



**IN THE COURT OF APPEAL**  
**AT NYERI**  
**CIVIL APPLICATION NO. NAI. 154 OF 1998 (NYR 12/98)**  
**CORAM: SHAH J.A (IN CHAMBERS)**

**GLADYS WANJIRU.....APPLICANT**

**AND**

**TERESA CHEPSHAT**

**PIUS KIBWEET SEVREY**

**BERNARD KATHANGA**

**KERUGOYA COUNTY COUNCIL**

**THE ATTORNEY GENERAL.....RESPONDENTS**

**Application for extension of time to file a Notice of Appeal from an order of the High Court of Kenya at Nyeri (Mr. Justice Ang'awa) dated 28th November, 1994**

**in**

**H.C.C.C. NO. 182 OF 1992**

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**RULING**

I have before me, an application, brought under rule 4 of the Rules of this court, for extension of time to lodge a Notice of Appeal and the Record of Appeal thereafter. The application comes as a result of the applicants appeal, Civil Appeal No. 297 of 1996, being struck out on 13th May, 1998 as the record of appeal did not contain relevant amended draft plaint, a primary document.

This application was filed only a day after the said appeal was struck out. The applicant has not been, therefore, inactMirv.e . Machira for the 1st, 2nd and 3rd respondents, Mr. Muchira for the fourth respondent and Mr. Kabitu for the 5th respondent all opposed the application on the grounds that ruling of the superior court sought to be appealed against is not before me. That lack has not worried me as it is clear that the struck out appeal was against the refusal by the superior court (Ang'awa J) to allow amendment to the plaint.

The second objection was under rule 13(5) of the rules of this court, that it to say, the pages in the application were not marked at 10th lines. That technical objection is not such as to merit striking out an application. Mr. Machira confirmed that he had no difficulty in following the application despite there being no 10th line numbering.

The third objection was to the effect that the proposed amended plaint now sought to be introduced was the same as the one that was not, during an earlier ruling by Ang'awa J, allowed. As I understood it Mr. Mahan at one stage made a double - barrelled application, seeking amendment of plaint and an injunction at the same time. That application was dismissed and hence the application, which was the subject - matter of the struck out appeal in this court was alleged to be res judicata. Mr. Mahan said he withdrew the said doublebarrelled application. I had to have recourse to the record of the superior court to inquire that the application was dismissed as a result of a successful preliminary objection taken by two respondents. If an application is dismissed as being defective there is no adjudication on merits and hence the second application cannot be barred by a plea of res judicata

I pointed out to Mr. Machira that the merits of the intended appeal are not in the province of a single judge of this court and if there is an intended appeal which is at least arguable it is incumbent upon the single judge to allow extension of time, if all other factors are in favour of the applicant. Mr. Machira took issue with the name (as used by the applicant) of the fourth respondent. It was pointed out that the name had been corrected to read "Kerugoya Kutus Municipal Council".

I am not prepared to say that the intended appeal is a frivolous one. I allow this application in my discretion and order that the notice of appeal be lodged within the next 10 days and the record of appeal within 30 days thereafter. The costs of this application will be costs in the intended appeal.

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

**A. B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**