for the appeal, you never at any time instructed us to do so. All you did was to request us to obtain for you a certified copy of the proceedings and in this regard we took the appropriate action."

At this point, the proceedings were ready but the judgment would be ready later. On April 18, 1986, the Nairobi advocates replied observing that as Mr Minishi conducted the case he should have advised whether or not there should be an appeal; and as a safety measure to file a Notice of Appeal to prevent applying for leave to appeal out of time, in case the client gave instructions to appeal. Mr Minishi took up his side of the argument on April 25, 1985. By this date the copies of proceedings and judgment had been supplied. But he protested that he had advised that quantum was on the high side. Surely, he argued, he could not file Notice of Appeal in the absence of instructions from either the Nairobi advocates or the Nzoia Sugar Company Ltd. On April 29, 1986 the Nairobi advocates indicated that there were grounds on which to appeal against liability and quantum; and Mr Minishi agreed, on May 8, 1986; and finally on May 15, 1986 instructions to apply for leave to appeal out of time were given; but the draft affidavit had to be approved in Nairobi.

The correspondence, continued through June and July. An application for stay of execution was made but by the end of July this application had been rejected on the ground that notice of intention to appeal had never been filed. By September 1986, the applicant had deposited the full decretal sum with Mr Dhanji, then advocate for the plaintiff, Mr Collins Fungututu. Therefore the application for stay of execution filed in this Court and set down for hearing on December 5, 1986 was withdrawn.

The result is that Mr Murioki asked that time be extended because of a genuine misunderstanding between his firm and the Nairobi advocates.

Mr Nakhone objected strongly. His first point, taken reasonably before Mr Minishi's replying affidavit was filed, and which annexed all the correspondence, is now answered. Mr Minishi did have clear authority to bring this application. It was given on May 15, 1986.

Mr Nakhone's second point was that the Notice of Motion did not specify the legal authority for the motion. It says –

"Amended Notice of Motion (under rules 4 and 42)."

The amended portion, that is, the stay of execution would have fallen under rule 5(2)(b) of the Court of Appeal Rules. But that point was withdrawn. Extension of time falls under rule 4, and a Notice of Motion falls under rule 42 of the Court of Appeal Rules. What is missing from the heading is therefore simply the "Court of Appeal Rules."

Mr Nakhone complains that the rules are there to be followed, without which he would be taken by surprise. But I find that I have a greater appreciation of Mr Nakhone's understanding of these matters

than that. Rules 4 and 42 could only apply to the Court of Appeal Rules and therefore I do not think any real difficulty arose. Mr Nakhone's preliminary points of law fail.

But of course Mr Nakhone is on sound ground to complain of the time taken and he says his client will be prejudiced, since he has used the decretal sum paid to him. It certainly raises a difficult point, concerning which I must weigh up the situation with care.

In the first place, there was clearly a misunderstanding between the advocates, and normally clients should not be penalised, where the client could not have been at fault in any way himself. I should perhaps state clearly what the practice ought to be, between advocates in Nairobi instructing advocates in outlying areas.

It is primarily the duty of the instructing advocates to give instructions that the advocates instructed should file notice of appeal, in the event of the case being decided against the instructed advocates. That is because authority stems from the instructing advocates. It is the latter's duty when getting instructions, to know what the client wishes to do, if the decision goes against the client. It is then an easy matter for the instructed advocate to advise whether an appeal is unwise and why; but in the meanwhile the appeal process can proceed.

In the second place, the instructed advocate, on taking up brief, must ask what his instructions are, if he finds a gap in his brief on the question of a possible appeal. That is because the time taken in posting letters from places outside Nairobi to Nairobi, and then for a reply is usually greater than the fourteen days allowed to lodge Notice of Appeal. The instructed advocate must be clear on what he is to do before he starts, because he will not have sufficient time after judgment is given. It comes to this that, instructions to prosecute or to defend should include instructions as to an appeal. I hope that these remarks will avoid the delay that arose in this case. I do not discount telephone instructions in emergencies, but I am not dealing with that problem here.

In as much as that problem has begun to emerge, with unfortunate consequences (although it cannot be absolutely novel), since the amendment of rule 4, and perhaps brought into prominence by the time taken for postal deliveries, I would be prepared to relieve the client of this situation. I consider it to be a genuine misunderstanding. I cannot think however that this sort of indulgence will be available for very long; certainly not after the system suggested in this ruling has become operative. On the other hand, I have to weigh the prejudice to the respondent. He has had the decretal sum paid to him and he is anxious that he may have to return it. The costs have been taxed, but as I understand it, they have not been paid. If that is so, they can be paid into an interest bearing account pending the appeal. It has been said that there is much prejudice on the intending appellant who may not be able to receive the sum paid. Much will depend upon the merits of the appeal; of which I have not been informed and so can make no assessment. In my view the prejudice claimed by both sides cancel each other out. The respondent has had the benefit of the decretal sum, and the applicant has caused his own delay.

In the circumstances of this case I consider that I should relieve the client of the misunderstanding between the advocates, and extend time.

Notice of Appeal should be lodged within 14 days of today's date; the record of appeal should be lodged within 60 days of the date on which the notice has been lodged. The applicant will pay all costs of the application and the adjournments which had to be granted.

Right of reference to Full Bench explained.

Dated and delivered at Nairobi this 24th day of December, 1986.

H.G. PLATT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR