

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 312 OF 1997
BETWEEN

1. GERRIT ANDREW WALTERFUNG ENGINEERING LTD
2. HENRY JUMBAAPPLICANTS
AND
DAVID OCHIENG RESPONDENT

**(Application for extension of time to lodge an appeal in
an intended appeal from an order of the High Court
of Kenya at Nairobi (Hon. Justice Shields) dated 7th
December, 1993 in**

H.C.C.C No. 4000 of 1993)

RULING

This is an application for an extension of time within which to lodge a record of appeal, brought under rule 4 of the Court of Appeal Rules.

From what I can glean from the scanty record before me, the applicants, Gerrit Andrew Walterfung Engineering Limited and Henry Jjumba, as defendants in High Court Civil Case No. 4000 of 1993, had Judgment entered against them jointly and severally in default of appearance. Their application to set aside the ex-parte judgment was dismissed with costs by Shields J. on 7th December, 1993. The applicants were aggrieved and promptly filed a notice of appeal declaring their intention to appeal against the order of dismissal. However, they did not file a record of appeal timeously. They, therefore, moved this Court under rule 4 aforementioned for an extension of time within which to file the record of appeal, which application was withdrawn on 31st October, 1997, and Mr. Joseph Nyamu for the applicants says that this application could not be filed earlier because he was waiting for a copy of the Certificate of Delay, from the superior court so as to incorporate it in the record of the application. The copy of the Certificate of Delay in the record of this application is neither dated nor signed. Nor is it certified. What Mr. Nyamu says cannot possibly be so because in his affidavit in support of the withdrawn application, Mr Nyamu had deponed that he received a Certificate of Delay on 31st January, 1997, and the same bore the date 2nd February, 1996. If that is the Certificate he had in mind then he had it in his possession before he filed this application. If not then he did not exhibit the Certificate of Delay which he says caused the delay in filing this application. Either way, there is no material to explain the delay in filing this application after the earlier one had been withdrawn.

Besides, as rightly pointed out by Mr. Mecha for the respondent, David Ochieng, this application is dated 10th November, 1997. The affidavit in support is postdated, 19th November, 1997. It means that the application was drawn, filed away, and on 19th November, 1997, Mr. Nyamu then swore the affidavit in support. The lapse of time between 10th and 19th November, 1997, is not explained. Nor is there any explanation as to why the application was not filed in court immediately, and had to wait until 15th December, 1997.

Clearly there was inordinate delay in bringing this application and in absence of a good explanation on the delay, I am unable to exercise my discretion under rule 4 aforementioned to extend the time within which to lodge a record of appeal, and in the result, I will dismiss the application with costs.

Dated and delivered at Nairobi this 3rd Day of November, 1999.

S.E.O BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR