



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 58 OF 1986

BETWEEN

BERNARD KIARIE.....APPLICANT

AND

BENSON KOAD NJOROGE..... RESPONDENT

**(Application for extension of time to file a notice of Appeal from a Judgment & decree, of the High Court of Kenya at Nairobi (Mbaya J.) dated 17.10.85
in
H.C.C.C. No. 2153 of 1979**

RULING.

This is an application for extension of time to file notice of appeal.

The applicant, a layman, was represented in the High Court suit. When the judgment was delivered in chambers of Mbaya J, he was outside. His advocate Mr Khaminwa did not convey the effect of the judgment to him. He learnt much later when he instructed his advocate to lodge an appeal. At this time the time for filing notice of appeal had ran out, still, the advocate did nothing. The applicant on his own, persued for the proceeding and instructed another advocate to institute the appeal on his behalf; hence the filing of this application. Before the application is heard, notice of appeal has been filed.

The applicant's contension is that the delay in filing the notice of appeal does not lie with him. The delay lay with his former advocate. This explains the delay and asks this court to exercise its discretion in his favour.

Mr Khanani's objection is simple in that the court is at disadvantage position because it cannot check the accuracy of the appellants contention or obtain anything from M/s Khaminwa and Khaminwa. He prays that this application be dismissed.

It is true that nothing is coming forth from Messrs Khaminwa and Khaminwa but before me is a statement on oath in a way of affidavit sworn by the applicant and which the counsel for the applicant relies. I have no way of doubting what has been alleged in the affidavit. This is not the first time allegations of this nature, comes before the court where, an applicant has alleged that the delay was caused by his advocate. There are several decisions by this court based on this allegation and the moment the matter comes to

court, the court has in most cases granted the application. Two decisions have been cited in this application where the court has been satisfied of the reasons for delay, in *George Muli Mwaravu vs Agnes Mwikali Mwaravu CA Nai 131/85* and *John Mochu Kariuki vs Kagiri Waweru and others CA Nai 113/85* and several others.

Under rule 4 of the rules of this court, the court has unfettered discretion to grant extension where it is satisfied that the cause of delay does not lie with the applicant. In the present case, the delay was caused by the previous advocate and not the applicant. In that case, the applicant should not be penalised for mistakes of another person, the agent.

The extension of time asked for is to validate the notice of appeal already filed out of time. Under the circumstances, I am satisfied that this application has merit. The time within which to file the notice of appeal is extended to April 30, 1986. The cost of this application will be costs in the appeal.

Any party aggrieved by this ruling may apply to the Deputy Registrar to refer this matter to the full court.

Dated at Nairobi this 3rd of July 1986.

J.M.GACHUHI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR