



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 46 OF 2011**

**STRATEGIC INDUSTRIES LTD. .... PLAINTIFF**

**VERSUS**

**REBECCA FASHION (KENYA) LTD. .... DEFENDANT**

**R U L I N G**

1. On the 23rd January 2013, I allowed the Defendant's Notice of Motion dated 11th September 2012 and dismissed the Plaintiff's suit. On the day that I delivered the Ruling, Mr. Anzala appeared for the Defendant/Applicant but there was no appearance for the Plaintiff despite notice, dated 17th January 2013, of the delivery of the Ruling having been given to both sets of advocates. The current Application before this Court brought under Certificate of Urgency in vacation and is dated 4th April 2013. Such seeks leave to be granted to the Plaintiff to file an appeal out of time. The Application is based on the following grounds:

**"1. THAT a ruling was entered on the 23<sup>rd</sup> January 2013 by Honourable Justice J. B. Havelock dismissing the whole suit herein without notice to the Plaintiff/Applicants which is a mandatory requirement.**

**2. THAT the Plaintiff/Applicant is aggrieved with the whole ruling and intends to appeal against the same and they have a good appeal with a very high chance of success.**

**3. THAT the Plaintiff/Applicant became aware of the ruling dated 23<sup>rd</sup> January 2013 sometime during the month of March 2013 once the 14 days to file Notice of Appeal had expired.**

**4. THAT the Advocate for the Plaintiff/Applicant had changed its offices from the date of filing of this suit in 2011 to the date when the application to dismiss the suit was filed and come up for hearing.**

**5. THAT it appears from the Court records that the court process server did not notice the change from the latest document filed in court and was not able**

to serve the Notice of the Ruling date on the Plaintiffs/Applicants Advocate.

6. THAT the Plaintiff believes that the failure to serve the Notice of Ruling was not intentional or driven by any malice, but an oversight.

7. THAT the Plaintiffs/Applicants constitutional guaranteed rights to a fair hearing and to appeal will have been denied adversely.

8. THAT appeal lies as a matter of right from the orders issued through the Ruling dated 23<sup>rd</sup> January 2013.

9. THAT the Plaintiff/Applicant's right to appeal should not be vitiated by failure to file Notice of Appeal in time owing to non notification as to the date of the Ruling by the Court process server or inadvertence to an alternative notification by the Plaintiff/Applicant Advocate of change of address.

10. THAT the application has been brought to this honourable court without inordinate delay.

2. The said Application of the Plaintiff is supported by the Affidavit of the advocate on record for the Plaintiff – **Cyprian Onyony**. The deponent complained that the Defendant's Application to strike out the suit as against the Plaintiff came for hearing on 27 November 2012 and this Court reserved its Ruling on notice. Such notice of the Ruling date was not served on the Plaintiff's advocates at their address or service which was detailed on the pleadings filed in Court. Mr. Onyony noted that the Court's record detailed that although the Defendant's advocates were served on 21st January 2013, the Plaintiff's advocates were not served and marked on the Notice of Ruling were the remarks that service was returned without having been effected on Onyony & Co., since the Advocates could not be traced. The deponent detailed that he had become aware of the fact that the Ruling had been delivered when he met with the Defendant's advocate, Mr. Anzala in the Court corridors sometime in March 2013. The Supporting Affidavit emphasised that the Plaintiff's right of appeal is of right and is enshrined in the Kenya Constitution, 2010. It was interesting to note that after swearing the Supporting Affidavit, the advocate for the Plaintiff filed a notice of change of physical address dated 21st May 2013. At the outset of this suit, the firm had its offices at 5th Floor, Travel House, Mama Ngina Street, Nairobi. Thereafter it moved offices to 2nd Floor, Caxton House, Standard Street, Nairobi and again in May 2013 to 3rd Floor Shankardass House, Moi Avenue, Nairobi.
3. When the Plaintiff's said Application came before Court on 26 April 2013, Mr. Henia holding brief for Mr. Anzala admitted that the Defendant had not filed any response to the same as it was of the opinion that this Court had no jurisdiction to extend the time for Appeal. In the Defendant's view, that was the province of the Court of Appeal. Mr. Onyony, in response on the part of the Plaintiff, maintained that under the provisions of Order 50 rule 5, this Court had power to extend time. Further, the Court had jurisdiction under **Order 42 rule 6 (4)** and **Order 43 rule 1** as well as Article 159 of the Constitution and **section 75 (1) (h)** of the *Civil Procedure Act*. As he understood the position, the Defendant was not opposing the Application. Counsel confirmed the contents of the Grounds in support of the Application as well as adopting the contents of his said Supporting Affidavit sworn on 4 April 2013. Mr. Onyony then referred the Court to the decision of **Ouko J.** in the case of **Meru Central Farmers' Cooperative Union v Justus Andrew (2009) eKLR** as well as the case of **Spin Knit v Kimani & 2 Ors (2009) eKLR**. He also referred to the Court of Appeal's decision in **Nichu Investments Ltd v Pan African Credit & Finance Ltd (2009) eKLR** at **P. 39**. Counsel also and finally on this point, asked the court to examine the finding in the case of **Thairu v Kairu & Kairu (2008) eKLR**. Thereafter, Mr. Onyony referred the Court to his supplementary list of authorities filed on 25 April 2013. Such related to mistakes of the advocate and he asked the Court to take cognizance of all the cases detailed in the list particularly **Assumption Sisters of Nairobi v Stanley Kebathi (2006) eKLR**. As regards the discretion of the Court to extend time, counsel referred to the case of **Ann Muchiri v David Mundia (2006) eKLR**.

