



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: LAKHA, J.A. (IN CHAMBERS))**  
**CIVIL APPLICATION NO. NAI. 55 OF 1998**  
**BETWEEN**

**MWANIKI NJOROGE KAMAU**

**JOSIAH KIMEMIA .....APPLICANTS**

**AND**

**LEE SHEH POONG .....RESPONDENT**

**(Application for leave to serve Notice of Appeal upon the Respondent out of time in an intended appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Lady Justice S. Ondeyo) dated 19th May, 1997**

**in**

**H.C.C.C. NO. 455 OF 1996)**

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**RULING**

This application raises yet again the question as to what is the principle underlying the exercise of this Court's discretion when an extension of time is sought under rule 4 of the Rules of this Court.

The plaintiff (respondent) sued the two defendants (applicants) to recover damages under the Fatal Accidents Act (Cap. 32) as well as the Law Reform (Miscellaneous Provisions) Act, (Cap. 26) arising from the death of his wife who died due to injuries suffered in a road traffic accident on April 25, 1995, involving motor vehicles KZR 458 and **KAD 429Y**. The second applicant was at the material time the registered proprietor of motor vehicle KZA 458 while the first applicant was at the material time, the driver of the said motor vehicle in his capacity as the second applicant's agent. Motor vehicle registration number KAD 429Y belonged to the deceased and she was at the material time, a passenger on the said motor vehicle.

After a full hearing, judgment by the superior court was delivered on May 19, 1997 against the applicants who filed a Notice of Appeal on June 3, 1997. In or about October, 1997, the applicants' application before the superior court for stay of execution was argued and granted on conditions which have been complied with. At the time of the hearing of that application, the respondent's advocate informed the applicants' advocate that the said notice of appeal had not been served on them yet the present application for extension of time was not filed until March 10, 1998 after the respondent's application had been filed on March 5, 1998 to strike out the application. This application highlights two

principles, each in itself is salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case.

I bear in mind the two principles above set out. In my judgment, the starting point is rule 4 itself, which explicitly confers the widest measure of discretion in applications for extension of time and draws no distinction whatsoever between various classes of cases. The rule clearly requires the court to look at all the circumstances and recognize the overriding principle that justice must be done.

I also remind myself that time requirements laid down by the rules are not merely targets to be attempted but they are rules to be observed. At the same time, the overriding principle is that justice ought to be done. Also, litigants are entitled to have their cases resolved with reasonable expedition. The non-compliance of time limits could cause prejudice to one or more of the parties to the litigation and disrupt the administration of justice by delaying final determination of cases with reasonable expedition. I am also satisfied that the absence of a good reason for any delay is not in itself sufficient to justify the court in refusing its discretion to grant an extension but the court is required to look at all the circumstances of the case and to recognize the overriding principle that justice must be done. In this case, the notice of appeal was filed clearly out of time. This renders the notice invalid and of no effect. The court is now being asked in this application to extend time for the service of such notice, service having not been effected within the prescribed time. To do so would be tantamount to giving effect to a document which is filed out of time (without leave) and is invalid. Nor has any application been made, formal or otherwise, to obtain an extension of time for the filing of a fresh notice of appeal to regularise the position.

There is also the question of delay in making of this application. As already observed, it has taken the applicants almost six months (since knowledge of their non-compliance) to file this application. No satisfactory explanation has been given for such a long delay in making what was perhaps a simple application. In addition, the time for the filing of the appeal has also expired because the applicants are not entitled to any automatic extension of time under the proviso to rule 81(1) since the application requesting for copies of proceedings was not copied to the other side which is a mandatory requirement for a party if it is to be entitled to an automatic extension. I am informed that no application has been made for extension of time to file an appeal out of time. There would thus appear to be a failure to observe at least three rules of the court.

Granting this application would be acting in futility. Even if I were to grant the application, the applicants are by no means out of the wood in view of other non-compliance of the rules. Each application must be decided on its own facts.

There is considerable delay in making this application with no explanation of the critical period. I find it difficult to exercise my discretion in favour of such a party stressing that rules are to be observed. Although I have under rule 4 the widest measure of discretion, I do not find it just in the circumstances of this case to exercise that discretion particularly as the notice of appeal itself has been filed out of time in consequence whereof, it is invalid and of no effect.

For these reasons and those urged by Mr. Ochieng on behalf of the respondent, I dismiss this application with costs.

**Dated and delivered at Nairobi this 3rd day of April, 1998.**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**