



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Tribunal case*

TORT

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- 3.1 *Judgment in favour of the respondents
delivered on 24th October 2011*
 - 3.2 *Appeal date 23rd November 2011*
 - 3.3 *Appeal filed in CA 594/11*
 - 3.4 *Appeal withdrawn voluntarily as having
been filed out of time. (13th December
2011)*
 - 3.5 *Applicant's goods proclaimed on
30th January 2012.*
 - 3.6 *Applicant files application on 30th January 2012
seeking leave to appeal out of time.*
 - 3.7 *Application opposed
(13th February 2012)*
4. *Application to file:*
 - i) *Appeal out of time*
 - ii) *Costs*
 - 4.1 *Reasons:*

That the appeal was dismissed by Ang'awa J

When it came for hearing on 13th December 2011.

4.2 *There was a mix-up in the High Court registry
prior to which advised to record a deposit in
an account.*

4.3 *Receipt books ran out*

4.4 *Clerk returned to advocate's chambers and
misplaced the memorandum of appeal
(22nd November 2011)*

4.5 *Memo of appeal found on 28th November 2011.*

4.5 *Appeal heard and dismissed for having
been filed out of time.*

5. *In reply.*

5.1 *Judgment delivered on 24th October 2011.*

5.2 *Stay of execution granted for 30 days.*

5.3 *Advocate took no action.*

5.4 *Auctioneers proclaimed goods on
30th January 2012 after 90 days since
delivery of judgment*

5.5 *Applicant files on the same day
application on 30th January 2012.*

5.6 *Perusal of CA 594/11 shows the appeal was
never dismissed but voluntarily withdrawn
by applicant.*

5.7 *Application an abuse of court*

5.8 *Advocate was negligent in not filing appeal
on time.*

6. *Held:*

- i) *Application struck out.*
- ii) *Costs to the respondent.*

7. *Case Law:*

8. *Advocates :*

- i) *F M Mutua instructed by M/s Mutisya & Co Advocates for appellant/applicant*
- ii) *T K Kariba instructed by T.K. Kariba Mbaabu & Co Advocates for respondent*

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 52 of 2012

NAIROBI PROJECTORS SERVICES

LTD APPLICANT/

VERSUS

JOHN KIMATHI MUTWAMWARI 1ST RESPONDENT

CITY FINANCE BANK LTD 2ND RESPONDENT

EDWIN NGONGA OGWE 3RD RESPONDENT

R U L I N G

I. INTRODUCTION

1. Judgment was entered in favour of the respondent on the 24th October 2011. Being dissatisfied with the decision of the Hon. Trial Magistrate, the appellants, M/s Nairobi Projectors Services Limited filed appeal CA 594/11.
2. This appeal was voluntarily withdrawn on 13th December 2011.
3. On the 30th January 2012, the appellant's goods were proclaimed. On the very same day, the advocate for the appellant filed an application on 30th January 2012 seeking leave to appeal out of time under Section 1A 1B 3A & 63(e) Order 50 r 6, Order 51 r 1, Order 42 Civil Procedure Rules.
4. The matter came for interparte hearing and was opposed by the respondents.

II APPLICATION TO FILE LEAVE OUT OF TIME 30TH JANUARY 2012

5. The arguments by the advocate supported by the application of the court clerk is that the court clerk proceeded to the High Court registry on the 22nd registry to file the appeal. time would have expired on 24th November 2011 (read 23rd November 2011). The clerk was asked to deposit moneys in the Judiciary account. There was no receipt so the clerk took the document back to the advocate's chambers. There the memorandum of appeal was misplaced. It was not until 28th November 2011 well after the time to file appeal had been passed that the appeal was filed being CA 594/11.
6. When the appeal came up for hearing, the High Court (Ang'awa J) dismissed the appeal for having been filed out of time.
7. In reply to this application, the advocate for the respondent stated that whereas the judgment was delivered on 24th October 2011 and the stay of execution granted within 30 days, the advocate took no action until 30th January 2012 90 days after the judgment was delivered and after the proclamation was issued.
8. The respondent perused the file CA 594/11 and noted that the appeal was never dismissed by the High Court but the appeal had been voluntarily withdrawn by the said advocate.
9. The section and rules brought to court for the application were in fact all wrong. This most certainly was an abuse of the process of the court. The respondent prayed the application be dismissed.

III OPINION

10. The advocate for the appellant (proposed) has illustrated to court mistakes done by the advocate and the advocate's staff. From the submissions before court by the respondent instead of the advocate for the appellant admitting the wrongs done – to err, to slip is not to fall, the advocate proceeded to
 - i) File an appeal CA 594/11 knowing it was out of time.
 - ii) Informed this court that the appeal was dismissed when it had been voluntarily withdrawn.
 - iii) Failed to take further action on the matter till proclamation was declared on 30th January 2012, prompting the filing of the application on the same day.
11. The client was in actual fact never deposed to any affidavit and most probably is unaware of this application.

12. For many years these courts have held that a mistake of an advocate should not be visited upon a client. If this mistake is genuine one could understand. The mistake in this matter includes the fact of there being no receipts. A bank issues receipts and unless payments are made for less than 500/- or so manual receipts are not issued.

13. Whereas, the fact that the wrong rules have been relied upon is a display of negligence and non diligence of the applicant's advocate.

14. There will come soon when a client is entitled to claim damages from his advocate where there has been excusable delay to deprive a client of his cause of action.

15. This application is hereby struck out with costs to the respondent.

DATED THIS 23RD DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

i) *F M Mutua instructed by M/s Mutisya & Co Advocates for
appellant/applicant*

ii) *T K Kariba instructed by T.K. Kariba Mbaabu & Co Advocates for
respondent*