IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox & Nyarangi JJA)

CIVIL APPLICATION NO. 51 OF 1985

Between

ATTORNEY- GENERAL .....APPELLANT

AND

THEURI.....RESPONDENT

(Reference to the full Court from the decision of Platt Ag JA)

RULING

On December 19, 1985, we had three matters before us in which the Attorney-General on the one hand and Mr Theuri on the other were the parties. The first was a reference by Mr Theuri to the Court because he wished to have the decision of single Judge of the Court reversed. The single Judge was Platt Ag JA who had allowed the application of the Attorney which he had made by a motion on notice filed on June 13, 1985 under rule 4 of the Court of Appeal Rules. The Attorney moved for orders:

"That the time to lodge the notice of appeal be enlarged and [that the] notice of appeal and memorandum of appeal be allowed to be filed out of time and for an order that the costs of and incidental to this application abide the result of the said appeal."

The learned Judge heard the parties on this on July 19 and in a ruling delivered on July 22 he allowed the motion in part extending the time in which the Attorney might lodge the notice of appeal up to the end of the next day, July 23, and awarding the costs of the application to Mr Theuri in any event but adjourning *sine die* the Attorney's application for the time in which to institute the appeal to be extended.

The Attorney's notice of appeal was from a decision of the High Court in Nairobi (O'Kubasu and Abdullah JJ) of May 20, 1985 whereby orders of mandamus went forth, first, to the Secretary of the Council of Legal Education to issue to Mr Theuri a certificate of enrolment, with retrospective effect from July 25, 1983, and to register Mr Theuri's articles of clerkship with retrospective effect from January 18, 1984, and, secondly, to the Principal of the Kenya School of Law to admit Mr Theuri to the School to continue a course of legal education in preparation for the examinations specified in Part IV of the Advocates (Admission) Regulations . Mr Theuri was awarded the costs, disbursements and outof-pocket expenses which had been necessarily and properly incurred in obtaining these orders.

At the end of the reference we declared Mr Theuri had succeeded in persuading us that the decision of Platt Ag JA should be reversed, and so it was. The costs of the reference and the motion before Platt Ag JA were reserved until we had delivered our reasons and heard the submissions of Mr Shields, the Chief State Counsel, for the Attorney and of Mr Theuri. We now give our reasons for what we did.

There are some facts and some principles which form the background to the reasons and we must include them here now. Platt Ag JA under rule 4 had to exercise judicially a discretion, which was whether or not by his order he should extend the time for lodging of the notice of appeal and, if he decided to do so, on what terms he should do so. It is a wide discretion and almost unfettered, for the only constraint imposed by the rule is that the terms should be just. It is a difficult one to exercise because it must embrace all the circumstance of the case and the right of the parties.

A reference is technically not an appeal but it has the nature of one, as Sir Charles Newbold P of the former Court of Appeal for Eastern Africa explained, and that Court decided it would not interfere with the exercise of a discretion of a single judge of that Court from whom the reference came unless it was clear that the single judge erred or exercised his discretion on improper grounds, the onus being on the one who asked for the reference to establish this. Duffus V-P and Spry J A (as they then were) agreed with all that; see *Meru Farmers' Co-operative Union Limited v Abdul Aziz Suleman, (No 2)* [1966] EA 442, 443. This court follows the same principles. *Mbogori & Mbogori v Farhat T Raliwala*, Civil Application NAI 34 of 1985 (Mombasa 5 of 1983) January 30, 1984, Mombasa.

Mr Shields had opposed Mr Theuri's motion for the orders of mandamus right from the outset in the High Court but he had to be in another court in Mombasa when the judgement of the two judges was delivered, so Mr Muhoro of the chambers of the Attorney-General took it, and this was done on May 20, 1985. Thereafter the Attorney had 14 days in which to lodge his notice of appeal, according to rule 74(2), that is to say on or before June 3.

