



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appli 301 of 2005**

**ALFRED MACHAYO ..... APPLICANT**

**AND**

**D.T. DOBIE & CO. (K) LIMITED ..... RESPONDENT**

*(Application for extension of time to file notice of appeal, request for proceedings, certified copies of the orders, time to serve the said notice of appeal, request for proceeding and time to file record of appeal in accordance with Appeal Court Rules out of time from the orders of the High Court of Kenya at Nairobi (Hon. Kuloba J.) (as he then was) dated 19<sup>th</sup> July, 2000*

in

**H.C.C.C. NO. 210 OF 1996)**

\*\*\*\*\*

**RULING**

**Alfred Machayo, (the applicant)** took out a notice of motion under **rule 4** of the **Court of Appeal Rules** seeking orders that time for filing and serving a Notice of Appeal and a Record of Appeal against the ruling of the superior court (*Kuloba J.*) dated 19<sup>th</sup> July, 2000 in **Nairobi High Court Civil Case No. 210 of 1996**, be extended, as also the time for requesting copies of proceedings, certified copies of the order and for serving a copy of the letter bespeaking the copies of proceedings and certified order.

The applicant is the Plaintiff in the aforesaid civil suit in which he claims damages from D.T. Dobie & Co. (K) Limited (*the respondent*) as defendant in that suit for libel. On the application by the applicant the superior court granted him leave to re amend his plaint but conditional on certain parts of the proposed amendments being left out. The superior court held that those parts concerned matters which arose after the date of the suit and that if allowed they would prejudice the defence of the respondent as defendant in the suit. The ruling of the superior court was delivered on 19<sup>th</sup> July 2000.

The applicant was aggrieved by the said ruling and filed **Civil Appeal No.254 of 2004**, on 19<sup>th</sup> November 2004. That appeal was struck out on 14<sup>th</sup> October, 2005 on amongst other grounds, that it was filed out of time without leave, and in the alternative without full compliance with **rule 81(2)** of the **Court of Appeal Rules**.

In the application before me the applicant is, in effect, seeking the court’s assistance to restart the

appellate process.

The power of the Court under **rule 4** is discretionary, which discretion is judicial, that is to say it has to be exercised on the basis of the law and evidence. The duty is on the applicant to demonstrate to the satisfaction of the Court that he should be granted the orders he seeks.

The applicant has given the background facts to this application and blames his advocates for his present predicament. He has deposed in a supporting and further affidavits, inter alia, that because of several mistakes on the part of his counsel on record, the amended plaint did not include all material particulars, he omitted to take certain essential steps in mounting his appeal which was ultimately found by this Court to be incompetent and was therefore struck out. He prays that I exercise my unfettered discretion under **rule 4**, aforesaid, and grant him the orders he seeks.

The application is opposed. Mr. Nyagah Makembo, the Administration and Service Manager of the respondent has sworn an affidavit in reply, in which he has set out incidents which show that the applicant did not act with diligence in mounting his appeal which was struck out, and also, that he delayed in bringing the present application. Consequently, he deposed, the applicant is undeserving of this Court's discretion in his favour.

There are several authorities by this Court, among them **Kenya Consumers Organization and Mike Mills vs. The Minister For Transport & Communications, The Minister for Finance and Kenya Posts and Telecommunications Corporation Civil Application No. NAI.77 of 1997** and **Crescent Construction Co. Ltd Vs. Delphis Bank Ltd Civil Application No. NAI. 54 of 2001** in which this Court has held that in a situation like the present one where an applicant's appeal has been struck out as incompetent, the Court should not revisit on the applicant the mistakes which led to the striking out of his appeal when considering a fresh application for leave to restart the appellate process.

**In Kenya Consumers Organization & Mike Mills vs. The Minister for Transport & Communication and 2 Others**; above, Omolo JA said:

***"I have said that the reason the applicants have given in explanation of the delay is not acceptable, but that, in my view is not the end of the matter. The Court is still entitled to look at the nature of the delay itself and if satisfied that the same is not inordinate, the court is still entitled to exercise its discretion in favour of an applicant. In this case, it is to be remembered that the delay was punished when the appeal was struck out and thereafter the applicants acted with reasonable promptitude."***  
(Emphasis supplied).

The learned Judge thereafter exercised his discretion in favour of the applicant in that matter.

There are of course exceptions, for instance, where it can be shown that the applicant has been systematically indolent or guilty of certain acts or omissions even subsequent to the striking out of his appeal, in which case the Court is entitled to consider those earlier mistakes to establish system and to draw adverse inferences against the applicant based on such acts or omissions.

In the matter before me almost all the matters raised against the applicant by the respondent concern acts or omissions before his appeal was struck out on 14<sup>th</sup> October, 2005. For those the applicant was sufficiently punished when the court ruled thus:

***"In the result we allow the application and order that Civil Appeal No. 254 of 2004 filed in this court on 19<sup>th</sup> November, 2004, be and is hereby struck out with costs to the respondent in that appeal."***

In the result I do not think that those matters are for consideration before me. I am of the view that if I were to take them into account the applicant will be unfairly vexed twice. Nor do I consider that the several authorities cited by Mr. Fraser for the respondent relating to acts or omissions on the part of the applicant before 14<sup>th</sup> October, 2005, fall for consideration in the circumstances of this case.

The applicant filed this application on 10<sup>th</sup> November, 2005 which was about a month after his appeal was struck out. Mr. Fraser, submitted that the delay in filing the application was inordinate and cited the case of **Omar Transmotors Ltd** and **Kariuki Ngumbi vs. Assa Okwemba Onyango Civil Application No. NAI. 62 of 2002** (C.A) as authority for the proposition that a period as short as two months may be regarded as being long enough to constitute inordinate delay.

I have considered the lapse of time from 14<sup>th</sup> October, 2005, when the applicant's appeal was struck out until the time he brought this application and although it is long in the circumstances, it cannot be regarded as inordinately long as of itself to deny the applicant my exercise of judicial discretion in his favour.

Mr. Fraser also raised the issue of the merits of the intended appeal. I do not think it will serve the interests of justice for me to make comments on the issue more so when the applicant's is not a frivolous and vexatious appeal or one which obviously amounts to an abuse of the process of the court. Likewise, I do not consider it safe to comment on the cumulative effect of the delay in concluding the dispute between the parties as that I reckon is a matter for the bench which will hear the appeal.

The applicant prays that apart from granting him extension of time to file and serve a Notice of Appeal and Record of Appeal, I should also extend the time to enable him request for copies of proceedings and certified copy of the order against which an appeal is intended. With due respect to the applicant **rule 81** does not apply where an intending appellant moves the court under **rule 4** for the enlargement of time within which to file and serve a record of appeal.

In the result, I am persuaded this is a case I should grant an extension of time to file and serve a Notice of Appeal and Record of Appeal. Accordingly I grant the applicant 10 days from the date hereof to file and serve a Notice of Appeal, and 30 days thereafter for him to file and serve a Record of Appeal. I decline to grant the request for extension of time within which to request for copies of proceedings and a certified copy of the superior court order against which an appeal is intended, as this does not arise. The costs of this application shall be to the respondent in any event.

**Dated and delivered at Nairobi this 9th day of June, 2006.**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**