



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**  
**Civil Appli. Nai 58 of 2008**

**CHARLES AGINA.....APPLICANT**

**AND**

**1. SHIPMARC LTD**

**2. J. H. NEILSEN.....RESPONDENTS**

**(An application for extension of time to file notice and record of appeal out of time in an intended appeal from a judgment and decree of the High Court of Kenya at Mombasa (Mwera, J) dated 16<sup>th</sup> September 2005**

in

**H.C.C.C. No. 40 of 2003)**

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**R U L I N G**

Before me is an application by way of Notice of Motion expressed as brought under:

***“Rule 4 & 42 Court of Appeal Rules as made under section 5 of the Appellant (sic) Jurisdiction Act”.***

In this application the applicant seeks the following orders:-

**“1. THAT this Honourable Court be pleased**

**to enlarge time to grant leave to the Applicant to file a Fresh Notice of Appeal and Record of Appeal in respect of the High (sic) of Kenya in Mombasa by Hon. Justice J. W. Mwera dated 16<sup>th</sup> September 2005,**

**2. THAT cost of this application.”**

The Application is brought on the following grounds:-

**“1. THAT the Applicant desires to Appeal against**

the judgment aforesaid.

2. **THAT the applicant did file an Appeal within time but the record of appeal had defects, which led to it being struck out.**

3. **THAT the Applicants intended Appeal has very high chances of success, as it raises serious issues of law and fact.”**

The foregoing simply means that this is an application under **Rule 4** of the Court of Appeal Rules which provides:-

**“4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

I should add here that the application was supported by an affidavit sworn by Charles Agina, the applicant in which the background to this matter is given which in essence is the factual position which cannot be seriously disputed.

When the application came up for hearing before me on 15<sup>th</sup> July 2008 Mr. J. O. Magolo appeared for the applicant while Mr. Kinyua appeared for the respondents. In his submissions Mr. Magolo relied on the supporting affidavit of the applicant and went on to emphasize that the earlier appeal was struck out by consent on 24<sup>th</sup> January 2008 and that the applicant would like to start the appeal process afresh. Mr. Magolo also explained that the earlier appeal was struck out because the record of appeal did not include certain relevant documents.

In opposing the application Mr. Kinyua appeared to have no problem with the delay between the time the appeal was struck out and the filing of this current notice of motion. He, however, had difficulties with the application as framed in that if allowed we may end up with two notices of appeal. He also complained about late payment of costs by the applicant as ordered earlier by this Court.

I have considered the submissions by counsel appearing for the parties herein. It is now settled that an application under Rule 4 of this Court’s Rules a single Judge of the Court is called upon to exercise his unfettered discretion but like any other judicial discretion, that discretion must be exercised upon reasons. The matters to be considered, whether to grant an extension of time are first the length of delay, the reason for the delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent, if the application is granted.

In ***PATEL vs. WAWERU AND 2 OTHERS*** [2003] KLR 361 at pages 362 – 3 this Court had the following to say in respect of **Rule 4** of the Court’s Rules:

***“This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. NAI. 251 of 1997 this Court stated:***

***‘It is now 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 whether to grant an extension of time are first the length of the delay. Secondly, the reasons 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.’”***

The Court is to be guided by the foregoing principles. What are the facts in this application? It is not in dispute that the applicant’s earlier appeal to this Court was struck out on 24<sup>th</sup> January 2008. In its

order striking out the applicant's earlier appeal this Court stated:

**“The application that was coming up for hearing this morning is one dated 26<sup>th</sup> June 2006. Essentially this is an application to strike out an appeal. Mr. Magolo, the learned counsel for the appellant/respondent informs us that he has discussed the matter with Mr. Kamundi, the learned counsel for the respondents/applicants and that they have reached a consent to the effect that the appeal be struck out with costs to the respondents.**

**In view of the foregoing, we order that the Civil Appeal No. 103 of 2006 be and is hereby struck out with costs which have been agreed at Shs.12,000/= to the respondents”.**

In view of the foregoing if the applicant wanted to file an appeal he had to start the appeal process afresh by seeking extension of time in which to file a fresh notice of appeal and record of appeal. Hence this application before me – see **KUWINDA RURINJA & COMPANY LIMITED v. KWINDA HOLDINGS LIMITED & OTHERS** – Civil Application No. NAI 243 of 1998 (unreported).

In the present application it has been shown that the earlier appeal was struck out on 24<sup>th</sup> January 2008 and the applicant decided to pursue the matter by bringing this application. The application was dated 28<sup>th</sup> February 2008 but lodged in the sub registry of this Court in Malindi on 3<sup>rd</sup> April 2008.

As Mr. Kinyua for the respondent conceded that there was no inordinate delay I am of the view that since the time from the appeal was struck out (24<sup>th</sup> January 2008) and the lodging of the notice of motion (3<sup>rd</sup> April 2008) could be attributed to putting everything else in order this can hardly be described as inordinate delay in the circumstances of the case. As the applicant had already exercised his right of appeal which was only thwarted on technicalities and having considered the judgment of the superior court, I think it cannot be disputed that the applicant's intended appeal raises arguable issues. But let me add a rider here that an arguable appeal, just like a triable issue, does not mean that the appeal shall definitely succeed - see **PATEL v. E.A. CARGO HANDLING SERVICES LTD** [1974] E.A. 75.

I was not told by Mr. Kinyua how the respondents will be prejudiced but in any event an award of costs would be sufficient in the circumstances of this case.

In view of the foregoing I am satisfied that this is a proper case in which I should exercise my discretion in favour of the applicant. Accordingly, I grant the prayers sought in this application and order that leave is granted to the applicant to file a notice of appeal within seven (7) days from the date hereof and lodge the record of appeal within thirty (30) days from the time the notice of appeal is filed. I further order that the costs of this application which I assess at Kshs.10,000/= be awarded to the respondent which amount should be paid within 30 days in default execution to issue.

Dated and delivered at Mombasa this 18<sup>th</sup> day of July, 2008.

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**