



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal Appli 159 of 2005**

SHITAL BIMAL SHAH..... 1<sup>ST</sup> APPELLANT/APPLICANT

ANJLI BHARAT SHAH..... 2<sup>ND</sup> APPELLANT/APPLICANT

SARUPA SHAH .....3<sup>RD</sup> APPELLANT/APPLICANT

AND

AKIBA BANK LIMITED .....1<sup>ST</sup> RESPONDENT

ANIL LAXMICHAND SHAH .....2<sup>ND</sup> RESPONDENT

PARAS VINOD SHAH .....3<sup>RD</sup> RESPONDENT

PONANGIPALLI V.S. RAO .....4<sup>TH</sup> RESPONDENT

KOLLURI V.S.K. SASTRY .....5<sup>TH</sup> RESPONDENT

(An application for extension of time to serve notice of appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Nairobi (Emukule, J.) dated 4<sup>th</sup> May, 2004

in

H.C.C.C. NO. 567 OF 2004)

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**RULING**

Before me is an application made under **rule 4** of this Court’s rules for the following order:

**“1. The time for service of the Notice of Appeal lodged in the High Court on 12<sup>th</sup> May, 2005 be extended to: -**

**(a) 25<sup>th</sup> May 2005 in respect of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents;**

**(b) 30<sup>th</sup> May 2005 in respect of the 2<sup>nd</sup> Respondent and;**

(c) 26<sup>th</sup> May 2005 in respect of the 3<sup>rd</sup> Respondent.

**SO THAT: the said notice of appeal be deemed to have been served in time and further that this appeal be deemed to be lodged timeously and/or properly.”**

The last limb; “*and further that this appeal be deemed to be lodged timeously and/or properly*” was withdrawn orally at the hearing of the application as it was superfluous.

The reason for seeking such order is straightforward and is expressed in the supporting affidavit sworn by **Njeri Mucheru–Oyatta**, the advocate seized of the matter. She swore on 07.07.05 as follows: -

**“3. THAT after filing the notice of appeal, the same was retained by the superior court for signing by the Deputy Registrar until 25<sup>th</sup> May 2005. Upon collection of the notice of appeal on 25<sup>th</sup> May 2005, service of the same was affected on the advocates for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents on the same day, the 3<sup>rd</sup> Respondent was served on the next day, 26<sup>th</sup> May 2005, and the 2<sup>nd</sup> Respondent was served on 30<sup>th</sup> May 2005, 5 days later.**

**4. THAT I understood then, that the time prescribed for service of the Notice of appeal under rule 76(1) of the Court of appeal Rules began to run after the Notice of Appeal has been signed by the Registrar and released to us for service. I was however reliably informed on 4<sup>th</sup> July 2005, by senior state counsel, Mr. Pheroze Nowrojee, whom I consulted in this matter, that the time began to run from the date of filing of the Notice of Appeal and therefore, the Notice of appeal was served out of time.**

**5. THAT I was not aware then, that service of the Notice of appeal could have been effected without the deputy Registrar’s signature otherwise I would have had the service effected in time.”**

Simply paraphrased, the advocate admits that it was her error in construing the relevant provision of the law that led to the omission now sought to be rectified. Is that reason enough to grant the application?

I have an unfettered discretion to exercise under **rule 4** since the stricture of “*sufficient reason*” was removed by amendment to the rule in 1984. That does not mean however that my decision should be made on whim or caprice. As was stated by this Court in **Grindlays Bank International (k) Ltd v George Barbour Civil app. No. NAI. 257/95** citing with approval **Ratnam v Cumarasamy & Anor [1964] 3 All ER 933** per **Lord Guest**: -

*“The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”*

The only material submitted for my consideration as stated earlier is the mistake of counsel, but to enure for the benefit of the applicant, it must be excusable. Learned senior counsel Mr. Nowrojee, who led Ms. Mucheru-Oyatta for the applicant, submitted that the mistake was made innocently in the construction of a provision of the law. In support of that submission he cited his own blunder some 25 years ago when he made an identical error. That was in **Gulamhusen Cassam & Anor. v Shashikant Sachania & Anor. [1982-88] 1 KAR 24.** As the advocate for the intending appellant in that case, Mr. Nowrojee filed a notice of appeal timeously but failed to serve it on the respondent contending that he could not collect the notice of appeal filed in court because the registrar had not signed the second portion of it. He served it nearly two weeks out of time. In dealing with the subsequent application for extension of time, Madan JA (as he then was) stated: -