Now a notice of appeal is an uncomplicated document. Musyoke JA of the former Court of Appeal for East Africa described a notice of appeal over ten and a half years ago in *Njagi v Munyiri* [1975] EA 179, 180 I as-

"…… nothing more than a formal written information to the Court of an intention to appeal, and it may be withdrawn at any time. It is normally lodged as a matter of course, on payment of a small fee, by any person wishing to appeal against a decision of a superior court, irrespective of whether the intended appeal has merits or not, and no documents of the superior court are required at this stage. Accordingly the applicant's contention that his failure to lodge the notice of appeal in time was caused by the High Court's inability to supply certain documents is irrelevant."

Today we would not go so far as to suggest that a notice of appeal should be lodged as a matter of course, whether the appeal had merits or not, but certainly no skill in drawing one or filing it is necessary. The fee is only Shs 150.00 for everyone save for the Attorney for whom there is no charge at all. And today at any time after lodging such a notice any appellant may lodge and serve a notice withdrawing it and if the respondent consents the appeal is struck out with no order as to costs. If the respondent objects then the appeal stands dismissed with costs. This can be found in rule 93. We presume Mr Theuri would not have objected to the Attorney withdrawing this appeal.

During his submissions in the course of this reference Mr Shields, the Chief State Counsel, cited the opening passages of the speech of Lord Parker of Waddington in *London Association for the Protection of Trade & Another v Greenlands Limited* [1916] AC 15, 38:-

“My Lords, the irregularities which characterised the pleadings in the present case and the unusual course taken (apparently without objection from anybody) by the trial judge have, in my opinion, considerably obscured the real issue. In some cases, no doubt, a waiver of technical points may be conducive to substantial justice being done between the parties. In others, again, it may be dangerous if only because the dividing line between technicality and substance is not always clearly defined. A rule of practice, however technical it may appear is almost always based on legal principle, and its neglect may easily lead to a disregard of the principle involved.”

And with all of that, of course, we most respectfully agree. We suppose, so, that what Mr Shields was at pains to impress upon us was that Mr Theuri’s proceedings were marked by irregularity and the learned judges of the High Court took unusual courses or cut corners, with the result that some principles involved was disregarded and the order of mandamus should not have gone forth. Assuming for the present, then, that all that is so, there could be no doubt that if the High Court Judges succumbed to Mr Theuri’s entreaties for these orders the Attorney would have to lodge a notice of appeal at once. He was not ready to do so until June 13, which was ten days out of time. We do not mean the Attorney in person was not ready but those from his chambers who were representing him and opposing Mr Theuri’s application.

The delay of ten days was due, according to the affidavit of the Secretary of the Council of Legal Education, in support of the Attorney’s motion before Platt Ag JA, to his asking the Council whether an appeal shall be lodged which it authorised on June 8, and the Secretary then asking the Attorney to appeal. So it was the Secretary who had been responsible for the delay and that was because he could do nothing without the imprimatur of the Council. The Principal of the Kenya School of Law on the other hand moved to comply with the orders of mandamus and did not wait to ask anyone if he should ask the Attorney to appeal from them.

Platt Ag JA in his ruling found that the Secretary decided not to comply with the High Court’s orders but, instead, to appeal. He consulted his diary and found that it had been decided on April 20 that the Council would meet again on June 8 so he put the matter of whether or not he should appeal in the agenda for that date.

The learned Judge found that the discretion he had to exercise was wide and merely confined by imposing terms which are just. He cast the burden of showing why this indulgence should be granted on the one who asked for it. There had to be some reason for this, he declared, though it need no longer be a special or sufficient one. He followed the approach of Lord Greene MR in *Gatti v Shoosmith* [1939] 3 All ER 916, 919 in which the discretion of the Court of Appeal in England was held to be a perfectly free one, so that the only question was whether upon the facts of each particular case that discretion should be exercised" Furthermore, if the applicant had made a mistake, whether or not, upon the facts of each individual case, it would be a proper ground for allowing an appeal to be effective though out of time or unjust to allow the appellant to succeed upon that argument"

Platt Ag JA found on the facts of the individual case before him the Secretary had to obtain the authority of the Council before embarking on the appeal (if he wanted to have the support and assistance of the Council) and that alone is what caused the delay. He added:-

