



**IN THE COURT OF APPEAL  
AT NAIROBI**

**CIVIL APPLICATION NO. NAI. 366 OF 2009**

**CORAM: ONYANGO OTIENO, J.A. (IN CHAMBERS)**

**BETWEEN**

**CATHERINE NJUNGUINI KANYA  
RAPHAEL JONAH MUTAHI  
VIOLET MUMBUA NDAMBUKI.....APPLICANTS**

**AND**

**COMMERCIAL BANK OF AFRICA.....RESPONDENT**

*(Application for leave to serve record of appeal out of time, from the ruling and decree of the High Court of Kenya at Nairobi (Kimaru, J) dated 21<sup>st</sup> March, 2009*

**in**

**H.C.C.C. NO. 531 OF 2002)**

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

**RULING**

On 25<sup>th</sup> May, 2006, *Ransley J (as he then was)* delivered judgment dated the same date in respect of Civil case NO. 1939 of 1999 and Civil case No. 1661 of 2001 which were consolidated and heard together. **CATHERINE NJUGUINI KANYA** the first applicant in this notice of motion, was the plaintiff in civil case No. 1939 of 1999 whereas **RAPHAEL JONAH MUTAHI** and **VIOLENT MUMBUA NDAMBUKI** second and third applicants were the plaintiffs in civil case NO. 1661 of 2001. **COMMERCIAL BANK OF AFRICA**, the respondent was the defendant in both cases. The three applicants felt aggrieved by that judgment. They moved to this Court and filed notice of appeal timeously. However, that notice of appeal was not served within the requisite period. They filed notice of motion in this Court pursuant to **Rules 4** and **42** of this Court's Rules in which they sought extension of time to serve that notice of appeal. That application was placed before a single Judge of this Court (*Tunoi, JA as he then was*) who after hearing it dismissed it stating in pertinent part as follows:-

***“It is my view that prolonging the settlement of the dispute may be prejudicial to the parties. Moreover, further prejudice will be caused to the respondent if the time to serve the notice were extended.”***

The applicants were not amused by that decision, but apparently, they did not seek a reference or if they sought it, it is not in the record. They however proceeded back to the High Court by way of a notice of motion dated 21<sup>st</sup> December, 2007 brought under **Order 44 rules 1(1)** and **(2)** of the Civil Procedure

Rules and **Section 3A** and **80** of the Civil Procedure Act. Chapter 21 Laws of Kenya and sought a review of the judgment delivered by *Ransley J* on 25<sup>th</sup> May, 2006, and setting aside of that judgment. That application came up before *Kimaru J* who in a lengthy ruling dated and delivered on 27<sup>th</sup> March, 2009, found that there was no error or mistake apparent on the face of the subject judgment that could be reviewed and thus dismissed the application.

The applicants were still not satisfied with that ruling. They instructed *M/s Khaminwa & Khaminwa, Advocates* to lodge appeal against that ruling on their behalf. On 8<sup>th</sup> April, 2009, that firm of advocates filed notice of appeal on their behalf. That was filed within the time required. They apparently also applied for copies of the proceedings and of the ruling in time. The respondent states in affidavit sworn by its Human Resources Operations Manager, *Ian Irungu* and it is not denied, that the High Court notified the parties' advocates that the copies of the proceedings were ready vide a letter dated 15<sup>th</sup> June, 2009. It would appear from paragraph 12 of the applicant's affidavit in support of the application and annexure exhibit RTM 3B that *Khaminwa & Khaminwa, Advocates* for the applicants paid for and received the copies of proceedings and ruling on 29<sup>th</sup> July, 2009. No action was taken on the matter till 22<sup>nd</sup> December, 2009 when this notice of motion was filed. It is dated 18<sup>th</sup> December, 2009 and it seeks two orders as follows:-

**“1. That there be an extension of time to allow the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants to file and serve their records of appeal on the intended appeal out of time.**

**2. That costs of this application be provided for.”**

It is brought on grounds:-

**“1. That the applicants have an arguable appeal with good prospects of success.**

**2. That the learned Judge erred in law by failing to appreciate the import of the award granted by the Industrial Court in Cause 77 of 1999.**

**3. That the applicant (sic) had done all in their power to avail the proceeding and ruling in the case.**

**4. That unfortunately their representing counsel then on record did not prepare and file the record of appeal either in time or at all.**

