



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CIVIL APPLICATION NO. NAI 198 OF 1995 (92/95 UR)**

**OCEANFREIGHT  
SHIPPING  
COMPANY LIMITED**  
.....  
**APPLICANT**

**VERSUS**

**OAKDALE  
COMMODITIES  
LIMITED .....**  
**..... RESPONDENT**

(An application for leave to file Notice of Appeal out of  
time being an intended appeal from the Judgment of  
the High Court of Kenya at Nairobi, Lady Justice E.  
Owuor dated 6th August, 1992  
in  
H.C.C.C. NO. 4434 OF 1989)

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**RULING OF THE COURT ON REFERENCE TO FULL COURT**

By its notice of motion dated the 14th August, 1995 and lodged in this court on the 16th August, 1995 and which was brought under rule 4 of the rules of the court, the applicant, Oceanfreight Shipping Company Ltd, asked a single judge of the court for two prayers, namely:-

1. That the applicant be allowed to lodge its notice of appeal against the judgment delivered by Owuor, J. on the 6th August, 1992, out of time as the applicant had been unaware of the date when that judgment was delivered; and
2. that the costs of and incidental to the notice of motion be left to abide the result of an intended appeal.

This is yet again one of those situations in which the learned judge of the superior court was wholly unable to deliver her judgment on the date she had said she would do so; she had originally said she would deliver her judgment on the 30th April, 1992; the judgment was not delivered until the 6th August, 1992, nearly five months later. And when it came to delivering the judgment, she apparently did not send

out a notice to both parties, so that they could both be present or arrange to be represented. Had she delivered her judgment on the 30th April, 1992 or had she given a notice to both parties as to when her judgment would be delivered, it is very unlikely that we would be dealing with the present motion at all. We would request the learned judges of the superior court to comply with these very elementary requirements of the process of administering justice so that parties are saved from unnecessary expenses and wasting of time.

It was agreed before us that judgment was in fact delivered on the 6th August, 1992 and under Rule 74 (2) the applicant was bound to file its notice of appeal within 14 days of the judgment. The rule does not say that an intending appellant who is not aware of the date of delivery of the judgment shall file a notice of appeal within 14 days from the date when he comes to know that judgment has been delivered. So that in the case of the present applicant whether his advocate only came to know on the 13th August, 1992, the applicant was still bound to file its notice of appeal within 14 days from the 6th August, 1992. That period would end on the 20th August, 1992. It is agreed the notice of appeal was filed on the 21st August, 1992. It was filed one day out of time and unless an application for leave to do so was made and was successful, the notice would be invalid.

The applicant made its motion asking that it be allowed to file its notice of appeal out of time. The motion, as is the practice of the court, was heard by a single Judge (Shah, J.A.). The learned single Judge took the view that since the applicant had already filed a notice of appeal which was still on record, to extend the time to file a notice of appeal would be in effect to allow the applicant to file two notices of appeal. The learned Judge thought, rightly in our view, that what the applicant ought to have asked him to do was to extend the time by such period as would validate the notice of appeal lodged on the 21st August, 1992. The applicant did not do so and the learned single Judge thought that:

"So effectively I am asked to disregard the notice of appeal filed on 21st August, 1992 and allow the filing of another notice of appeal out of time and then validate, ex-post facto, the appeal already filed without there being an extension of time to validate the notice of appeal filed on the 21st August, 1992. I cannot do so. The applicant is taking too many short-cuts. ...."

This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong.

The application, as we have repeatedly said, was under Rule 4; the learned single Judge was asked to extend time. It is true that in its motion, the applicant did not ask the learned single Judge to extend time by such period as would validate the notice of appeal filed on the 21st August, 1992 but we do not agree that that failure took away the learned Judge's discretion under Rule 4 to extend the time by such period as would validate the notice already filed. After all there cannot be any sense in having two notices of appeal and validating the one already filed would still amount to an extension of time, which was what the applicant asked for. Mrs. Rawal for the respondent conceded before us that had the single judge validated the notice of appeal already on record, he would still be within his discretion under Rule 4. The learned single Judge thought he could not do so. With respect we think he could do it, and that entitles us to interfere with his exercise of discretion.

As to Civil Appeal No. 156 of 1995 Mr. Kanyi wrongly informed the single Judge that the same was filed on the 6th September, 1995. The correct position is that that appeal was filed on the 30th August, 1995. It was filed out of time by one or two days but at the start of the hearing of the motion Mr. Kanyi's informal application to include a prayer for the validation of the appeal itself was granted. Once again Mrs. Rawal conceded that the delay of one day, in respect of the notice of appeal and the delay of two days in respect of the appeal itself cannot, in the circumstances of this motion, be inordinate.

That being our view of the matter, we allow this reference, and extend the time within which the notice of appeal was to be filed by one day, namely to the 21st August, 1992 so as to validate the notice filed on that date and we also extend the time within which the record of appeal was to be filed to the 30th August, 1995. We order that the costs of this reference and of the notice of motion itself shall be in the appeal. Those shall be our orders.

Dated and delivered at Nairobi this 9th day of July, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

.....

JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR