**IN THE COURT OF APPEAL**

**AT NYERI**

**(Coram: Hancox, JA (In Chambers)**

Civil Application No Nai 60 Of 1986

**(In the matter of an intended appeal)**

**BETWEEN**

**GIKARA KIRIAMBURI ……..…….…….. .....APPLICANT**

**AND**

**WAHOME GITHINJI ……..…….....**
**RESPONDENT**

(Application for extension of time within which to appeal from a judgment of the High Court of Kenya

at Nyeri (JS Patel, J) dated November 19, 1985

In

High Court Civil Appeal No 32 of 1983)

---

**RULING**

This is an application for extension of time within which to institute an appeal under rule 4 of the recently amended Court of Appeal Rules. Save for the passage of the application to the Registrar of the High Court for a copy of the proceedings and judgment, and that some of the delay has been caused by the illness of the applicant/intended appellant, there is scant information in the supporting affidavit, file on March 4, this year, as to the nature of the case, and the reasons why the appeal is said to be meritorious.

This is the main objection to the application taken by Mr Ndirangu, who has appeared throughout for the respondent to this application. I have accordingly perused the records of both the lower courts to ascertain the subject matter of the case and its passage through the various stages before this second intended appeal. Before going any further I would, however, make the same observation as was made by Potter JA, in the authority to which Miss Dar on behalf of the applicant, referred me in the course of her submissions urging me to grant this application.

In that case, *Mejrumnissa v Mohamed Parvez* ( No 2 ) [1979] KLR 234, which was decided when "sufficient reason" for extension of the time still had to be shown, the applicant was not personally or by his advocate guilty of any delay. The delay was entirely due to this Court's failure to supply the requested

copies of the proceedings. However, as in the case, the applicant did not obtain from the Registrar of the superior Court, from which the appeal was being preferred, a certificate of delay under the proviso to rule 81(1) of this Court's rules. Had he done so then very probably, the application would have been unnecessary, for there would have been an automatic extension of time, since the letter of request was correctly copied to the respondent in accordance with rule 81(2). I respectively agree, however, with Potter JA, that the failure to obtain a certificate of delay does not preclude an applicant from seeking an extension of time under rule 4, though, quite naturally, his task is made much easier if he does so.

The case originated in the Senior Resident Magistrate's Court at Nyeri as Civil Suit 127 of 1981. The present applicant sued the respondent alleging that the plot of land at Aguthi/Mungaria/342, which belonged to him, was given to the respondent and that plot no 341, in the same location, which belonged to the respondent, was given to him. He further alleged that the respondent had refused to have these matters rectified. The respondent disputed this, alleged that he had been misled by the applicant, and counterclaimed for orders that he be allowed to occupy plot 342 and that the applicant should move to plot 341, or alternatively, that the applicant should remain in 342 but yield up 2.4 acres thereof to 341 in which he the respondent would then remain. I observe that the pleadings were closed some three months before the advent of the Magistrates Jurisdiction (Amendment) Act 1981, which came into force on December 31, 1981 and which featured both in the subsequent application to set aside the arbitrator's award and in the judgment of the High Court on the first appeal delivered on November 19, 1985.

The case was, however, referred to arbitration by consent by the then Senior Resident Magistrate at Nyeri on May 26, 1982, and the award dated the September 7, was filed in Court on October 1, 1982. An application to set it aside was filed on October 22, 1982, (though, curiously, dated the November 2, 1982) , and this was heard and dismissed by Mr O'Connor, Senior Resident Magistrate, as he then was, on January 20, 1983, and he then entered the judgment in terms of the award which he summarised as follows:-

> "Aguthi/Mangaria/342 to remain registered in the name of Wahome Githinji, and Aguthi/Mungaria/341 to remain in the name of Gikaria Kariamburi. Gikaria Kariamburi to vacate plot Aguthi/Mungaria/342 on or before 30/6/83. Costs to defendant upto point of referral to arbitration."

Thus the respondent was substantially successful and the applicant then appealed against the dismissal of the application to set the award aside to the High Court by a Memorandum filed on October 21. 1983. A I said, this was dismissed by JS Patel J, on November 19, 1985. The Notice of Appeal was filed expeditiously, on November 22, 1985, and served on Mr Ndirangu, I am prepared to accept, for the purpose of this ruling only, on the same day. He has, however, not filed a notice of address for service as enjoined by rule 78(1)(a).

Having endeavoured to set out the history of the case, so far as it is relevant. I now turn to the merits of the instant application before me. As I said Mr. Ndirangu's main, and indeed only, objection was that no draft Memorandum of Appeal has been exhibited to the supporting affidavit and there is no other indication showing that there are good grounds of appeal, and, by the same token, whether there would be prejudice to one side or the other if the application is or is not granted. Miss Dar did not seek to get away from this but urged me to exercise my now unfettered discretion in her client's favour, nonetheless.

Mr Ndirangu cited to me the case of *Pollok House Ltd v Nairobi Wholesalers Ltd* [1972] EA 172 in which, on a reference to the Full Bench, the Court held not only that the delay of 55 days in applying for a copy of the record was unexplained and unreasonable, but also that it was impossible to say if any prejudice would occur as result of the granting of the application, for the reason that no information whatsoever had been given as to the nature of the case in which it was intended that an appeal should be preferred.

To this authority I would add a much earlier decision by the Court's predecessor in *Bhatt v Tejwant Singh and another* [1962] EA 497, in which Sir Owen Corrie Ag JA's judgment in the earlier case of *Shah v Jamnadass* [1959] EA 838 at p 840 was quoted as follows:-

> "Finally it is objected that the nature of the case which gives rise to the application should have been stated. This is in my view the most substantial ground of objection. The object of including r 9 in the rules of court is to ensure that the strict enforcement of the limitations of time for filing documents prescribed by the rules shall not result in a manifest denial of justice. It is thus essential, in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgement and of his reasons for desiring to appeal against it to enable the court to determine whether or not a refusal of the application would appear to cause injustice."

In *Bhatt's* case the court said:-

> "The rule laid down in the passage above quoted from *Shah v Jamnadass*, is a general but none the less salutary one, and advocates would be well advised to comply with it in all cases, both for the full information of the court and because failure to observe it may well result in their application being refused."

This case has been followed recently several times, and in particular in *Munywe Ribiro v Annah Wanjira* Civil Application NAI 46 of 1982. I again echo those words.

The discretion, however, under rule 4, could only be exercised before it was amended if sufficient reason was shown for the delay and consequent application for an extension. A study of most of the pre-1984 cases shows that this consideration weighed quite heavily with the single judges of appeal and full courts who were faced with this type of application. However in recent years there have been indications of a more generous view prevailing, particularly in land matters, which as was said in *John Kuria v Kelen Wahito* Civil Application NAI 19 of 1983, a decision of the Full Court, are always a sensitive issue.

In *Mehrunnissa v Parves (supa)* Potter JA was moved to exercise his discretion in favour of granting the application despite the fact that the applicant had given no information about the ruling appealed from or the grounds of appeal, and in doing so he expressly referred to *Bhatt v Tejwant Singh (supra)*. I am inclined to take the same view, particularly as the delay would have been covered by a certificate under the proviso had the applicant been minded to obtain it. I have gleaned sufficient information from the two lower court files to satisfy me that the appeal is not entirely without prospects of success.

For these reasons, then, I propose to allow the application and to extend the time for instituting the appeal to 21 days from today, that is to say by June 9, 1986. As in *Mehrunnissa*'s case and for the same reasons I order that the costs of this application will be the Respondent's in any event.

**Dated at Nyeri this 23rd day of May, 1986.**

**A.R.W.HANCOX**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**