“ ... certainly he would need to explain his position to the Council, and seek the Council’s support. In view of the publicity that the matter had attracted, he would need to proceed carefully, and if the Council felt that the Secretary should follow the lead of the Principal of the School of Law, then there would be no appeal. The Secretary would not want to attract opprobrium by lodging a notice of appeal and then withdrawing it. The few days out of time allowed for due process of consultation, and I think that that was

a responsible attitude in the circumstances of the case. On the other hand, suppose I take Mr Theuri's point of view and consider the Secretary to have been mistaken it is clear that it would be a very understandable mistake; indeed just such a mistake for which *Gatti v Shoosmith* provides an answer. The delay was one of only a few days. In all the circumstances I am quite satisfied that the delay is one which should be executed under the new rule 4, all other things being equal ……"

He did not take the merits of the intended appeal into consideration because there had been no special emphasis on it though he thought the 'situation seems arguable'. In this he was correct, according to the recent decision of Sir John Donaldson MR in *Palata Investments Ltd and Another v Burt & Sinfield Ltd and Others*, CA, The Law Society's Gazette, September 11, 1985 page 2501.

We must ask what was the reason in*Gatti v Shoosmith* for the appellant's failure to institute his appeal in time" Lord Greene MR described it as:-

"…….a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors'– a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. This was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was due entirely to this misunderstanding."

We appreciate that Platt Ag JA did no more than take the same approach of the Master of the Rolls to misunderstandings but it seems to us with profound respect that no one in the application with which he was dealing misunderstood anything, with or without reading our rules, or having the authorities in mind.

The Attorney's opposition to the application of Mr Theuri to the High Court for those orders was led or conducted by Mr Shields. There would have been some discussion before or during the course of the proceedings in that Court as to whether there would be an appeal if Mr Theuri were successful. And with the irregularities and unusual courses that there were which obscured some vital principle an appeal could and should have been launched as soon as the Judges of the High Court had concluded their judgement. Mr Shields never heard it delivered, it is true, but Mr Muhoro did, and, we trust, took a note of not only the results but the main reasons for it. They were not telephoned to Mr Shields at Mombasa before he read of them in newspapers there. They may have been telephoned later for all we know, just when Mr Shields saw the item in the newspaper we were never told.

There was no need for any collection of the sum needed for filing the notice of appeal. This might be a problem for a poor lay litigant. There was apparently no doubt that the judgment should be appealed, though we do not endorse that having not heard any appeal from it. All that had to be done was for someone in the chambers of the Attorney to draw, sign and file this notice which could be withdrawn later at any time in our view (per Platt Ag JA) without any opprobrium.

What happened" The Secretary of the Council chose not to obey the simple orders of the High Court but to find out from the Council if they should be appealed. He thought they had been wrongly issued, and he and the Council approached the matter of appealing from them in a calm deliberate unhurried fashion. But while they did so, the fourteen days passed. Now all the people involved in this matter save for Mr Theuri were professionals. We cannot, with respect, accept that they were right to let this happen, and we cannot find any circumstances that justified such a lapse. Thus, it was for these reasons that we decided that Mr Theuri had persuaded this Court that the learned single Judge had exercised his discretion on improper grounds because he appropriated the delay to the Secretary's desire to take instructions before launching the appeal rather than to State Counsel's failure to take immediate action

or seek instructions from his superior when the adverse decision was given. Accordingly we reversed him.

Now we turn to the question of who should pay the costs of the reference and of the motion before the single Judge and after that the other two applications between the parties which we had adjourned until today.

RULING OF THE COURT:

Mr Theuri asks this Court to award him the costs of this reference because he succeeded in persuading the Court to reverse the decision of the single Judge of Appeal, and costs follow the event. He claimed he had done much research into the facts for the reference and into the law relating to such a reference, into the judicial exercise of the discretion vested in a single Judge of Appeal by the amended rule 4 of the Court of Appeal Rules and into the question of whether or not the time for lodging a notice of appeal under rule 74(2) (*ibid*) should be extended. Mr Shields, the Chief State Counsel, for the Attorney-General, opposed the award of costs to Mr Theuri because he was not an advocate. He submitted that all he was entitled to was what he had spent necessarily and properly on paying the fees for filing documents and serving them and the expenses of attending the hearing of the application and the reference.