**5. That there is no prejudice, likely to be occasioned to the respondent herein were this appeal to be allowed.**

**6. That it is only fair, just and mete that the applicants herein be given an opportunity to be heard so that the matter be ultimately concluded.”**

There is an affidavit in support of the application sworn by the second applicant which depones to what I have set out above and blames their former advocates, *Khaminwa and Khaminwa* for having failed to file the record of appeal timeously notwithstanding that that firm received copies of proceedings and ruling in good time. He depones at paragraphs 15 and 16 as follows:-

**“15. That efforts to have *Khaminwa & Khaminwa, Advocates* present the intended appeal came to naught culminating in the writing of a letter by the 2<sup>nd</sup> applicant to the said advocate's firm, withdrawing his instructions and demanding the return of his file. Annexure marked RTM-6 and annexed hereto.**

**16. That the said advocate firm acceded to the 2<sup>nd</sup> applicant's request and handed over the file, leading to the instructions of Messrs Oduk & Company Advocates conducting this appeal on the 2<sup>nd</sup> day of November, 2009.”**

The respondent opposes the application vide a replying affidavit sworn by its Human Resources Operations Manager, *Ian Irungu* as we have indicated above. He depones in this affidavit that as the proceedings were ready by 15<sup>th</sup> June, 2009, the record of appeal should have been filed by 18<sup>th</sup> August, 2009 being 60 days from 19<sup>th</sup> June, 2009. It must be noted that 19<sup>th</sup> June, 2009 is when the respondent's

advocates received the copies of the proceedings and whereas the time according to them started running from that date, nonetheless as for the applicants they received the proceedings according to the receipt annexed to that affidavit on 29<sup>th</sup> July, 2009 and much as I feel they ought to have acted faster since the letter from court to them informing them that the proceedings were ready was dated 15<sup>th</sup> June, 2009, however, that date 29<sup>th</sup> July, 2009 is in my view, the date that time started to run out against them as that was the date they received the proceedings. The respondent also depones in that affidavit that pursuant to *Ransley J's* judgment they had released the subject title deeds to the third applicant, had forwarded payments due to the third applicant, and had set aside amounts due to the first and second applicants following the set off as per the relevant judgment. I understand that to mean that the respondent would be prejudiced were the application to be granted.

*Miss Kwinga*, the learned counsel for the applicants in her submission to me relied on the supporting affidavit and blamed the former advocates of the applicants for the delay that necessitated the application seeking extension of time and urged me to invoke the provisions of **Sections 3A** and **3B** of the Appellate Jurisdiction Act to allow the application notwithstanding the delay. She referred me to the case of ***ITHAGI KAHIHIA & ANOTHER vs. EDWARD GIKONYO & ANOTHER*** Civil Application No. Nai. 350 of 2004 (NYR. 34/04) and two other cases. *Mr. Fraser* the learned counsel for the respondent narrated the history of the entire saga and submitted that as *Oduk & Company, Advocates*, took on the conduct of the matter on 2<sup>nd</sup> November, 2009 and this application was filed on 22<sup>nd</sup> December, 2009, there was still an unexplained delay of 50 days. He further submitted that the intended appeal has no prospects of success as the decision of *Kimaru J.* was based on sound principles as there was indeed no mistake on the face of the judgment of *Ransley J.* that required review.

I have anxiously considered the record, the application, the affidavit both in support of it and in opposition to it, together with the annexed affidavits, the submissions by both learned counsel, the ruling of *Kimaru, J.* and the law. This application is brought under **rule 4** of this Court's Rules. The law is now well settled in regard to the principles that would guide the court when considering such application. The court in considering such an application exercises unfettered discretion, but like all such discretionary powers, it must be exercised judicially and not upon Judge's own whims nor capriciously. In order to ensure that the discretion is exercised judicially, the principles that guide court have been set out in several decisions of this Court one of which is the ruling in the case of ***MAJOR JOSEPH MWETERI IGWETA VS. MUHURA M'ETHARE & ATTORNEY GENERAL*** Civil Appl. No. Nai. 8/00 (UR) where this Court stated:-

***“The application made under rule 4 of the rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed, and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might seriously be defeated if there was laxity in respect of compliance to them.”***

The above factors cannot be exhaustive in view of the fact that the court hearing such an application has unfettered discretion. Other cases decided by this Court such as those of ***LEO SILA MUTISO vs. ROSE HELLEN WANGARI MWANGI***, - Civil Application No. Nai. 251 Of 1997. ***KENYA TEA DEVELOPMENT AUTHORITY vs MICROFILM EQUIPMENT LTD & ANOTHER***, Civil Application NO. Nai. 221 of 1999 (UR) and ***HUSAMUDIN GULAMHUSSEIN POTHIWALLA AND OTHERS vs. KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY LIMITED & OTHERS*** Civil Application No. Nai. 286 of 2003, to mention but a few, all echo the same principles.

