



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram: Platt, Gachuhi JJA & Masime Ag JA)**

**CIVIL APPLICATION NO NAI 143 OF 1987**

**BETWEEN**

**LYDIA WANJIRU MWANGI.....APPELLANT**

**AND**

**RAJNIKANT JOSHI.....RESPONDENT**

*(Application for extension of time to file an appeal from a Ruling of the High Court at Mombasa, Bhandari J)*

**RULING**

January 28, 1988, **Platt, Gachuhi JJA & Masime Ag JA** delivered the following Ruling.

There are before the Court two applications Nos 143 of 1987 and No 6 of 1988. In the first, the applicant Lydia Wanjiru Mwangi seeks an extension of time to lodge the record of appeal out of time. In the second, Rajnikant Joshi seeks to strike out the notice of appeal because a step has not been taken, namely, to lodge the record of appeal within time. Thus under Rule 80 of the Court of Appeal Rules the appeal may be struck out. In accordance with our usual practice both applications were heard together, the application for leave to extend time being heard first.

The Ruling of the High Court was given on July 3, 1987. It was a ruling on an application for review. Such a ruling concerns the nature of the review process rather than the fact that there was a consent judgment.

Notice of appeal was given on July 7, 1987. On July 9, copies of proceedings and ruling were bespoken. Unfortunately, Mr Gikandi failed to copy this request to the respondent. Had he done so, then under Rule 81 of the Rules, the time taken to obtain the copies would have been extended. It would then not have been out of time in all probability. But the proceedings were received on August 28, 1987 and sent back for correction. They were finally received on September 7, 1987. The full 60 days had been sent on July 7, 1987. Mr Gikandi then found his mistake and applied for extension of time on September 14, 1987. He had taken 67 days and in another sense he was 7 days late. Mr Gikandi takes full responsibility for the lapse. He blames nobody else.

Mr Khanna complains that the affidavit in support lacks particulars. It would of course have been as well to have included them. They were connected with the time Mr Gikandi sustained his mistake and the nature of the corrections he called for on the copies of proceedings.

But looking at the matter as a whole, we find that there is enough material upon which to make a just order, as is required by Rule 4 of the Rules.

The proper approach is to be found in *Gatti vs Shoosmith* [1939] 3 All ER 916 which was elucidated in *Palata Investments Ltd vs Sinfield Ltd* ( see the Times Law Report of May 28, 1985). It was then said:

“The previous practise of in relation to applications for leave to appeal out of time was for the Court to concentrate on the circumstances of the delay (See *Gatti*’s case above). In that case there had been a delay of a few days caused by the mistake of a legal adviser, and the Court of appeal held that it was a proper case for them to exercise their jurisdiction to grant leave.

..... having drawn attention to the old procedure, their Lordships expressed the opinion that in cases where the delay was very short and there was an acceptable excuse in the delay as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal would arise.”

We have often pointed out that this approach should guide us. Of course if the appeal has absolutely no chance of success no doubt that would be a factor to be borne in mind. Here, there is an arguable appeal. We accept Mr Gikandi’s apology for his mistake and grant his client an extension of time.

The Record of appeal shall be lodged in 30 days from todays date.

As a result, the application to strike out the appeal has been overreached.

The applicant must pay the costs of both applications.

**Dated and delivered at Mombasa this 28th day of January , 1988**

**H.G PLATT**

.....

**JUDGE OF APPEAL**

**J.M GACHUHI**

.....

**JUDGE OF APPEAL**

**J.RO MASIME**

.....

**AG. JUDGE OF APPEAL**