Starting from the provisions in the Court of Appeal Rules relating to any decision about the payment of costs, we find that the Court may assess them or direct them to be taxed, and any decision as to the payment of costs, not being a decision whereby the amount of the costs is assessed, shall operate as a direction that the costs be taxed. Rule 105(1). The Registrar (or Deputy Registrar) of this Court is the taxing officer and has the power to tax the costs between party and party of on arising out of any application or appeal of this court. Rules 2 and 108(1).

‘Application’ and‘‘appeal’ do not, however, include ‘a reference’ according to their definitions in the Rules, but although the term ‘reference’ is in the side note to rule 54(1) which provides for a ‘reference’, yet that rule, in itself, stipulates that any person being dissatisfied with the decision of a single Judge [of Appeal] in any civil matter may apply to the single Judge informally at the time when the decision is given or by writing to the Registrar within seven days thereafter to have any order, direction or decision of a single Judge varied, discharged or reversed by the Court rule 54(1)(b). It is in the Rules, and in effect, a reference is just another application and the Deputy Registrar is the taxing officer for it as for an ‘appeal’ or an ‘application’. And such costs are to be taxed in accordance with the rules and the scale set out in the Third Schedule of the Rules. Rule 108(2). There in the Schedule will be found a provision that the Deputy Registrar must allow the reasonable expenses of a party who appeared in person at the hearing of an application or an appeal (and those of witnesses who give evidence at any such hearing). Para 19.

Now what Mr Theuri seeks, we believe, is an award that will include not only a sum for the work he did in preparing this matter for the application to the Single Judge of Appeal and for the work he did for the reference to this court but also another sum for the national costs of briefing an advocate for both matters or part thereof.

Mr Shields is, of course, correct when he says that Mr Theuri cannot rely on the provisions of the The Advocates (Remuneration) Order because Mr Theuri is not an advocate.

In England, by Order 62 rule 28A of The Rules of the Supreme Court, Parliament has provided an exception to the principle that by an award of costs a successful party is only to be indemnified against

costs which he has incurred. The exception is that a successful litigant in person (in England) who suffers a pecuniary loss can recover for work done by him up to 2/3 of that which would have been allowed for that work if a solicitor had done it. Disbursements are allowed in full provided they would have been allowed if incurred by a solicitor. A notional disbursement such as fees for counsel or part of these fees was not covered because the successful litigant in person had not incurred them. See Lloyd, J in *McLeod Johnston- Hart v Aga Khan Foundation* QBD, July 7, 1983, the Law Society's Gazette Wednesday October 5, 1983, p 2437. Here in Kenya we do not have such an order and rule in our legislation and we respectfully draw the attention of the Rules Committee to the English ones for introduction, if it thinks fit, into the Civil Procedures Rules.

Returning to Mr Theuri, we find he is entitled, as a successful litigant in person, to an indemnity from the respondent Attorney against the costs he has in fact incurred in bringing this application to the single Judge of Appeal and then of this reference to the Court, because costs follow the event, unless the Court or Judge shall for good reason otherwise order, and we cannot find any good reason to order otherwise. Section 27(1) Civil Procedure Act (Cap 21).

We cannot make any order against the Council of Legal Education its Secretary at the relevant time or now, or the Principal of the Kenya School of Law because none of them was a party to the application or the reference. The Attorney can, of course, we respectfully suggest, decide out of which vote by Parliament for his chambers or for the Council of Legal Education the costs should be approved and paid to Mr Theuri. The costs are limited to the payment Mr Theuri incurred necessarily and properly for this application and reference, and they include reasonable expenses for his attendance at both.

We acknowledge and appreciate the extent of Mr Theuri's work and research in both applications, and particularly the fact that he listed the authorities and copied the unreported ones for us in obedience to our Rule 26. We can do no more for him because we apply, and do not create, any law in such matters.

We take one more step, however, in the interest of both parties, or so we think, and we fix these costs for the application and the reference together at one sum of Shs 1,200.00 in the hope of ending this litigation. This course should obviate their taxation or a reference under rule 109 from the Deputy Registrar to a single Judge of Appeal, or an adjournment by him to the Court, or an application to the full Court by any party dissatisfied with what the single Judge did.

Dated and delivered at Nairobi this 19th day of December , 1985.

A.AKNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR