



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, Ag. J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 337 OF 1996
BETWEEN

- 1. JEDIDA ALUMASA**
 - 2. CALEB MWASHI**
 - 3. SELINA MUDUYA**
 - 4. SAMUEL ALUDA.....APPLICANTS**
- AND**
- S. S. KOSITANY.....RESPONDENT**

**(Application for extension of time to file Notice of Appeal and Record of Appeal out of time in an intended appeal from a judgment of the High Court of Kenya at Nairobi (Mr. Justice Mwera) dated 3rd December, 1992
in
H.C.C.C. NO. 4831 OF 1988)**

RULING

The applicants herein have moved the Court by a Notice of Motion under rule 4 of the Rules of this Court for an order extending time within which to file and serve a notice of appeal and, thereafter, to lodge a record of appeal in an intended appeal against the judgment of the superior Court at Nairobi (Mwera, J.), in its Civil Case No. 4831 of 1988, dated 3rd December, 1992. The applicants had previously lodged Civil Appeal No. 5 of 1994, against that decision, but the appeal was struck out on 11th October, 1996, for being incompetent. The applicants had not included a certified copy of the decree in the record of appeal and that rendered the appeal incurably defective.

The applicants by bringing this application have evinced an intention to restart the process of appeal. Their Counsel, Miss Judith Guserwa, submitted before me, on the authority of **Frederick G.K. Waithaka v. Thuo Kamau and David Njuguna Thuo**, Civil Application No. Nai. 71 of 1994, (unreported); that the failure to include in the record of appeal a certified copy of the decree appealed against in that appeal was due to her own mistake, which mistake, she said, should not be visited on the applicants. She urged further, that the applicants acted with due dispatch in not only filing the appeal which was struck out but, also, in bringing this application after that appeal was struck out. Relying on the case of **John Kago**

Ndungu v. James Karimi Wambugu, Civil Application No. Nai. 209 of 1996 (unreported), she submitted further, that the mere fact that the applicants' appeal was struck out did not disentitle them to the right of seeking extension of time under rule 4, above.

Mr. Tiego, who appeared for the respondent, did not think the applicants are entitled to the order sought. His view was that they have been guilty of inordinate delay in seeking extension of time. In reaching that conclusion he started computing time from the date of the judgment intended to be appealed against, and urged me to ignore the steps the applicants had taken in their appeal which was struck out. Relying on the case of **A.G. v. Theuri**, (1982-88) 1 KAR 929, Mr Tiego submitted that it is dangerous not to follow rules laid down to aid in the administration of justice. In his view, rule 74 of the Rules of this Court is worded in mandatory terms and should be given full effect. Further, that a Court is obligated to grant extension of time only where sufficient cause has been shown by the applicant.

An intending appellant is obliged by reason of rule 74, above, to file a notice of appeal within a stipulated period.

The law recognizes that in certain cases it may not be possible to comply with that requirement. Hence the provisions of rule 4, above, which give the Court unfettered discretion to extend the time. The discretion is judicial and, therefore, must be exercised on the basis of legal principles and acceptable evidence.

It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures, provided he can be able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal. That is what the applicants did in this matter. Their appeal was struck out on 11th October, 1996, and on 8th November, 1996, they brought this application. The delay in bringing the application cannot, in the circumstances of this case, be regarded as inordinate. I take cognizance of the fact that the affidavit in support of this application is sworn by one of the applicants on her own behalf and on behalf of the other applicants. It is probable that their counsel had to write to them to require them to call at her chambers with a view to swearing the affidavit. It must, also, be noted that the respondent is not complaining of the delay from the date the applicants' appeal was struck out, but since the date of judgment. It will, in my view, be preposterous to accept the view the respondent's counsel put forward, that the steps the applicants took in their struck out appeal should be ignored. Doing so will, in my view, be acting on the erroneous assumption that human beings never make mistakes and that all human errors are inexcusable.

Considering all the facts and circumstances of this matter I am persuaded to and hereby grant the extension prayed for. The applicants have five (5) days from the date of this ruling to lodge and serve a fresh notice of appeal and 15 days, thereafter, to lodge and serve a record of appeal. The costs of this application will abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 26th day of February, 1997.

S.E.O. BOSIRE

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Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR