



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 223 of 2009

MECHANICAL ENGINEERING PLANT 1ST APPLICANT
ERNEST MUNGAI KAMAU 2ND APPLICANT
FLORENCE NJERI MUNGAI 3RD APPLICANT

AND

STANDARD CHARTERED BANK KENYA LTD RESPONDENT

(Application for extension of time to lodge and serve Notice of Appeal and Record of Appeal in an intended Appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts at Nairobi (Azangalala, J) dated 12th March, 2008

In

H.C.C.C. No. 92 of 2007)

RULING

On 17th July, 2009 this Court struck out as incompetent Civil Appeal No. 60 of 2008. The appeal was by Mechanical Engineering Plant Ltd., Ernest Mungai Kamau and Florence Njeri Kamau, the applicants before me who seek an order under **rule 4** of this Court's rules, extending the time within which to file and serve a fresh notice of appeal and thereafter to file and serve a record of appeal against the decision of the superior court given on 12th March 2008, in High Court Civil Case No. 92 of 2007. In the aforesaid appeal, Standard Chartered Bank Kenya Ltd., was the respondent, and it is the respondent in the application before me. The appeal was struck out because the person who filed the record of appeal described himself as an advocate, yet as at the date he filed the record he did not possess a current Advocates Practising Certificate. By dint of the provisions of **section 9** of the Advocates Act, **Cap 16** of the Laws of Kenya such a person was not competent to act as an advocate. Consequently, whatever he did when acting as such was a nullity and hence the striking out of the aforesaid appeal.

The applicants are desirous of restarting the appellate process. They brought this application on 24th July 2009 praying that the time within which to file a notice of appeal and a record of appeal be enlarged and so should the time for serving the said documents.

It is now well settled that a party whose appeal has been struck out as being incompetent may apply for

extension of time within which to file and serve not only a fresh notice of appeal but also a fresh record of appeal. When that happens the period before the order striking out the appeal may only be taken into account where it is intended to show a tendency on the part of the applicant of being dilatory. Otherwise this Court's view has always been that the striking out of the appeal serves as sufficient punishment for any acts or omissions which led to the striking out of the appeal. I believe it is on that basis that the applicants approached this Court with the present application.

This application, as I stated earlier was filed on 24th July, 2009, about 7 days after the applicant's appeal was struck out. It is opposed by the respondent which relies on acts and omissions relating mainly to the struck out appeal. For those, the applicants were punished when their appeal was struck out. They lost all the money they had spent in hiring counsel, preparing documents and the court fees which they paid to lodge the appeal.

The applicants filed this application promptly. It is my view that this is a fit case for me to exercise my unfettered discretion under **rule 4** above, to extend the time. Accordingly, I extend the time by ten (10) days from the date hereof for the applicants to file and serve a fresh notice of appeal and a further thirty (30) days from the date of service of a notice of appeal, within which to file and serve a record of appeal.

As regards costs, it is clear from the circumstances that the applicants are the party to pay the costs of the motion. Accordingly I order that the costs of the motion dated 23rd but filed in Court on 24th July, 2009, be borne by the applicants to be taxed if not agreed.

Dated and delivered at Nairobi this 9th day of October, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.