



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

**Civil Application No. 314 of 2005**

1. PAUL NJOROGÉ
2. JOHN MACHUA
3. SIMON NJOROGÉ
4. THOMAS KAMUYU
5. HUNTER GITHUA ..... APPLICANTS

**AND**

1. THE ATTORNEY GENERAL
2. REGISTRAR OF SOCIETIES
3. THE CHIEF NGECHA LOCATION
4. MANASSEH NG'ANG'A
5. ISAAC GICHEHA
6. PATRICK N. NDABI
7. PAUL MUTHEE KAMAU
8. JOSEPH NGUGI NGOTHO
9. DONALD GITAU KAMUYU
10. FRANCIS GITHUTHA
11. BENARD CHEGE GACHERU ..... RESPONDENTS

*(Application for leave to file record of appeal out of time in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 22<sup>nd</sup> day of June, 2005*

in

**H.C.MISC.C. NO. 90 OF 2004)**

## RULING

This is an application under **rule 4** of the Court of Appeal Rules (the Rules) for leave to file a record of appeal out of time from the judgment of Angawa J. dated 22<sup>nd</sup> June, 2005.

A notice of appeal was filed in time on 27<sup>th</sup> June, 2005. A letter was written on the same day to the Registrar of the High Court requesting a copy of the proceedings in the superior court but that letter was not copied to the respondents and no certificate of delay was issued. In these circumstances the applicants were not entitled to the benefit of the proviso to **rule 81** of the Rules.

The record of appeal should therefore have been lodged not later than 60 days after the lodging of the notice of appeal on 27<sup>th</sup> June, 2005. No record of appeal has in fact been lodged as yet. The notice of motion now before me was lodged on 17<sup>th</sup> November 2005 which is nearly three months after the record of appeal should have been lodged. This application seeks an order that leave be granted to file of the record of appeal within 21 days of the order on the application being made.

The length of delay sought to be excused is therefore approximately three months.

The reason for that delay proffered by the applicant was that there were negotiations between the parties aimed at reaching an amicable settlement. These negotiations are described in paragraphs 15 to 21 of the supporting affidavit sworn by Bishop Paul Njoroge on behalf of the applicants which paragraphs read as follows:-

***“15. That in the months of July, 2005 one of my preachers Mr. Samuel Mwangi Kamau told me that he was informed by the fifth and sixth respondents that he should approach me and inform me that the present 4<sup>th</sup> and 11<sup>th</sup> respondents were willing to settle all cases in court and forget all differences existing between the applicants and them so long as I and other applicants transferred to them the properties where their followers attend church services, and so long as I allowed them to split from Heroes of Faith Christian Fellowship Church and form their own independent church.***

***16. That on receiving the information I consulted the applicants and we agreed to the proposal and we agreed for the two groups to meet and to discuss the details.***

***17. That in mid July 2005, two pastors namely Mr. Samuel Mwangi Kamau and Mr. Simon Njoroge Miringu on my instructions went to Njabini to see the other group about the fine details of settling the dispute and they talked to the 7<sup>th</sup> 6<sup>th</sup> 4<sup>th</sup> 10<sup>th</sup> respondents including others namely William Gichuki, John Gatheru and Mr. Ichoho and it was agreed that they would first consult Christian followers before making a final commitment.***

***18. That at the end of July, 2005 the 7<sup>th</sup> respondent rang me and asked me if I would be willing to go to Njabini in Kenale area to meet his group to engage in the final deligations (sic, presumably delegations) and I agreed.***

***19. That at the beginning of August 2005 I and the 5<sup>th</sup> applicant and the preacher Samuel Mwangi Kamau went to Njabini and met the 6<sup>th</sup> respondent and his wife, the 7<sup>th</sup> respondent and his wife and the fifth respondent and his wife and it was agreed as follows:***

***(a) All suits both actually existing and contemplated would to cease or be withdrawn (sic? withdrawn).***

***(b) The 4<sup>th</sup> to 11<sup>th</sup> respondents and their followers would form their own church independent from Heroes of Faith Christian Fellowship.***

(c) Both parties would engage a neutral advocate to make a list of all of the properties of Heroes of Faith Christian Fellowship to enable division of the same among the two groups and I would ensure that whatever properties to be taken by the Respondents would be transferred to them.

(d) Each group would take a copy of the agreement to its Lawyer for safekeeping.

20. That at the end of August 2005 the 7<sup>th</sup> Respondent rung (sic) the preacher Mr. Samuel Mwangi Kamau and informed him that the 4<sup>th</sup> to 11<sup>th</sup> respondents would not honour the agreement made as per paragraph 21 herein above and they would rather hold elections as per the Judgment of lady Justice Angawa dated 22<sup>nd</sup> June 2005. This is what preacher Samuel Mwangi Kamau told me and I verily believe to be true.

21. That the applicants including me would have made the application for leave to file record of appeal out of time but for the discussions that were held as is stated in the preceding paragraphs.”

This account of the alleged negotiations relied upon by the applicants as the principal reason for the delay in filing the record of appeal was flatly denied in the affidavit in reply sworn by Manasseh Ng’ang’a the 4<sup>th</sup> Respondent.

I consider that it was a risky strategy for the applicants to delay filing the record of appeal on the strength of verbal negotiations, which do not appear to have been reduced to writing at any material stage. It would have been prudent to have complied with the requirements laid down in the Rules while the alleged negotiations were ongoing and to have confirmed their existence in writing at some stage.

As it is I am not in a position in which I can make any meaningful decision as to who is telling the truth as to the existence of the alleged negotiations. The burden of proving their existence is upon the applicants who now wish to rely upon them and I am of the view that this burden has not been discharged.

In these circumstances I consider that I should treat the delay between the expiry on about 27<sup>th</sup> August 2005 of the 60 days from the lodging of the Notice of Appeal to the filing of the current application before me on 17<sup>th</sup> November 2005 as being inadequately explained. This is a period of about two and a half months.

I do not consider that the applicants will be unduly prejudiced by having to fall back on carrying out elections in compliance with the constitution of the Church known as **Heroes of Faith Christian Fellowship Church**.

For the above reasons and in the exercises of my discretion under **rule 4** I hereby dismiss the application with costs to be borne by the applicant.

**Dated and delivered at Nairobi this 10th day of March, 2006.**

W. S. DEVERELL

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR