



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 177 OF 2008

SAMEER JETHWA.....APPELLANT/RESPONDENT

AND

1. FRANCESCO DI NELLO

2. SACHA FRANCESCA.....RESPONDENTS/APPLICANTS

(An application for enlargement of time within which to file and serve a notice of motion

application seeking to strike out the record of appeal filed on 26th August, 2008

In

H.C.C.C. No. 681 of 1997)

R U L I N G

This is an application under **rule 4** of the Court of Appeal Rules (*Rules*) for extension of time for filing and serving an application under **rule 80** of the Rules for striking out the record of appeal. The present application is made by the two respondents in **Civil Appeal No. 177 of 2008**.

Sameer Jethwa, the appellant filed a suit in the superior court against the two respondents/applicants claiming general and special damages for injuries sustained in a road traffic accident.

The superior court found the respondents liable for negligence and awarded the appellant special damages. However some heads of damages claimed by the appellant were dismissed. The appellant being aggrieved filed a notice of appeal and on 27th August, 2008 filed the present appeal which in essence seeks the enhancement of general damages. The record of appeal was served on the advocates for the respondents on 29th August, 2008. By **rule 80** of the Rules an application to strike out a notice of appeal or appeal should not be brought after the expiry of thirty days (30) from date of service of the record of appeal on the respondent.

As the application is opposed the applicant has to demonstrate, among other things, that the intended application to strike out the appeal is not frivolous; that the delay is not inordinate and that the

respondent will not suffer undue prejudice if the application is allowed.

The draft application to strike out the appeal shows that the intended application would be supported by four grounds namely, that:

- (i) *the decree contained in the record of appeal is fatally defective as it erroneously stipulates the special damages awarded in Australian dollars as \$414,202.00 instead of \$414.22 awarded in the judgment,*
- (ii) *that documents not relevant to the record of appeal have been included in the record of appeal;*
- (iii) *that the record of appeal has omitted several essential documents including the Further-Re-Amended Plaintiff.*
- (iv) *that the record of appeal does not include relevant pleadings and the ruling of **Owuor, J.A.** extending time for filing the notice of appeal.*

It is not appropriate, in my view, to investigate in detail the merits of the four grounds of the intended application. It is apparent however that the decree erroneously indicates that the superior court awarded Australian dollars 414,202.00 for medical expenses instead of Australian Dollars 414.22 which was in fact awarded. That is a major error and substantially enhances the special damages awarded. It is just that the applicant should be given an opportunity to be heard on this ground.

This application was filed on 8th October, 2008 about 8 days after the expiry of the time limited by proviso to **rule 80**. The applicant's advocates explanation for the delay is that the application for striking out the appeal was prepared in time but was not filed in time due to inadvertence. The application which was drawn is annexed to the application and is dated 24th September, 2008 well within the time stipulated by proviso to **rule 80**. I am satisfied that the present application was filed without much delay and the delay of 8 days is excusable.

The respondent's counsel deposed in the replying affidavit that the appellant who is paraplegic had to wait for six years to file the appeal and that the present application prejudices him in that it would delay the hearing of the appeal.

It is not apparent that the intended application would delay the disposal of the appeal. The appeal was filed on 27th August, 2008. It has no hearing date and it has not been certified as urgent. It is unlikely that it would be due for listing before the intended application is disposed of. Any prejudice can be minimized by a direction that the intended application be disposed of on priority basis.

For foregoing reasons I exercise the Court's discretion in favour of the applicants. I extend the time for lodging an application for striking out the appeal and order that the intended application be filed and served within 14 days from the date hereof. I further direct that the application when filed be heard on priority basis.

The costs of this application shall be costs in the intended application.

Dated and delivered at Nairobi this 17th day of March, 2010

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR