



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI. NAI NO. 160 OF 2008 (UR 101/2008)**

**DEPLHIS BANK LIMITED**

**(NOW ORIENTAL COMMERCIAL BANK LTD) ..... APPLICANT**

**AND**

- 1. CHANN SINGH CHATTHE**
- 2. SATTWANT SINGH CHATTHE**
- 3. SUKHWINDE SINGH CHATTHE**
- 4. RAGHBIR SINGH CHATTHE all t/a AGRICULTURAL CONTRACTORS**
- 5. CHARANJIT SINGH HAYER**
- 6. RAJNIKANT KARSANDAS SOMAIA ..... RESPONDENTS**

**(Being an application for extension of time to file and serve a notice of appeal out of time in an intended appeal from an order/ruling of the High Court of Kenya at Kisumu (Tanui, J.) dated 4<sup>th</sup> May 2005**

**in**

**H.C.C.C. NO. 164 OF 2003)**

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**R U L I N G**

On 11<sup>th</sup> July 2008, I delivered a ruling in Nairobi, on two consolidated applications to wit **Nos. 119 of 2008** and **No. 117 of 2008**, which applications raised same or similar issues of law and fact. Both applications were for an order extending time within which to file and serve a fresh notice of appeal and a

record of appeal against two different rulings by Tanui, J. given on 4<sup>th</sup> May 2005, in **High Court Civil Case No. 164 of 2003**. The parties in both applications were the same and so were their respective capacities as litigants.

In the order against which an appeal is intended Tanui J. summarily dismissed the counter-claim of Delphis Bank, now referred to as Oriental Commercial Bank Limited, against six named persons who were the plaintiffs in the suit. Delphis Bank is the applicant herein, and seeks an order extending the time within which to file and serve a fresh notice of appeal and a record of appeal. The applicant had earlier brought an identical application which was struck out as incompetent when it came before me on the same day with **Civil Application Nos. 117 and 119 of 2008** respectively, on 27<sup>th</sup> June 2008. The affidavit in support of it was not commissioned. The application before me is based on the same grounds as those which were proffered in support of the struck out application. The only addition are reasons for the omission to commission the affidavit. The same grounds advanced in support of this application are generally the same ones which were relied upon in support of **Civil Application Nos. 117 and 119 of 2008** respectively.

Mr. Wasuna appeared for the respondents and his submission, on the main, was that deliberate omissions to follow rules of court ought not and should not be countenanced; the decision against which an appeal is intended was made in 2005, and the delay in realizing the fruits of the litigation is prejudicial to the respondents more so because the decree is a money decree; there is the risk of not getting the witnesses if there will be further delay and that the court should consider the arguability of the intended appeal because the applicant should have but did not pursue its remedy under **O.IXB rule 4(1)** of the Civil Procedure Rules and that being so no appeal lies.

Had the applicants' earlier application not been struck out I would have consolidated it with the aforesaid two and granted it. The omission to commission its supporting affidavit denied the applicant the orders it seeks now. I do not wish to rehash the reasons I gave for allowing the two applications. I was exercising judicial discretion and in my view the applicant satisfied me at that time that it was deserving of an order extending the time within which to lodge and serve a notice of appeal and a record of appeal.

Have the circumstances changed? The applicant realized its mistake. It was penalized on costs. It brought this motion within a week of the striking out of its earlier application. Its counsel, then appearing for it, Rita Kingara Mwangi has satisfactorily explained the failure to commission the affidavit. She had caused all other copies of it to be commissioned and the copy for the court record was omitted by mistake of counsel and which should not be visited on the applicant.

It is now trite law, that an applicant whose appeal or application has been struck out can restart the process if he or it has reasonable grounds for explaining the delay or omission in taking the essential step according to the rules of Court. The applicant is desirous of exercising its undoubted right of appeal. In exercise of my unfettered discretion under **rule 4** of the Court's Rules, I am minded to allow the application on the basis of the reasons I gave in my aforesaid ruling of 11<sup>th</sup> July 2008. The applicant has 14 days from the date hereof to file and serve a notice of appeal, and 30 days thereafter to file and serve the record of appeal, failing which this application will stand dismissed. The costs of the application to the respondents, to be agreed, failing agreement to be taxed.

Dated and delivered this 31<sup>st</sup> day of October 2008.

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**