4. In a brief response to the submissions of Mr. Onyony, Mr. Henia maintained that **Order 43 rule 1** did not apply to the Application before Court and neither did **Order 50 rule 5** to which Mr. Onyony had referred the Court. A Notice of Appeal was provided for under the *Court of Appeal Rules No. 75*. That rule clearly detailed how one approached the Court of Appeal and an application to extend time for appeal needed to be made under **Rule 4**. Mr. Henia repeated his submissions that this Court did not have the jurisdiction to extend the time that the Plaintiff had to file a Notice of Appeal before the Court of Appeal.
5. The Plaintiff's Notice of Motion dated 4 April 2013 quite clearly seeks leave for it to be allowed to file an appeal out of time. It is not seeking leave to file a Notice of Appeal out of time. Indeed, a copy of the Notice of Appeal under **Rule 75** of the *Court of Appeal Rules* appears at Exhibit "CO 7" of the Supporting Affidavit to the Application. I note that it is dated 26 March 2013 but there is no stamp of the Court of Appeal thereon nor indeed of this Court in terms of its having been lodged herein. However, I do agree with the submissions of the Defendant's counsel that the validity of that Notice of Appeal is a matter for decision by the Court of Appeal not this Court. I also agree that the provisions of **Order 43 rule 1** do not apply for an Application for extension of time. That Order only details where an appeal lies as of right under various Orders of the *Civil Procedure Rules, 2010*. Similarly, I do not find that the provisions of **Order 42 rule 6 (4)** applies either. That rule reads:

**“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”**

As I have already noted above, the copy of the Notice of Appeal annexed to the Supporting Affidavit to the Application is not stamped by that Court. Further, I do not see that **Order 51 rule 1** of the *Civil Procedure Rules* helps the Plaintiff in any way as that rule only details that all applications to Court shall be by motion and shall be heard in open court. Indeed the Plaintiff's Application herein is by Notice of Motion and it has been heard in open Court. Plaintiff's counsel also referred to **section 75** of the *Civil Procedure Act*. That provides that an appeal shall lie as of right from a number of orders therein detailed (a) to (h) as thereunder. Those orders referred to arbitration and awards arising therefrom as well as an order of arrest or attachment under **section 64** of the Act. Further, it applies to orders under provisions of the Act imposing a fine or order directing the arrest or detention in prison of any person, as well as an order made under rules from which an appeal is expressly allowed by rules. With due respect to the learned counsel for the Plaintiff, such has no relevance to the Application before this Court. However in relation to the provisions of the Constitution, there is no doubt that counsel for the Plaintiff is absolutely correct in that such enshrines the Plaintiff's right of appeal.

