

REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: PALL J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 372 OF 1996

BETWEEN

DAVID KONGO APPLICANT

AND

NJOROGE NJUGUNA RESPONDENT

**(Being an application for extension of time to file an
appeal from the judgment of the High Court of Kenya
at Nairobi (Mr Justice Nyarangi) dated 18th October,
1979,**

in

H.C.C.C. No. 575 of 1968

R U L I N G:

David Kongo (the applicant) has applied by way of notice of motion under r.4 of the Court of Appeal Rules (the Rules) for an order for extension of time to file an appeal from the judgment of the High Court of Kenya at Nairobi (Nyarangi J. as he then was) dated 18th October, 1979 in the High Court Civil Case No. 575 of 1968 on the grounds that the applicant had previously filed Civil appeal No. 79 of 1985 which was struck out because the applicant did not include a certified copy of the decree in the record of appeal; that the omission to include the order (sic) decree was a mistake on the part of his then advocate; and that as the applicant had fully entrusted the prosecution of the appeal in the professional hands of his advocates, his mistake should not be visited upon the applicant. The applicant has further deponed by his affidavit in support of the motion that he stands to suffer greatly because of the mistake of his advocate and so in the interest of justice the application ought to be allowed. The respondent Njoroge Njuguna is not likely to suffer any prejudice, he has claimed.

Aforesaid appeal was struck out on 25th October, 1989 whereas this notice of motion was lodged on 27th November, 1996. The applicant's explanation for this colossal delay is that although he was present in the court at the hearing of the appeal, on the said 25.10.1989, he did not follow the deliberations and when the court rose, he inquired from the advocate about the outcome of his appeal. However the advocate told him that he would write to him as the advocate was in a hurry to attend another matter in another court. The advocate never wrote to him and in December, 1989 he went to the advocates office. But the advocate handling the appeal was not present and his staff was very reluctant to explain to him the outcome of the appeal. He then instructed his present advocates M/s. Kirundi & Co. who inspected the court record and found that the appeal had been struck out because it did not include a certified copy of the decree appealed from. M/s. Kirundi & Co. then filed application No.10 of 1990 which application was withdrawn and the applicant was given leave on 18th March, 1992 to file a fresh application for extension of time to lodge the appeal. Thereafter, after a lapse of more than 4 years, the applicant has brought this application. So if not for any other reason, I would have dismissed this application because I am not at all satisfied that applicant has been diligent enough to be entitled to my unfettered discretion to extend the time for lodging the appeal.

However there are also other reasons for not granting the application. It is trite law that no appeal

can be filed to the court unless the applicant has lodged a valid notice of appeal in pursuance of rule 74 of the Rules. The applicant has not applied by the motion before me for an order for extension of time to file the notice of appeal although it is debatable whether in the circumstances of this case I can grant such a request in view of S.7 of the Appellate Jurisdiction Act read with rule 41 of the Rules. He had filed a notice of appeal dated 22.11.1996 which is at P.108 of this motion which he now has withdrawn and asked me to strike out. At any rate that notice was not a valid one, having been filed out of time without any order for extension of time.

Mr Kimani who appears for the applicant in this motion has submitted that when his client's appeal was struck out on 25th October, 1989 as being incompetent as hereinabove mentioned, the notice of appeal in pursuance of which that appeal had been lodged, survived as it could not be struck out along with the appeal. That is another debatable point on which the court is divided at the moment. Until the court on a reference finally decides on whether a valid notice of appeal is also struck out along with an incompetent appeal, I would not like to express my views. However, even if we suppose that Mr. Kimani's argument is tenable, it would not help him as Mr Wamae for the respondent has submitted that no valid notice of appeal had been filed in pursuance of which the said appeal that is Civil Appeal No.79 of 1985 had been lodged. In the record of that appeal at page 58 is a notice of appeal which is dated 10th day of October, 1984 which was lodged way out of time. There is no evidence of any order for extension of time to file the said notice. Then there is another notice of appeal which is dated 29th March, 1985 at P.74 of the same record of the said appeal. Again there is no evidence that either of the two notices of appeal had been validated by any appropriate order for extension of time.

Even if it is accepted that a notice of appeal is not struck out when an incompetent appeal is struck out, it can only mean a valid notice of appeal can survive. An invalid notice of appeal is no notice at all.

As I have said no appeal can be filed unless a valid notice of appeal to precede it has been filed. In other words a valid notice of appeal is the basis of a competent appeal. In the instant case, there is no notice of appeal which could be relied upon by the applicant. So, even if I grant an order for extension of time to file the record of appeal, it would not help the applicant because no appeal can be filed without a proper notice of appeal. The applicants application therefore fails and it is hereby dismissed with costs.

Delivered and dated this 26th day of November, 1997

G.S. PALL

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JUDGE OF APPEAL