“Rule 75 clearly shows that notice of appeal may be served on the party directly affected by the appeal without it being signed by the registrar, either before or within seven days after lodging it. There is no

prohibition in the Rules against serving notice of appeal even before it is lodged in the superior court. Form D shows that notice of appeal has to be sent to the registrar of the High Court which can only be done without his signature or first, signed either by the appellant himself or is advocate. Therefore, on the face of it, there was no excuse for not serving notice of appeal within time.

The applicants' legal adviser Mr. Nowrojee freely admitted that it was an error of judgment on his part to think that notice of appeal had to be signed by the registrar before service. An error of judgment on the part of a legal adviser may help to built up sufficient reason under Rule 4 to induce this court to exercise its discretion to extend time for the doing of any act under the rules of court."

The decision was, of course, made when there was a requirement under **rule 4** that the applicant must show "*sufficient cause*". The error was this time round not committed by Mr. Nowrojee and I would have found it difficult to find it excusable if it was. Not that Ms. Mucheru-Oyatta, who is relatively young in the profession, should be readily excused. There was a 25 year-old existing decision of the Court of Appeal, and I believe there are others, on the exact legal point that perplexed her and she ought to have been diligent in her research or in making the consultation she ultimately made with senior counsel for advise. The consultation was made more than one month later on 04.07.05 when it was confirmed that the three respondents were served late.

Learned counsel for the respondent Ms. Malik does not dispute the facts stated in the supporting affidavit as there is no affidavit in reply. She does not pretend that advocates are so well learned that they will not make mistakes of law. Her objection to the application is rather that after the filing of the notice of appeal and the record of appeal, if there was a failure to take an essential step in that process, the appeal is for striking out. Thereafter the applicant may apply to have extensions of time granted to comply with the omissions made the first time round. In Ms. Malik's submission, **rule 4** does not allow for extensions of time to deem a record that is already filed in contravention of the rules to have been properly filed and served. In response to that submission, Mr. Nowrojee submitted that the court has the discretion to enlarge time whether to file or serve a document and the deeming of filing and service within time is a consequence of enlargement of time. The application made in this matter is not about filing, which was within time, but about service. The notice of appeal may, if this Court enlarges time, either be served again or be deemed to have been served on time when it was.

I have considered the objection made to the application and I think, with respect, that the construction placed on **rule 4** by Ms. Malik is a misreading of the rule. It is pertinent to reproduce it here:

**"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."** – emphasis is supplied.

So that, it matters not whether the essential step for which enlargement of time is being sought was discovered after the filing of the record or other document in issue. If the court is inclined to enlarge time, there would be no impropriety in deeming the essential step as having been done within the time as extended. I would overrule that objection.

That leaves the consideration whether the mistake of counsel in this matter is excusable. Such mistakes come in all shapes and sizes, as it were, but some have been rejected by this Court, such as total inaction by counsel disguised as a mistake. The most memorable discourse on the subject was again from Madan JA (as he then was) in **Murai v Wainaina (No. 4) 1982 KLR 38**:

"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

The delay in serving the three respondents with the notice of appeal was 6, 7 and 11 days respectively. The respondents were certainly not misled that the applicant was not intent on pursuing the appeal and if they were, they did not challenge the record of appeal soon after on that ground or at any rate, before the applicant filed the application now before me on 12.07.05. The delay in all the circumstances is not inordinate and the prejudice, if any, caused on the respondents may be recompensed in payment of costs.

Accordingly I exercise my discretion in favour of the applicant and grant the application as prayed in prayer (1) save for the prayer that the appeal be deemed to have been lodged timeously which prayer was withdrawn. I further order that the costs occasioned by this application assessed at Shs 15,000/= shall be borne by the advocate seized of the matter, Ms. Njeri Mucheru-Oyatta personally and shall be paid within 14 days. In default execution shall issue against the advocate.

Those are my orders.

*Dated and delivered at Nairobi this 17<sup>th</sup> day of March,. 2006.*

**P.N. WAKI**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**