

REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

Coram: Gicheru, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 152 OF 1996

BETWEEN

FRANCIS MUTERU

COCA COLA BOTTLING COMPANY.....APPLICANTS

AND

S.E. ANJARWALLA.....RESPONDENT

(An application for extension of time to file Notice and Record of appeal in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Mbaluto, J.) dated 27th July, 1990

in

H.C.C.C. NO. 1357 OF 1982)

RULING:

The applicants' application for extension of time within which to file the Notice of Appeal and the record of Appeal came up for hearing on 2nd December, 1996. That date had been taken by consent of parties on 13th September, 1996. But on the date of hearing the applicants' application, there was no appearance for the applicants with the result that their application for extension of time as is referred to above was dismissed under rule 55(1) of the Rules of this Court. Against that dismissal, the applicants now seek to reinstate their dismissed application under rule 55(3) of the Rules of this Court. Under the foregoing sub-rule, the applicants are required to show that they were prevented by sufficient cause from appearing when their application now being sought to be restored was called on for hearing. According to counsel now appearing for the applicants the reason for the applicants' inability to appear and prosecute their application on 2nd December, 1996 was that counsel then appearing for them, Ms. Lucy Mburu of Murimi & Company, Advocates who were seized of the application in question, failed to report to work on that day and it was not until 4th December, 1996 when it was discovered that she had removed all her personal belongings from her office and had apparently absconded. She has since not returned to the firm of Murimi & Company, Advocates. About two weeks thereafter, the aforesaid firm of Advocates sought to have the applicants' application for extension of time as is set out at the beginning of this ruling restored to hearing. Counsel for the respondent, however, is opposed to the restoration of the said application for the reason that since the decision of the superior court which was given on 27th July, 1990, the applicants had displayed lack of seriousness in pursuing and prosecuting their original appeal NO. 22 of 1992 which was struck out by this Court on 25th April, 1996 on account of being incompetent. To counsel therefore, to restore the applicants' application for extension of time within which to lodge the Notice of Appeal and the record of Appeal in connection with their already struck out original appeal NO. 22 of 1992 would only help them in their intention to delay the conclusion of the matter adjudicated upon by the superior court.

From the supporting affidavit of counsel now appearing for the applicants, it does not appear to me that the firm of Murimi and Company Advocates had any foreknowledge that counsel then appearing for the applicants, Ms Lucy Mburu, would abscond on the day when the applicants' application was listed for hearing - 2nd December, 1996 - and there is nothing in rebuttal in connection therewith. In the

circumstances, the explanation by counsel now appearing for the applicants as to why there was no appearance for the applicants when their application for extension of time as is referred to in this ruling was called on for hearing on 2nd December, 1996 is in my view sufficient for the restoration of the said application. In the result, the applicants' application for extension of time within which to file the Notice of Appeal and the record of Appeal is restored to hearing. The costs occasioned by the present application are awarded to the respondent in any event.

Dated and delivered at Nairobi this 25th day of April, 1997.

J.E. GICHERU

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JUDGE OF APPEAL