6. I found it somewhat disconcerting that the Plaintiff's counsel attached his authorities relating to leave to file an appeal out of time to his Affidavit in support of the Application. This is not good practice as such tends to lead to the said authorities being overlooked. However, I have perused the said authorities and would comment as follows:
  - a. As far as the **Spin Knit** case is concerned, such involved an appeal to the High Court from a subordinate court and I did not consider the same relevant to the Application before this Court.
  - b. However, the finding of **Ouko J.** in the **Meru Central Farmers'** suit is relevant based on the fact that notice of the date of the delivery of the judgement therein was not communicated to the applicant and that the first he knew about it was when his goods were proclaimed in execution. The Defendant in that case was aggrieved by the judgement and intended to file an appeal challenging the same. The learned judge found as follows:

**“I am satisfied from the applicant's explanation that he was not aware of the delivery of the judgement; no processes after such delivery was served upon him and he was ambushed with a proclamation. For that reason the applicant is granted leave to file and serve his appeal within fourteen (14) days from the date of this order.....**

**The court’s inherent jurisdiction has been invoked. I am satisfied that the applicant may suffer substantial loss; and the application for stay has been brought without unreasonable delay.”**

However, as regards that particular case, it must be borne in mind that the applicant therein was seeking the stay of the execution of a decree pending the hearing and determination of an intended appeal as well as leave to appeal out of time.

- c. The finding of **Omolo JA** in the **Nichu Investments** case was more illuminating to this Court. However, the application therein was brought under **Rule 4** of the *Court of Appeal’s Rules* directly to the Court itself. As I understand it from the Defendant’s counsel such is the position being adopted by the Defendant herein namely that the Plaintiff should have brought its application directly before the Court of Appeal rather than coming before this Court. However, **Omolo JA** quoted extensively in his Ruling from the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. NAI. 255 of 1999 (unreported)** as follows:

**“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; and secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.....**

**These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words ‘in general’. Rule 4 gives a single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in paragraph would be to fetter the discretion of the single judge and as we have pointed out, the rule itself gives the discretion which is not fettered in any way.”**

Unfortunately for the Plaintiff and as pointed out by the Defendant’s counsel, the above principles under **Rule 4** of the Court of Appeal Rules do not assist the Plaintiff in its application before this Court.

- d. Further, where the Plaintiff receives no assistance in its application before Court, is in the **Joseph Thairu** case (supra) which it has cited. **Section 59** of the Interpretation and the General Provisions Act was quoted by my learned brother **Waweru J.** in his Ruling. **Section 59** reads:

**“59. Where in a written law the time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”**

That case involved an extension of the time to file an appeal from a decision of a provincial appeals committee to this Court. In the case, **Waweru J.** went on to find:

**“Where time is limited by statute for the taking of any action or proceeding, unless the same statute or other statute or subsidiary legislation donates to the court power to extend that time, the court does not have any inherent power to extend the time. I so find. Therefore, section 3A of the Civil Procedure Act has not been properly invoked.**

**The result is that this court does not have jurisdiction to grant the extension of time sought. The Application is therefore misconceived.”**

- e. The next case to which counsel for the Plaintiff referred the Court as regards applications for extensions of time to file an appeal, was the **Ann Muchiri** case (supra). **Okwengu J.** quoted extensively therein from the finding in the **Leo Sila Mutiso** case (supra) before granting the application under the provisions of **section 79 G** on the *Civil Procedure Act* as well as the old **Order XLIX rule 5**. Again unfortunately for the Plaintiff **section 79 G** relates to time for filing appeals from subordinate courts to this Court. Indeed, my learned sister allowed an application to file an appeal out of time against the judgement delivered in *Nyeri CMCC 853 of 2003*. This is not the case here.
- f. The Plaintiff also sought to rely upon the decision of **Ibrahim J.** (As he then was) in the case of **Philip Kipchumba Misoi & 3 Others v Kachero Ole Malala & Anor.** (2006) eKLR. Again that case involved an appeal to this Court from the decision of a Land Dispute Tribunal entered as a judgement of a Magistrate’s Court and applied the provisions of **section 79G** of the *Civil Procedure Act* as above. The learned Judge found as follows:

