



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: PALL J.A. (IN CHAMBERS))**  
**CIVIL APPLICATION NO. NAI 96 OF 1997**  
**BETWEEN**

JOHN MWANGI.....APPLICANT  
AND  
FRANCIS MWANGI  
NJUGUNA.....RESPONDENT

**(Application for extension of time to file Notice of  
Appeal and Record of Appeal out of time in an  
intended Appeal from the Judgment of the High Court  
of Kenya at Nairobi (Mr. Justice Mbogholi) dated  
18th May, 1993**

**in  
H.C.C.C. NO. 3647 OF 1982)**  
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**RULING**

By this notice of motion brought under r.4 of the Court of Appeal Rules (the Rules), the applicant has applied for an order for extension of time for filing notice of appeal as well as record of appeal. This application has been necessitated because the applicant being aggrieved from the judgment of the superior court had appealed by Civil Appeal No. 82 of 1997 but on 14th April, 1997 his appeal was struck out as it did not contain a certified copy of the decree of the superior court. The present application was filed on 12th May, 1997 that is 28 days after the applicant's appeal had been struck out. This delay of 28 days is not so inordinate as to call for an explanation from the applicant to account for the delay. I am satisfied that the applicant cannot be accused of lack of alacrity in coming back to court with his present application.

Mr. Oyugi for the respondent has opposed the application relying on the ruling of Cockar C.J. as he then was sitting as a single Judge of this Court in Civil Application No. NAI 95 of 1997. AFRO MEAT COMPANY LTD. V. SYPROSE AGEKA OWUOR (unreported) in which he held:

***"An application for extension of time to file and serve notice of appeal must in the first instance be filed in the High Court."***

On the other hand Gicheru J.A. in Civil Application No. NAI 83 of 1997 ABERCOMBIE & KENT LTD & ANOTHER vs. OLOOLOLO GAMES RANCH LTD (unreported) and also Shah J.A. in Civil Application No. NAI 97 of 1997 Gabriel Kigi and Ors v KIMOTHU MWAURA and another (unreported) and some other Judges of Appeal have not agreed with that view of the former Chief Justice and held that an application under rule 4 of the Rules for extension of time to file notice of appeal could be competently filed in this court without in the first instance filing it in the High Court. The result is that the Court of Appeal has been divided in two opposite camps on this point of law. This divergence of

opinion had arisen out of the interpretation of S.7 of the Appellate Jurisdiction Act (Cap.9) read with rule 41 of the Rules, as it then stood. Section 7 of the Appellate Jurisdiction Act reads as follows, (paramateria):

***"7- The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired." Rule 41 of the Rules, as it then stood; it has been since amended, read as follows: "41- Whenever application may be made to the court or to a superior court, it shall in the first instance be made to the superior Court."***

This application was generally stood over by me to await for the result of a reference to full court in the said Civil Application No. NAI 83 of 1997. I understand that the application has been heard but the ruling of the court has not been delivered as yet. In the meantime to put this controversy to end, the Rules Committee, exercising its powers under S.5 of the Appellate Jurisdiction Act by Legal Notice No. 11 of 1997, which came into force on or about 5th February, 1998, deleted rule 41 and replaced it with the following new rule:

***"41- The Court may in its discretion entertain an application for stay of execution or extension of time for doing any act authorised or required by these Rules notwithstanding the fact that no application has been made in the first instance in the superior court".***

In view of that alteration in the law, I directed the registry to list the application for further hearing before me. Consequently counsel for both sides appeared before me on 20th April, 1998. Mr Mbugua for the applicant submitted that the effect of the amended rule 41 was that if at all there was an impediment that an application of this nature should in the first instance be made to the superior court, it had now been removed.

Mr Oyugi, apart from opposing the application on the ground of unexplained delay on the part of the applicant in bringing this application, argued that the application should be looked at in the light of rule 41 as it stood when the application was filed and not the amended rule as it now stands. He further emphasised that there was nothing in the amended rule 41 to suggest that it was intended to have a retrospective effect. He, however, agreed that rule 41 as it stood before the amendment and also as it now stands after the amendment was a procedural rule.

The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are decided according to the law as it existed when the action or proceeding was begun, unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication (Hutchinson vs. Jauncey (1950) 1 K.B. 574 C.A.). But in the case of an enactment which alters or affects only the procedure or practice of the court, the general principle is that it has retrospective effect unless there be some good reason against it. Maxwell on the interpretation of statutes 10th Edition at p.225 says:

***"It seems ..... that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the statute makes has been disadvantageous to one of the parties. It matters not that the effect of a procedural alteration is to make a prosecution under a penal Act possible where formerly it had been impossible. Although to make a law punish that which at the time it was done, was not punishable, is contrary to sound a principle, a law which alters the procedure may with perfect propriety, be made applicable to past as well as future transactions and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course of procedure..... If the time for pleading were shortened, or new powers of amending were given, it would not be open to the parties***

***to gainsay such a change, the only right thus interfered with being that of delaying or defeating justice, a right little worthy of respect."***

So I hold that the present application should be disposed of in the light of the present rule 41 of the Rules. As such the respondent's argument that the application is misconceived and not properly before the court is rejected. Counsel for the respondent at the end agreed that if the said amendment was retrospective, his objection on the validity of the application had been overtaken by the amendment. Lastly, the discretion granted under r.4 of the Rules is unfettered and is only subject to it being exercised on terms as the court may think just. The respondent has not opposed the application on the basis that the intended appeal is not an arguable one. In Civil Application No. NAI 356 of 1996 this court recently said:

***"Lastly we would like to observe that the discretion granted under r.4 of the Rules of this Court to extend time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can be fairly said that his action was in the circumstances inexcusable and his opponent was prejudiced by it."***

In the end therefore I grant the motion and order that the time for lodging a fresh notice of appeal be and is hereby extended to 15.5.1998 and the applicant may lodge the appeal and the record of appeal within 45 days from the date the notice of appeal has been lodged. Costs of this motion shall abide by the result of the intended appeal. Mr. Mbugua has pointed out that the applicant recently passed away. As the notice of appeal is nothing but an intimation that the applicant desires to appeal, the death of the applicant will be

relevant only when the intended appeal is filed as it will have to be filed by the legal representative of the deceased applicant.

**Dated and delivered at Nairobi this 30th day of April**

**1998**

**G.S. PALL .....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**