



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NYERI

(CORAM: SHAH, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 347 OF 1996

BETWEEN  
JOHNSON MBIRI KIRATU  
LUCY MABUTI MBIRI ..... APPLICANTS  
AND  
ROGERS MURIITHI KIRATU ..... RESPONDENT

(An application for leave to file Notice of Appeal and Record of Appeal in an intended Appeal from the Judgment/Decree of the High Court of Kenya at Nyeri (Lady Justice Ang'awa) dated 29th September, 1993

in

H.C.C.C. NO. 342 OF 1986)

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R U L I N G

I have, before me, an application made under Rule 4 of the Rules of this Court, for extension of time to file a notice of appeal and record of appeal out of time.

The relevant facts are that the appeal filed by the applicant (Civil Appeal No. 213 of 1995) was struck out as having been filed out of time without leave; the said appeal was struck out on 15th May, 1996; prior to the appeal being struck out the applicant's counsel was aware of the fact that the appeal was filed out of time as he had applied for extension of time to treat the appeal as having been filed in time prior to the date the appeal itself came up for hearing; that application was withdrawn on 16th October, 1996.

The application was filed on 29th day of October, 1996 after the aforesaid withdrawal of the application to regularize the appeal.

Mr. Mahan for the respondent opposes the application on the ground that there has been an inordinate delay in the filing of this application. The delay, he argued, was about six months.

Mr. Mwangi, counsel for the applicant says that he could not have filed the application until after his earlier application to regularize the appeal itself was dealt with and that therefore he had to wait until then.

Whilst the application to regularize the struck out appeal was pending there was nothing to stop the applicant from filing this application. There is no rule in the Rules of this Court barring the applicant from filing the present application despite the pendency of an application which had died a natural death when the appeal was struck out. The question that I have to go into now is as to whether Mr. Mwangi was justified in waiting for about six months before filing this application when he himself says that his earlier application was overtaken by events on 15th May, 1996. My view is that Mr. Mwangi should have filed this application much earlier in time as he was aware of the uselessness of the pending application. I agree with Mr. Mahan when he argued that Mr. Mwangi was taking matters for granted.

I have undoubted discretion to extend time under Rule 4 of the Rules of this Court; but that discretion is to be exercised judicially and I cannot accommodate an applicant who takes 5 months and a half to apply for extension of time. The application, in the circumstances, is dismissed with costs.

Dated and delivered at Nyeri this 15th day of May, 1997.

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR