



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPEAL (APPLICATION) NO. 58 OF 2011**

**BETWEEN**

**1. S. K. MACHARIA**

**2. ROYAL CREDIT MEDIA .....APPLICANTS/APPELLANTS**

**AND**

**STANDARD CHARTERED BANK LIMITED.....RESPONDENT**

*(An application for leave to amend the heading of the notice of appeal dated 28<sup>th</sup> April, 2010 and lodged in the High Court in Milimani H.C.C.C. No. 1713 of 2001 and extension of time within which to file and serve the record of appeal lodged in this Honourable Court on 24<sup>th</sup> March, 2011 against the ruling of High Court of Kenya at Nairobi (Kimaru, J.) dated 23<sup>rd</sup> April, 2010*

**in**

**H.C.C.C. No. 1713 of 2001)**

**\*\*\*\*\***

**RULING**

In the application by notice of motion expressed to have been filed under **section 3A** and **3B** of the Appellate Jurisdiction Act and **rules 4** and **44** of the Court of Appeal Rules 2010 the applicants seek the following orders; namely:-

***“1. That this Honourable Court be pleased to grant leave to the applicants to amend the heading of the Notice of Appeal dated 28<sup>th</sup> April, 2010.***

***2. That if prayer 1 is granted the Amended Notice of Appeal annexed to this application be deemed to have been duly and properly filed and served.***

***3. That this Honourable Court be pleased to extend the time within which the applicant file (sic) the record of appeal lodged in the Honourable Court on 24<sup>th</sup> March, 2011.***

***4. That if prayer 3 above is granted the Record of Appeal filed on 24<sup>th</sup> March 2011 be deemed to have been duly and properly filed and served.***

**5. That the costs of this application be in the cause.”**

The application was based on the grounds set out therein; namely:

**“That:**

- (i) Due to a typing error on the heading of the Notice of Appeal dated 28<sup>th</sup> April 2010 the name of the 2<sup>nd</sup> appellant/Applicant is given as ‘Royal Media Services’ instead of ‘Royal Credit Limited’.**
- (ii) The Record of Appeal lodged in this Honourable Court on 24<sup>th</sup> March, 2011 was lodged 4 days out of statutory period.**
- (iv) This Honourable court has unfettered discretion to allow an amendment on any document.**
- (v) This Honourable court has unfettered discretion to extend the time within which to file and serve the Record of Appeal and to deem a Record of Appeal filed and served out of time as properly filed and served.**
- (vi) That the overriding objective provided under sections 3A and 3B of the Appellate Jurisdiction Act confers on the Honourable Court considerable latitude in the interpretation of the law and rules and in the exercise of its discretion always with a view to achieving any or the attributes or all attributes of the overriding objective.**
- (vii) The overriding objectives of the Act is expeditious hearing of the Appeal with minimal costs to the parties.**
- (viii) It would achieve the objective of the Appellate Jurisdiction Act if this application was allowed without waiting for the appeal to be struck out and then the affidavits to apply for leave to file a fresh one.**
- (ix) The intended appeal has good chances of success if the application is granted.**
- (x) This Court has held that in application for extension of time to file and serve notice and record of appeal out of time the court considers delay in time as from the time the previous notice or record of appeal was struck out, no application has been made to strike out the notice or record of appeal and the same have not been truck out.**
- (xi) That it is in the interest of justice that the application be allowed as no prejudice has been occasioned to the respondent due to the 4 days delay in filing the Record of Appeal and a typing error of the name of the 2<sup>nd</sup> appellant/applicant on the heading of the Notice of Appeal.**

The supporting affidavit deposed to by one *Wamucii Nyotah*, one of the advocates in the firm of *M/s Kamau Kuria & Kiraitu Advocates* for the applicant who was in charge of the preparation of the notice and record of appeal herein. The averment in the affidavit are in similar manner as the grounds set out on the body of the application except he admits that he did not supervise the court clerks in the office to ensure the record of appeal was filed in time and that there was a delay in the High Court in preparing and giving a certificate of delay to the firm, which was another reason for the delay in filing the record of appeal by four days.

The application was heard on 5<sup>th</sup> October, 2011 when **Mr. Kamau Kuria**, learned counsel for the appellant told the Court that the reason why the 2<sup>nd</sup> applicant was described by the wrong title was because the firm acts for Royal Media Services in other matters, hence it was an inadvertence on the part of the advocates for the applicants. On the delay to file the record of appeal out of time by four days, he submitted that one of the advocates in his firm failed to supervise the preparation of the record in order to ensure it was filed within the prescribed time. According to him sufficient reasons had been given for the

required amendment to the notice of motion and leave to file the appeal out of time.

**Mr. Oraro**, learned counsel for the respondent did not have any serious objection to the prayer to correct the name of the 2<sup>nd</sup> applicant on the Notice of Motion but felt that the record had serious omissions and irregularities which go to the merit of the appeal. He named some of them as failing to number the pages of the application. He also submitted that although there were three plaintiffs in the plaint the notice and record of appeal only named two plaintiffs which was a substantial omission going to the merit of the appeal. That though Madhu Paper International was in liquidation, the official Receiver had not been enjoined in the record of appeal. In that event counsel was skeptical about the success of the appeal.

This application was made under **rules 4** and **44** of the Court of Appeal Rules. Mr. Oraro did not see any problem with the prayer under **rule 44** and I do not see any either. However, in respect to the prayer under **rule 4** of the Rules, Mr. Oraro doubts the probability of success of the appeal for failure on the part of the applicant to enjoin the official Receiver to the Notice and/or Record of Appeal. Although Madhu Paper International Limited (*in liquidation*) is shown as a party to the appeal, it cannot stand on its own and on this basis he submits that the application must be rejected.

The factors to be considered in an application under **rule 4** have been propounded in many decisions of this Court – see ***Mutiso v Mwangi – Civil Application No. Nai. 255 of 1997*** and ***Mwangi v Kenya Airways Ltd [2003] KLR 486***, amongst others. They include the period and reasons for the delay, possibility of success of the appeal if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration are all relevant though not exhaustive by any means.

But under the Rule also this Court has unfettered discretion to grant or not to grant the order sought considering all the circumstances of the case. And apart from this, **sections 3A** and **3B** of the Appellate Jurisdiction Act confers on this Court similar discretion to apply the overriding objectives of the Act and the rules made there under to facilitate “the just, expeditious, proportionate and affordable resolution of Appeals governed by the Act and the aims which the Court should strive to achieve in matters before it in furthering the overriding objectives, like the just determination of proceedings.

Taking all this into account and that the delay in this application was four days and that the disputed amount is quite huge, I feel I should exercise my unfettered discretion in favour of the applicant on the following conditions:

***(a) That within one (1) month from the date of this order, the applicant should make an application to enjoin the official Receiver to the Notice and Record of Appeal.***

***(b) That costs of this application either agreed or taxed shall be paid to the respondent within ten (10) days of either agreement or taxation.***

Failure to comply with any of the above conditions, this application to stand dismissed.

***Dated and delivered at Nairobi this 27<sup>th</sup> day of January, 2012***

**D. K. S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**