

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. NAI.155 OF 1997 (UR. 63/97)

MUTIA MITHAMO

ANNAH MURUGI GATHUKUMI

JOSEPH MURIUKI M'ITHAMO APPELLANTS

AND

WILSON KINYA MITHAMO RESPONDENT

**(An application for extension of time within which to
file and serve notice of appeal and record of appeal
from a ruling and order of the High Court of Kenya
at Nyeri (Justice P.K. Tunoi) dated 22nd February
1993**

IN

H.C.C.C. NO.158 OF 1990

RULING OF THE COURT

This is an application under Rule 4 of the Rules of this Court for extension of time within which to file and serve a Notice of Appeal and thereafter a record of appeal. The applicants were the unsuccessful parties in their application before the Superior Court at Nyeri (Tunoi J, as he then was) for and order vacating an arbitration award. They filed Civil Appeal No. 184 of 1993 which appeal was struck out on 25th October, 1995 because the record of appeal did not contain a certified copy of the order appealed against. It would appear to me that they later successfully applied to this court for extension of time within which to restart the appellate process because their subsequent appeal against the same order to wit Civil Appeal No.194 of 1996 was also struck out on the 15th May, 1997, because of their failure to include in the record of appeal a certified copy of the order appealed against.

In the present application the applicants pray that I exercise my judicial discretion under rule 4 of our Rules to extend time, once again, so that they may start, denovo, the appeal process. Miss Ndirangu for the respondent has opposed the application on the ground that the applicants are not serious in their quest for justice. She submitted that the applicants having been given a chance to regularise the mistake which made their first appeal to be struck out, but failed to do so, deserve no sympathy from this court. I agree. Although the discretion of this court under rule 4, above, is wide, it must be exercised judicially and on the basis of evidence and sound legal principles. This application is an abuse of the process of the court. The applicants did not disclose the fact that they had filed Civil Appeal No. 184 of 1993, and that the same had been struck out for the same reason as Civil Appeal No.194 of 1996.

Although in the case of Elizabeth Kamene Ndolo vs. George M. Ndolo Civil Appeal No. NAI 104 of 1995 (UR) this court held that where an appeal has been struck out for being incompetent as opposed to where it has been dismissed, there is nothing to stop the appellant asking the court to extend time under rule 4 to enable the filing of a fresh notice of appeal, where, as here, the appellant is shown not to be candid or serious in their quest for justice, the court should, in my view, be disinclined to exercise its

discretion in favour of extension of time.

In the above circumstances and for the reasons I have given I decline to exercise my judicial discretion under rule 4 and dismiss the application with costs to the respondent assessed at Kshs.2,000/=.

Dated and delivered at Nairobi this 3rd day of July, 1997.

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL