



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPLICATION NO. NAI 250 OF 1996

1. SAMSON
MWAKITINDI

2. ISMAIL S. YUSUF
T/A I.S. YUSUF
TRANSPORTERS.....
.APPLICANTS

VERSUS

1.ERIC ISAYI
SHALINGA an infant
suing by his next friend
MARY SHAMTE

2.HARVEY E
ROBINS and THE
UNION NATIONAL

BANKOF
PITTSBURG (both
suing as Co-Executors

of the Estates of
Burton L. Rapport and
Giesela L. RAPPORT

3.ZABLON
CHANGAWA

4.ANWARALI &
BROTHERS.....
.....RESPONDEN
TS

(Application for extension of time to file and serve
Notice of Appeal and Record of Appeal out of time in
an Appeal from the Decree of the High Court of Kenya

**at Nairobi (Justice Butler-Sloss) dated 25th day of
April, 1990
in
HCCC 856 OF 1995 & HCCC 467 OF 1986)**

R U L I N G

The applicants' civil appeal No. 94 of 1993 against the superior court's (Butler-Sloss J.) decision in its civil case No. 467 of 1986, delivered on 25th April, 1990, was struck out on 4th July, 1996, because the record of appeal did not contain the trial Judge's notes, parts of the record of proceedings and a certified copy of the decree appealed against. On 30th July, 1996, the applicants brought this application to seek extension of time within which to lodge and serve a notice of appeal, and thereafter to lodge and serve a record of appeal. They also pray that the record of the struck out appeal "so far as is practicable" be deemed to be the record of appeal in their intended appeal. When I pointed out to Mr. Nyamu, counsel on record for the applicants, the provisions of rule 85 (2A) of the Rules of this Court he submitted that that part of the prayers could in exercise of this court's discretion be severed off without fatally affecting the application.

The application is brought under rule 4 of the Court's Rules, which provision donates unfettered discretion to extend time within which to take an essential step in an appeal or intended appeal. It is clear from that provision that no conditions are therein set which must be satisfied before the court can grant the extension of time. That being so and the jurisdiction of the court under the rule being discretionary and judicial an applicant must show sufficient grounds for seeking extension.

The application was opposed on two main grounds. Firstly, that the applicants' earlier appeal having been struck out their fate in the matter was sealed and they have no right of starting the appeal process de novo. Striking out of an appeal does not, to my mind, operate as res judicata to a subsequent appeal on the same or other grounds. It is common practice presently, that, subject to satisfying the court that there are sufficient grounds for extending time within which to lodge a fresh notice of appeal, the court will invariably extend the time. For instance, in the cases of **Joseph Lima & 86 others v. Ann Merz** Civil Application No. Nai 218 of 1996 and **The Commissioner of Lands & Another v. Coastal Aquaculture** Civil Application No. Nai 294 of 1996 (both unreported), the respective applicants therein, as here, after their appeals had been struck out moved the Court under rule 4 of the Court Rules, for extension of time within which to file and serve a fresh notice of appeal. In both matters time was extended.

The second ground which was raised by the respondents against the application was that the applicants did not show sufficient grounds for seeking the extension of time. Mr. Havelock for the 2nd respondent submitted that because the original notice of appeal was not served on him within the time prescribed under rule 76(1) of the Rules of Court, the application was flawed from the start with the result that whatever reasons the applicants advanced in support of the application are of no moment. Mr. Ngaira, for the first respondent concurred with him. Mr. S. Kinyanjui for the 3rd and 4th respondents was of the view that the applicants having failed to include in the record of appeal of Civil Appeal No. 94 of 1993, certain primary documents the applicants lost their right to restart the process of appeal.

The striking out of an appeal seems to me to serve as punishment to the appellant for his negligence in compiling the record of appeal. It is no bar to restarting the process of appeal. An applicant is only obliged to show good reason for seeking extension of time.

While the grounds advanced on behalf of the respondents mhaavye some bearing on this application I do not consider them to be weighty enough to constrain me to exercise my discretion against granting time. They certainly would constrain a court to strike out an appeal for being incompetent, but in a matter like the present one the major consideration is whether the applicants sought extension of time without undue delay and also, whether the applicants acted diligently after their appeal was struck out. On the material before me the applicants filed this application with due dispatch and I have no evidence that they did not exercise due diligence in the matter. Perhaps the only matter which is of concern is that as yet they

have not obtained copies of proceedings in full. It is not known nor could the applicants' counsel state with certainty when they are likely to be obtained. The decree intended to be appealed against was passed many years ago. I have no explanation except that the trial judge's notes are not easily decipherable, as to why the copies of proceedings cannot be readily availed. Whether or not hereafter the copies of proceedings will this time be made available is difficult to say. What I think is the best course in the circumstances is to grant the applicants one more opportunity to see if this time they will be lucky. In coming to that conclusion I have considered the fact that none of the respondents filed any affidavit to controvert what has been deponed to by the applicants' counsel in his affidavit in support of this application.

In the result and for the foregoing reasons I am constrained to grant the application, extend the time within which to file and serve a notice of appeal by 7 days and a further 30 days within which to lodge a record of appeal. I am however unable to grant the prayer that the record of appeal of the struck out appeal be used in the intended appeal in view of the provisions of rule 85 (2A) of the Rules of this Court on the basis of which Civil Appeal NO. 94 of 1993 was struck out. The costs of the application shall be in the intenDdaetde da papneda l.d el iIv esroe do radte rN.airobi this 7th day of May, 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