**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram:Hancox JA)**

**CIVIL APPLICATION NO NAI 56 OF 1983**

**BETWEEN**

**SAMUEL MBUGUA GITHERE …….....……APPLICANT**

**AND**

**KIMUNGU……RESPONDENT**

*(In an intended appeal from the High Court at Nairobi, Gachuhi J)*

**RULING**

This application is in two parts, the first to extend the time for filing the notice of appeal and the second to extend the time for instituting the appeal which, the applicant's notice of motion filed on November 15, 1983, states:

> "... shall be made to run from the date of receipt of the complete record from the High Court, with liberty to apply for further extension."

I take these in turn. As background to the first, there was an application before Kneller JA, in Civil Application NAI 21 of 1983, by Muita Njuguna, who was the defendant in High Court Civil Case No 67 of 1978, (with which I understand the case in which the present applicant was the defendant, High Court Civil Case 70 of 1978, was consolidated) for an extension of time to "lodge" the appeal in that case. This was dismissed on July 4, 1983, with leave to Muita Njuguna, *inter alia*, to file a fresh application to have the time for filing and serving notice of intended appeal extended, presumably because it had by that time been realized that the applicant had not even got to first base. That notice of appeal, or rather purported notice of appeal, was dated February 25, 1983, but not apparently filed in the High Court Registry until February 28, 1983. It was received in this registry on March 16, 1983. In answer to Kneller JA in that application Mr Wamae, the applicant's advocate, is recorded as having said, *inter alia*:

> "Notice of intended appeal lodged on February 28th, 1983, out of time by 14 days. Our clerk left our employment in between. I believe."

In the instant application, the notice of intended appeal against the same decision of Gachuhi J dated January 28, 1983, was, as Mr Lakha, who leads the submission for the applicant, said, dated February 4, 1983, filed in the High Court registry on February 16, 1983 and received in this registry on February 22, 1983. Thus, it was five days out of time. The reason advanced in Mr Wamae's affidavit in support of this application is that though the notice was prepared on February 4, 1983:

> "... due to some confusion on the part of the clerk to whom it was passed it was not filed until February 16, 1983, that is to say 5 days late."

Mr Lakha has argued that the new rule 4 of this Court's Rules applies, so that it is now not necessary to be satisfied that an applicant has shown "sufficient reason" to extend time, as formerly, and that I should not apply to this case the remarks which I made obiter in *Muita Njuguna v Samuel Mbugua Githere*, Civil Application NAI 33 of 1983, that is to say, between the same parties as led to Kneller JA's decision, and presumably pursuant to the leave he had given, on October 27, 1983, that a notice of appeal being a simple document, no more than a formal written information to the court of an intention to appeal, not dependent on preparation of the record or anything of that kind, (see Musoke JA in *Njagi v Munyiri* [1975] EA at p179) the court will look with less sympathy on it than on other applications to extend time.

In the affidavit in support of the application in case NAI 33 of 1983 (relating to the other applicant) Mr Wamae stated that it was this applicant's failure to pass on the result of the case (of which Mr Wamae had informed him by telephone immediately after the judgment of Gachuhi J) which led to the filing of that notice of appeal out of time, because he had no instructions, but that he nevertheless took steps towards the filing of the appeal, including the filing of the purported notice of appeal, "purely as a precaution". Although Mr Gathuru argued strongly that the old rule should apply to this application, since all the events to which it related had occurred before the coming into operation of the amended rule 4 on February 6, 1984, I am prepared to accept Mr Lakha's contention that I should apply the new rule, since it was clearly the intention that the court should, in dealing with applications which henceforth came before it, have unfettered discretion, and not be too rigidly bound by previous authority which might in certain cases work injustice to one or other of the parties. The previous authority of *Abdul Aziz Ngoma* [1976] KLR 61, which Mr Gathuru cited, a decision of this court's predecessor, was a strong one, Wambuzi P stating (not without sympathy for the appellant) that the court was bound by an earlier decision to hold that a procedural error on the part of an advocate (which would, of course, include that of his clerk) did not amount to sufficient reason for extending time to file the memorandum and record of appeal, and that consequently the court had no jurisdiction to do so. The present court, in *Paul Gachau v Stanley Gicharu Karau* Civil Application, NAI 2 of 1979, decided the same way, though there no reason at all appears to have been given for the delay. Nevertheless a more humane approach was already being taken two months earlier, notwithstanding the severity of the previous rule 4, in *Belinda Murai and others v Amos Wainaina*, Civil Application NAI 9 of 1978, where the advocate had through a mistake, failed to include copy of the formal order in the record. Madan JA said:

> "A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it, if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown, for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice."

