

REPUBLIC OF KENYA

N THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 272 OF 1997
BETWEEN

MAGONDU NGARIAPPLICANT

AND

SIMON MURIITHI MAGONDURESPONDENT

**(Application for extension of time to lodge a record of appeal
from a judgment of the High Court of Kenya at Nairobi
(Sheikh M. Amin J) dated 14th May, 1996
in
H.C.C.A. NO. 153 OF 1992)**

R U L I N G

The applicant intends to file a second appeal in this Court. The judgment the applicant proposes to appeal from was delivered on the 14th May, 1996. The applicant promptly filed his notice of appeal on the 23rd May, 1996 and on the same day the applicant applied for proceedings and judgment. A copy of the letter bespeaking the proceedings is attached to the motion and it shows that it was copied to the respondent, though in paragraph four of his replying affidavit, the respondent swears that the letter was not served on them. I note what Mr. Muriithi for the applicant says as regards the replying affidavit; it was filed in court only on the 30th June, 1998 and I think it would not be right for me to conclude that the letter was not served on the respondent. In any case, Rule 81 (2) of the Court's Rules does not require that a copy of the letter be "served" on a respondent. All the rule requires is that a copy of the letter be sent to the respondent. I do not understand the word "serve" to be the same with word "send".

That brings me to the certificate of delay. That certificate shows that judgment and proceedings were ready for collection on the 29th May, 1997, and that they were actually collected on the 6th June, 1997. The present motion was not filed until the 17th October, 1997, a delay of some 133 days according to Mr. Mwihi's calculation. The applicant was bound to give some explanation for that delay and as far as I can see from the affidavit in support of the motion, the explanation appears to be that various things were wrong with the proceedings supplied and that the applicant asked the Deputy Registrar to put right the matters the applicant thought were not in order. If that is what actually took place, then it was clearly the duty of the applicant and his legal advisors to ask the Deputy Registrar to issue a certificate reflecting the correct position. As it is the averments in the supporting affidavit are directly contradicted by the certificate of delay and I see no reason to prefer the averments in the affidavit over what is contained in the certificate of delay. I know that my discretion to extend time is unfettered but even then where there has been such a long delay, there must be some explanation or some material upon which the discretion of the court is to be exercised. No valid explanation has been given to me for the delay and that being my view of the matter, I refuse to exercise my discretion in favour of the applicant, disallow the notice of motion and order that the same be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 2nd day of July, 1998.

R. S. C. OMOLO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR