



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GACHUHI, GICHERU JJ A & CHESONI Ag JA)**

**CIVIL APPLICATION NO NAI 119 OF 1989**

**KIRAGU.....APPLICANT**

**VERSUS**

**KIRAGU.....RESPONDENT**

(Application for extension of time to file an appeal in an intended appeal from a judgment of the High Court of Kenya at Nairobi (Owuor J) dated 19th November, 1982, in HCCA No 134 of 1981)

**RULING**

Kinyati Kiragu, the applicant herein, applied to this court under Rule 4 of the Court of Appeal Rules for extension of time for filing an appeal. The application was heard by a single Judge of Appeal (Kwach JA) who dismissed it with no order as to costs.

The decision from which the applicant desires to appeal was passed by Owuor J on 19th November, 1982, i.e. seven years plus ago. At paragraphs 6 and 7 of the affidavit in support of the application for extension of time the applicant deponed as follows:-

“6. THAT on the 27th day of June, 1989, is when my advocate informed me that the case was decided on 19<sup>th</sup> December, 1982 as our application hereby attached was dismissed with costs.

7. THAT the delay has therefore not been caused by negligence on my part but on the part of my former advocates.”

Mr Mungai wa Kamotho represented the respondent in the High Court in the case from the decision of which the applicant wishes to appeal. He states at page 4 of his replying affidavit that on the 27th day of April, 1983 M/S Gautama & Kibuchi, advocates filed a change of advocates notice showing that they had replaced the applicant’s former advocates. Indeed Gautama & Kibuchi, Advocates must have received instructions from the applicant to file the notice of change of Advocates. At paragraph 5 of the same affidavit Wa Kamotho says this:

“5. THAT on the 16th day of June, 1983 the applicant herein filed an application seeking for review of the judgment therein under Order XLIV rule 1(1) (attached is a copy of the application marked MK (2).”

As Kwach JA observed in his ruling the application for review was supported by an affidavit sworn to by the applicant, Kinyati Kiragu, who even identified himself by his ID Card No 3397408/66. Consequently his claim that he did not know of the judgment of 19th November, 1982 does not bear any truth at all.

The applicant's counsel while agreeing that the intended appeal is against the judgment of November, 19th 1982 still insisted that the outcome of the review was not made known to the applicant till 1989. We do not see how this assists the applicant.

Prior to 1984 no extension of time under rule 4 of the Court of Appeal Rules could be allowed by the court unless the applicant established "sufficient reason". Although the words "sufficient reason" have been deleted from the provisions of the said rule the power conferred on the court by the amended rule 4 still is wide and leaves extension of time under the rule a discretionary matter. The practice remains as it was in the case of *Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd* [1959] EA 838 that an application for an extension of time for lodging an appeal may be made even after the prescribed time has expired. However, failure by an applicant to explain away the delay in prosecuting his appeal may lead to the extension being refused.

The exercise of discretion under rule 4 is governed by the same principles that apply to the exercise of discretion by a Judge generally as in the Superior Court. Thus as laid down in *Mbogo & Another v Shah* [1968] EA 93 at page 96 where a single judge of this Court has exercised a discretion conferred onto the court by the rules of the Court of Appeal the full court shall, upon a reference to it, not interfere with the Judge's exercise of discretion unless the full Court is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and consequently arrived at a wrong decision or unless it is manifest from the application as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been or there would be injustice if his decision is not interfered with.

In an application like the one that was before the learned Judge it was imperative for the applicant to be truthful in his affidavit in support of the application as that would assist the court in arriving at a just decision.

Any falsehood in the applicant's affidavit or submission was likely to mislead the court and where the court is not satisfied with the explanation for the delay in seeking the extension the court may dismiss the application. We agree with the learned single judge's findings that the applicant was untruthful in his supporting affidavit as to when he learned of the decision from which he intends to appeal and therefore there is no excuse for the delay or whatever reason caused this inordinate delay of seven years has not been explained away. The judge exercised his discretion judicially. The upshot is that the application for extension of time to lodge an appeal fails and is ordered to be dismissed.

Dated and Delivered at Nairobi this 16<sup>th</sup> Day of March, 1990

**J.M. GACHUHI**

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**JUDGE OF APPEAL**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**Z.R. CHESONI**

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**Ag JUDGE OF APPEAL**