Eighteen years earlier in *Shah Bharmal v Santosh Kumari* [1961] EA at p 681, Forbes JA had taken the view that despite the then more restricted discretion given in East Africa than in England by order LVIII rule 15 of the Rules of the Supreme Court, the mistake of a legal adviser could amount to sufficient cause, though in that case there was held to be no mistake but merely inordinate delay, a factor which weighed with the court in *Gachau v Karau* (*supra*).

A parallel situation as regards the amendment of the rules might be said to have occurred in England in relation to extension of time. Under the former order LVIII rule 15 RSC, no appeal could be brought after the expiration of fourteen days after the decision "Except by special leave of the Court", held in *Gatti v Shoosmith* [1939] 3 All ER 916, to mean that some special reason (stronger wording, perhaps, than

sufficient reason) had to be shown. In *In re Coles and Ravenshear* [1907] 1 KB 1, the Court of Appeal held they were regretfully bound by decided authority to hold that the mistake of a solicitor's clerk did not amount to a sufficient ground for the granting of special leave. However by 1939 the discretion, by then conferred by order LXIV rule 7 RSC, had become unfettered, and the principles upon which a mistake should be regarded were stated by Greene MR in *Gatti v Shoosmith* at p 919 to be as follows:

> "On consideration of the whole matter, in my opinion, under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case."

Now that the discretion is a free one the only question is whether, on the facts of this case, that discretion should be exercised in favour of the applicant. The discretion is to be exercised judicially upon principles which are well understood, remembering that the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress, and that the court should not be so far bound and tied by the rules, which are intended as general rules of procedures, as to be compelled to do that which will cause injustice in a particular case. This is in effect, the submission of Mr Lakha, who stated that his client will abide by such terms as the court makes if he succeeds.

I agree that where there has been a *bona fide* mistake, and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut out from being heard on his appeal; though it must, again, be remembered that this case has been heard on its merits in the High Court.

In my judgment the applicant has not shown in this case that he should have the unfettered discretion exercised in his favour. As Mr Gathuru says, the nature of the confusion which existed in the mind of the clerk was not specified in the affidavit of Mr Wamae, neither did the clerk himself swear an affidavit. Mr Lakha suggested in argument that the clerk did not realize the notice of appeal had to be filed within fourteen days. In the other case, it was stated that "our" clerk left the advocate's employment. If it was the same clerk in both cases the advocate could have said that the clerk had left and, if this was the case, could not be contacted to swear an affidavit. If it was not the same clerk, then he is presumably still with the firm and could state precisely why he did not file the notice of appeal in time. There can be no suggestion, as in the other application, that the advocate could not obtain instructions from the client. Why did he therefore not file the notice of appeal as a precaution as he did (albeit belatedly) in Muita Njuguna's application? It is a simple document, probably the simplest of all appeal documents, requiring no particular ingenuity or perspicacity, and could easily have been filed almost as Musoke JA said in *Njagi v Munyiri* (*supra*), as a matter of course.

This application was not filed until November 15, 1983, some ten and a half months after the decision of Gachuhi J, and over ten months after the period allowed had expired. As Forbes JA said in *Bharmal v Kumari* (*supra*), in relation to an application for leave to file grounds for affirming a decision, it is incumbent on a party who is out of time to make application for an extension of time within a reasonable time. The possibility of injustice to the applicant was prayed in aid by Mr Lakha. But what about injustice to the respondent? If this simple and formal document is not filed and served on him, is he not entitled to assume that the other party has accepted the High Court decision and order his affairs accordingly? In all the circumstances, and particularly in view of the delay which has taken place, I am not prepared to exercise my discretion in favour of granting an extension of time to file the notice of appeal. In those circumstances, it is not necessary, and not right, for me to deal with the second part of the application to institute the appeal out of time, which as Mr Lakha says, is now a matter of discretion, rather than the automatic extension, by exclusion of the period certified by the registrar for the preparation and delivery of the record, under the proviso to rule 81(1). Neither have I felt it necessary to indicate upon whom the

notice of appeal should have been served under rule 76(1).

For these reasons, I dismiss the application with costs.

**Dated and delivered at Nairobi this 6th day of March, 1984.**

**A.R.W HANCOX**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**