**Muli v Kituku**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of ruling:** 5 March 2004

**Case Number:** 168/03

**Before:** Omolo JA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*Appeal – Time – Extension of time – Mistake of advocate – Whether mistake of advocate in applying for*

*leave to appeal against a decree to be borne by client – Decree – Whether leave to appeal required –*

*Rule 4 – Court of Appeal Rules.*

**RULING**

**Omolo JA:** This is a somewhat intriguing application. It is one under rule 4 of the Court’s Rules and as usual, it asks me: “That leave be granted to the Applicant to file a notice of appeal and record of appeal out of time”. On 18 July 2001, Mwera J gave a judgment in which he found as follows: “Having considered all evidence here in the light of the pleadings and the law, the plaintiff has proved its case. Muli Mbuna (PW2) sold the land to him validly. PW2 was the registered owner. The Defendants were not. The Defendants are thus ordered to vacate the land within the next 90 days. It was said that PW2 has another land at Kathonzweni where Mwanzia, First Defendant’s son already resides. It looks like the defendants prefer parcel number 67 but that does not and should not militate and prejudice PW 1’s right and title to it. In sum the claim is proved and orders issue to the Plaintiff with costs. The counterclaim is dismissed because it was not brought under Order XXXVI of the Civil Procedure Rules and it was not proved. It is dismissed with costs. Judgment accordingly”. These orders finally and conclusively determined the whole case, that is High Court civil case number 256 of 1996 filed at Machakos. There was nothing more left for the High Court to do in respect of that suit and a decree naturally followed from the judgment of the High Court. I am told that the advocates who represented the Applicant in the High Court at the stage of judgment filed a notice of appeal but failed to serve that notice on the advocates for the Respondent. I have not been shown a copy of that notice. Then a new firm of advocates, M/s *Osoro Juma and Company Advocates*, came on the record for the Applicant. Mrs *Juma*, for some strange reason, thought that the Applicant required leave to appeal against the judgment. She appeared to think that Order XLII of the Civil Procedure Rules does not confer an automatic right of appeal against the grant of a mandatory injunction. Of course, Order XLII had nothing to do with the matter. The High Court had issued a decree granting a mandatory injunction and the relevant provisions for appeal were to be found in section 66 of the Civil Procedure Act (Chapter 21). The Applicant clearly had an automatic right of appeal under that section and I cannot see what the provisions of Order XLII had to do with the matter. But the Applicant went before Nambuye J. She sought, among other things, leave to appeal. It was granted to her on 27 March 2003. It is obvious that Nambuye J also, thought that the Applicant required leave. The Learned Judge also extended the time for filing the notice of appeal and the record of appeal. The Judge presumably did this under section 7 of the Appellate Jurisdiction Act (Chapter 9) Laws of Kenya. Mr *Mulwa* for the Respondent told me, probably with some justification, that that section applies only to criminal appeals. I am not prepared to decide that point in this ruling, bearing in mind that section 7 has previously been used by the High Court to extend time in civil matters and this Court itself has accepted such appeals as being valid. I am not prepared to question that position in this application. Nambuye J extended the time within which the Applicant was to file her notice of appeal and record of appeal. She was given seven days to file and serve the notice of appeal; the Applicant complied with that portion of the order. She was given 60 days from the date of the order to file her record of appeal. The Applicant failed to comply with that order and hence her motion now before me. She says that when she came to file her record, the registry of the court pointed out to her that the “order” contained in her record was not certified. I take it by “order” the Applicant’s counsel means the decree extractable from Mwera J’s judgment for that is what she has always wanted to appeal against. The problems in which the Applicant finds herself are clearly the creation of her advocates who do not appear to understand the difference between an “order” and a “decree”. Some orders require leave to appeal; no decree requires leave to appeal. The problem is such that even Nambuye J was not able to appreciate it quite well. In the circumstances, though this was a mistake on a question of law by an advocate I am not prepared to shut out the Applicant. If the Applicant’s advocates had correctly appreciated the legal position, all that M/s *Juma* would have done would have been to come to this Court and ask for extension of time within which to serve the notice of appeal which was said to have been filed by the previous advocates but not served on the advocates for the Respondent. Having taken all the relevant factors into account, I allow the Applicant’s notice of motion dated 20 June and lodged in the court on 23 June 2003 and extend for the Applicant the time within which to file her record of appeal and she must now file her record of appeal within twenty-one (21) days of the date hereof. For the avoidance of doubt the record of appeal is to contain a certified decree and not a certified order. The Applicant is to blame for the unnecessary delay and I order that she must pay the costs of this motion in any event. Such costs are to be agreed or taxed. But should the Applicant fail to file her record of appeal within the stated 21 days and should she fail to serve that record on counsel for the Respondent within seven days of the lodgement of the record in court, then in the event of such failure, the motion shall stand dismissed. For the Applicant:

Ms *Juma* instructed by *Osoro Juma and Co*

For the Respondent:

*Mulwa*