**“There is no provision giving the Lands Dispute Tribunal and the Provincial Appeals Committee powers to entertain applications for leave to file appeals out of time both under the Act and the Rules. So where should an aggrieved party go for redress and particularly if he comes to know of the decision after 6 months as contemplated by Order 53, of the Civil Procedure Rules and the Law Reform Act? Does this court have jurisdiction to intervene?”**

**In the case of PYX GRANITE CO. LTD –V- MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND OTHERS 1959, 3 All E.R. 1 and 6, Viscount Simonds said:-**

**“..... it is principle not by any means to be whittled down that the subject’s recourse to her majesty’s courts for the determination of his rights is not excluded except by clear words .....**”

**The right of appeal in any proceedings is a very substantive and important right. That right is given by section 8 of the Act. There is no doubt that a period of 30 days to appeal is a reasonable period but what if the date of judgment was unknown by a party? What if no notice of the delivery of the decision was given to a party? Surely there must be a way to seek justice and ask for extension of time? In such a situation, this court, the High Court of Kenya, will look and search through each ‘nook and cranny’ to see that justice is done. It is for this reason that this court is given inherent jurisdiction.**

**Once a decision of the Tribunal is entered as a judgment of a Magistrate’s court it is stated that the decree shall be enforced in the manner provided under the Civil Procedure Act. Section 3A of the Civil Procedure Act grants the courts inherent jurisdiction and of more importance, section 60 (1) of the Act gives this court unlimited original jurisdiction in Civil or Criminal matters. This court embraces the words of May LJ in *ABSE –VS- SMITH* (1966) 1 All E.A. 360, when he said at 361:**

**“First, I have no doubt that it is essential for the proper administration of justice in the courts of this country and the maintenance of the rule of law throughout the land that every court must retain the untrammelled power of regulating its own proceedings at least in all cases where there are not regulated by ancient usage or statute”.**

**There is no procedure or provision for a party whose right of appeal has been impinged upon by non-service or notification of the date of a Tribunal’s decision.**

**This means that a statutory right has been taken away. The subject matter is substantial. There are jurisdictional issues disclosed on the face of the record. It would be a total failure of justice, if our laws do not have a solution to this unfortunate situation. It is for this reasons, that I do hereby invoke the inherent jurisdiction of this court, and grant prayer 2 of the Notice of Motion dated 24<sup>th</sup> May, 2006. The Appeal shall be filed with 30 DAYS from today. In exercise of the same jurisdiction and to ensure that the grant of leave is effectual, I do hereby order stay of the execution of the judgment and decree in ELD. CMCC. No. 27 of 2005 until the Appeal in the Appeal's Committee is heard and determined. Liberty to apply is granted".**

- g. Almost as if Plaintiff's counsel was blaming himself for his non-appearance on the date when the Ruling was delivered by this Court on 23 January 2013, the remainder of the authorities cited to Court under the Plaintiff's second list of authorities related to mistakes of advocates. Indeed, there may have been a mistake by the advocate in failing to notify this Court of his firm's change of physical address relying on the court to pick up such address from recent documentation filed by the Plaintiff. However, in my view, these matters do not need to be dwelt upon here.
7. From my reading of the *Civil Procedure Rules, 2010*, I see no specific power given to this Court to extend time for the filing of an appeal for whatever reason. As found by **Ibrahim J.** in the **Miso** case (supra), **section 3A** of the *Civil Procedure Act* grants this court inherent jurisdiction and that section has been referred to by the Plaintiff in the heading to its said Application before this Court. **Section 3A** reads as follows:

**"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

In my view, I consider it necessary that, for the ends of justice, the Plaintiff herein be allowed to file an appeal out of time. I have perused the draft Memorandum of Appeal and consider that the same may have some merit. Accordingly, I direct that the Plaintiff do file its Appeal within 30 days from the date hereof. Liberty to apply is granted. There shall be no order as to costs.

**DATED and delivered at Nairobi this 17<sup>th</sup> day of July, 2013.**

**J. B. HAVELOCK**

**JUDGE**