In the application before me, the facts are straightforward and indeed not in dispute. These are that

*Kimaru J's* ruling sought to be appealed was delivered on 27<sup>th</sup> March, 2009. Notice of appeal was filed on 8<sup>th</sup> April, 2009 and that was in time as I have stated. *Khaminwa & Khaminwa, Advocates* applied for and received copies of proceedings on 29<sup>th</sup> July, 2009. They should have filed record of appeal by 27<sup>th</sup> September, 2009 that being the last day of the 60 days allowed under the rules for filing record of appeal after the date the notice of appeal was filed or after the receipt of proceedings. They did not do so with the result that any further delay after 27<sup>th</sup> September, 2009 required to be explained. This notice of motion was filed as I have stated and as is agreed by both parties on 22<sup>nd</sup> December, 2009. That is 85 days delay. The applicants blame *Khaminwa and Khaminwa Advocates* for that entire delay period. But is that correct? In my view, the delay attributed to *Khaminwa & Kaminwa Advocates* is only the delay upto and including 2<sup>nd</sup> November, 2009. Thereafter, the delay from 2<sup>nd</sup> November 2009 upto 22<sup>nd</sup> December, 2009 cannot be put on *Khaminwa & Khaminwa*, as by 2<sup>nd</sup> November, 2009 they had passed on the file to the applicants who had instructed the present advocate to act for them. That delay of 50 days from 2<sup>nd</sup> November, 2009 to 22<sup>nd</sup> December, 2009 needed to be explained. I note that *Mr. Fraser* did not address me on the delay occasioned by *Khaminwa & Khaminwa, Advocates* and in my view that was proper as though *Khaminwa and Khaminwa Advocates* were applicant's agents, nonetheless, I take the view that on matters such as the time limits set by Rules of the Court, the agent's mistakes should not be visited upon the clients for those are technical matters that clients cannot comprehend and are some of the reasons why they hired the lawyer. I therefore will accept the delay between 29<sup>th</sup> July, 2009 when copies of record were released to the former advocates of the applicants as properly explained by their statement on oath that it is their former advocate who let them down. That explanation is accepted as *Mr. Fraser* also did not address me on that aspect. However, the delay between 2<sup>nd</sup> November, 2009 and 22<sup>nd</sup> December, 2009 i.e. delay of 50 days has not been explained. I gave *Miss. Kwinga* time to explain it and she had no explanation. I am prepared to accept that part of this time was taken in processing and preparing the record of the notice of appeal although that is not alleged in the affidavit before me but if I were to allow fifteen (15) days for that exercise, I still have over thirty (30) days unexplained delay.

On the issue of whether the intended appeal is arguable or not, without dealing with the merits of the appeal, I also have difficulties as there is no draft memorandum of appeal annexed to the application. Upon my own reading of the ruling of *Kimaru J*, I see no *prima facie* grounds that can help me decide on that issue.

As to the issue of prejudice, the respondent has set out in its affidavit the action they have already taken on the judgment of *Ransley J* and as observed by *Tunoi, JA (as he then was)* in the part of his ruling I have reproduced above, it would appear that granting the application would seriously prejudice the respondent as was observed that earlier on.

*Miss Kwinga* asks me to invoke the provisions of **Article 159** of the constitution as well as **Section 3A** and **3B** of the Appellate Jurisdiction Act. In my view, these provisions were not meant to aid an indolent party. They were meant to ensure justice to a party who has taken proper action to comply with the law but finds technicalities as stumbling block on his way to justice and cases where unnecessary delay and expenses would ensue. They are certainly not as has been said time and again panacea to every case where a party has failed to comply with the law as is in this case, neither were they meant to replace the Rules.

From what I have stated above, it is clear that I have no basis for the exercise of my discretion in this matter. It lacks merit. It is dismissed with costs to the respondent.

**DATED and DELIVERED at NAIROBI this 2<sup>nd</sup> day of MARCH, 2012.**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**