



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: OMOLO, J.A (IN CHAMBERS)**  
**CIVIL APPLICATION NO. NAI. 127 OF 1998**  
**BETWEEN**

**FREDRICK J. P. ARODI**

**DORCAS JANE ONDITI ..... APPLICANTS**

**AND**

**I. W. WAWERU t/a WATHIOMO SAFARIS**

**JULIUS MUSEE KORIR .....RESPONDENTS**

**(Application for leave to file memorandum of Appeal out  
of time in an intended appeal from judgment of the  
High Court of Kenya at Kisumu (Wambilyangah J) dated  
3rd day of July, 1996  
in  
KISUMU H.C.C.C. NO. 242 OF 1990)**

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**R U L I N G**

The applicants in the motion presently before me are I.W. Waweru t/a Wathiomomo Safaris and Another while the respondents are Fredrick J.P. Arodi and Another. The motion as filed merely shows the parties either as plaintiffs or defendants. I do not know the logic or wisdom in doing so, but I shall say no more on that point. The applicants intend to appeal from the judgment of the superior court dated the 3rd July, 1996. The applicants had filed a notice of appeal from that judgment. That notice was filed on the 8th July, 1996. A record of appeal, namely Civil Appeal No. 26 of 1997 was eventually filed but when that appeal came before this court for hearing on the 25th March, 1998, the same was struck out on the ground that it was filed out of time without leave. By the present motion brought under Rule 4 of the Court's rules and filed on the 6th May, 1998, the applicants now pray for an order:

***"That the applicants be granted leave to file the memorandum of Appeal out of time."***

Mr. Limo who argued the motion before me on behalf of the respondents explained that after their record of appeal was struck out on the 25th March, 1998, they wrote to their clients seeking instructions on the matter and that they were waiting for the order of the Court which struck out their record of appeal. I think the period of delay which the applicants were obliged to explain was from the 25th March, 1998, when the previous appeal was struck out and the 6th May, 1998, when the present motion was filed. In answering the applicants' submissions before me, Mr Owuor for the respondents seemed to me to go back to the events which took place before the record of appeal was struck out. I do not think those events can again be raised in this motion as grounds for opposing the motion. The defaults of the applicants before filing the arbitive appeal were sufficiently punished when the Court struck out the appeal and I cannot again use the same defaults as a basis for refusing the extension of time sought by the applicants. Mr Owuor also argued that the respondents had filed a separate notice of motion No. 38 of 1998 and that in its ruling on that motion, the Court had specifically struck out the notice of appeal filed by the applicants on the 8th July, 1996. I have had a look at that motion and I agree with Mr Owuor that the previous appeal was struck out as a result of prayers in that motion. But I do not agree with Mr Owuor that there was an order of the Court directed specifically at the notice of appeal. The prayer in that motion was:

***"That the Respondents' Civil Appeal No. 26 of 1997 be dismissed for incompetence, want of Prosecution and/or Lack of merit and abuse of the Process of the Court."***

and as I have said the Court struck out the appeal principally on the ground that the same was filed out of time without leave. There was no order specifically striking out the notice of appeal as Mr Owuor told me during the hearing of this motion. Whether or not a notice of appeal is also struck out when the record of appeal itself is struck out remains a point of debate in this Court and I will not presume to decide it here. All that the applicants ask me to do in this motion is to extend time for them to file a record of appeal out of time. If I extend time, the applicants will lodge their record of appeal and if the respondents think that such a record would have been lodged without a valid notice of appeal having been filed, there would be nothing to stop the respondents asking the Court to strike out the record.

It is clear beyond any doubt that the applicants have always wanted to appeal and the delay between the 25th March and 6th May, 1998, though not satisfactorily explained, is not an inordinate one and does not prevent me from exercising my discretion in favour of the applicants. That being my view of the matter, I allow the notice of motion and order that the applicants shall lodge their record of appeal within fourteen days of the date hereof. The costs of this motion shall be costs in the intended appeal.

**Dated and delivered at Nairobi this 17th day of July, 1998.**

**R. S. C. OMOLO**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**