



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OKWENGU, J.A. (IN CHAMBERS)**

**CIVIL APPEAL NO.340 OF 2014**

**BETWEEN**

**ELIZABETH NJERI NDERI AND**

**SARAH WANGITHI MWANGI (Suing as the Legal Representatives of the  
Estate of PETER NDERI KINYUA (Deceased)).....APPLICANT**

**AND**

**HIGHWAY CARRIERS LIMITED.....RESPONDENT**

*(Being an application for extension of time to serve Notice & Record  
of Appeal out of time in an Appeal from Ruling/Orders of the High  
Court of Kenya at Nairobi (Onyancha, J.), dated 24th September 2014*

*in*

*H.C.C.A. No.11 of 2010)*

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**R U L I N G**

[1] By a Notice of Motion dated 17th October, 2016, the applicants **Elizabeth Njeri Nderi** and **Sarah Wangithi Mwangi**, the legal representatives of **Peter Nderi Kinyua** (Deceased), have moved this Court for orders of extension of time within which to serve the Notice of Appeal, Memorandum of Appeal and Record of Appeal on the respondent in regard to an appeal that the applicant intends to lodge against a ruling delivered by the High Court on 24th September, 2014. The applicants also seek a further order that service of the aforementioned documents be deemed to have been properly done.

[2] The application is grounded on an affidavit sworn by the applicant's advocate Kimandu Gichohi and grounds that have been stated on the face of the motion. The explanation given for the delay is that although the notice of appeal and the record of appeal were filed in Court within the required time, service upon the respondent was not done within time; that the delay was caused by the relocation of the offices of the applicants' advocate which necessitated movement of their files; and that the advocates inadvertently only realized almost two years later that service had not been effected upon the respondent.

The applicant therefore urges the Court to exercise its discretion in his favour.

[3] The respondent objected to the motion urging the Court that the delay of two years was not only inordinate and inexcusable but also prejudicial to the respondent. He urged the Court to follow its decisions in *Ransa Company Ltd & 2 Others v Manca Francesco* [2015] eKLR; and *Boy Juma Boy & 2 Others v Mwamlole Tchappu Bwana & Another* [2014] eKLR, in which the Court declined to use the overriding objectives to excuse delay or mistakes of counsel, on the ground that the overriding objectives are intended to facilitate the expeditious disposal of appeals and that parties and their advocates are under a duty to assist the Court to further that objective by playing their roles as expected. Finally, the respondent maintained that the applicants intended appeal has little chance of success, as the applicants were unable to provide critical evidence necessary to prove their case.

[4] This Court has been called upon to exercise its discretion as a single judge to extend time for filing a notice of appeal and also grant leave to appeal out of time. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No. Nai. 255 of 1997) (unreported); this Court stated thus regarding how such discretion is to be exercised.

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.*

[5] It is not disputed that the applicant actually filed the notice of appeal and the record of appeal within the required time. In fact, the notice of appeal was filed on 29th September, 2014, which was just 3 days after the ruling delivered on 26th September, 2014; and the record of appeal filed on 28th November, 2014 which was within the stipulated period.

[6] Rule 77 requires the notice of appeal to be served on the respondent within 7 days from the date of lodging the notice. The respondents were however only served about 2 years after the filing of the notice. The period is rather long. However, the applicant has given a plausible explanation that there was a mix-up in the office of his advocate caused by the fact that the advocate relocated his office. This explanation has been confirmed by in an affidavit by the applicant’s advocate. The explanation may sound rather simplistic, but it is a fact that with movement of office confusion regarding files is not unusual.

[7] It is clear that the applicant had given instructions to appeal in this matter and that the process of appeal was initiated within time. In my view, this is a clear case in which the failure to serve the documents within time was due to the mistake of his counsel.

[8] Unlike the case of *Ransa Company Ltd & Others v Manca Francesco* (supra), in which the documents were filed out of time and no application for leave was sought, the documents here were filed in time and it is only service that was not effected, and the applicant is in fact seeking extension of time. Similarly, in *Boy Juma Boy & 2 Others v Mwamlole Tchappu Mbwana & Another* (supra), no notice of appeal was filed. I therefore find the two cases cited in which the court was dealing with application for striking of the appeal is different from the present position in which a single judge is exercising unfettered discretion under **Rule 4** of the Court Rules.

[9] The applicants had filed a memorandum of appeal raising 5 grounds. The suit concerned compensation to the estate of the deceased and whether the applicants were dependants of the deceased and an issue arose as to whether the applicants were dependants of the deceased. There is an arguable issue as to whether the learned judge reconsidered and evaluated the evidence that was adduced in the lower court. It is only fair and just that the applicant be given an opportunity to canvass his appeal.

[10] In the circumstances, I allow the application and extend time for serving the notice of appeal and the record of appeal. I order that the notice of appeal, memorandum of appeal, and record of appeal that have

already been served on the respondent, shall be deemed as properly filed.

[11] I award costs of this motion to the respondent.

**Dated and delivered at Nairobi this 19th day of October, 2017.**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**