



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**CIVIL APPEAL 352 OF 2005**

**GERPHAS ALPHONSE ODHIAMBO.....APPLICANT**

**AND**

**FELIX ADIEGO.....RESPONDENT**

*(An application for extension of time to file a notice of appeal out of time from the ruling and decision of the High Court of Kenya at Kisumu (Tanui, J.) dated 27.09.05*

**in**

**H.C.C.C. NO. 16 OF 2002)**

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**RULING**

The notice of motion before me seeks an order for extension of time, under **rule 4** of the rules of this Court within which to serve a notice of appeal filed on 05.10.05. The intended appeal is against the ruling of the superior court (Tanui, J.) made on 27.09.05 at Kisumu and therefore the filing of the notice of appeal was timeous. But service of it was made on 13.10.05 which, by dint of **rule 76** of the rules, was one day out of time. That is why this application is made.

On the face of it, that delay is not in inordinate, but the discretion donated under **rule 4** is not for exercise whimsically. As I stated in **Fakir Mohammed v Joseph Mugambi & 2 others** Civil Application Nai. 332/04 (Nyr. 32/04) (ur):

**“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38.”**

The period of delay, however short, must go in tandem with the explanation for it. Without any such explanation there would be no basis for exercise of discretion. An attempt has been made in the affidavit in support of the application to offer some explanation for the delay and it is only one. Learned counsel

for the applicant, Mr. Otieno swears that the court file disappeared after the notice of appeal was lodged on 05.10.05 and was not available until 13.10.05 when the notice was collected and served. But the basis of his knowledge is derived from information received from his court clerk who was dealing with the file and there is no affidavit from the court clerk or an explanation why he could not state the information personally. Indeed this was one of the major attacks made on the application by learned counsel for the respondent, Mr. Mwamu. The other was that this application was itself filed after inordinate delay as it was not filed until 13.12.05, which is two months since the notice of appeal was lodged. Mr. Mwamu also submitted that the intended appeal has, in any event, no chances of success and it would be futile therefore to grant the extension of time sought.

Mr. Mwamu cannot be faulted for raising those issues because they are germane to this application. An affidavit, by definition, is evidence given on oath and is subject to the provisions of the ***Evidence Act, Cap 80*** – see ***section 2(2)***. Admissibility of hearsay evidence must therefore be shown to comply with the provisions of that Act. Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all. Even where exception is made to ***section 2(2)*** of the ***Evidence Act***, as it is in interlocutory proceedings under the ***Civil Procedure Rules, Order 18 rule 3(1)***, the need to ensure that facts are proved by a person or persons who have personal knowledge of such facts is closely guarded. This Court interpreted that provision in **Kenya Horticultural Exporters [1977] Ltd v Pape (trading as Osirua Estate)** [1986] KLR 705 where it stated:

**“Order XVIII rule 3(1) of the Civil Procedure Rules is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words “may contain” suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove.”**

The requirement of supporting documents as relates to applications before this Court are stated in ***Rule 43***, thus:

**“Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.”** – emphasis supplied

I see no reason, as none is stated, why the court clerk who had personal knowledge of the disappearance of the court file could not swear the supporting affidavit as required under our rules. I will disregard the affidavit in that regard.

More importantly, there is total lack of any relevant material to explain the delay occasioned in the filing of this application. It cannot simply be ignored or waived capriciously as it reflects on the applicant’s diligence. I am told in the affidavit in reply, that it is the same lack of diligence that resulted in the striking out of the appeal pending before the superior court for want of prosecution. This I am unable to discount since the applicant has said nothing about it, either in a subsequent affidavit or in submissions before me. There is no material placed before me either, to assess the relevant factor relating to the chances of the appeal succeeding. Not even the nature of the case is disclosed, and it seems to me, that the applicant was presumptuous about the success of his application. As was stated by this Court in **First American Bank of Kenya Ltd. & Anor v Grandways Venture Ltd Civil Appl. NAI. 173/99 (ur)**:

**“In the instant case there is no affidavit in support by the advocate who allegedly committed the mistake. Nor is there any material by way of any explanation. As a matter of common sense, though not making it a condition precedent, the Court will want to take into account the explanation as to how it came about that the applicants found themselves with an appeal that was incompetent. If the omission was deliberate and not due to accident the Court would, in our view, be unlikely to grant an extension. But, again, with respect, there was no material before the learned single Judge. Nor was there any material before her to show that the omission was the**

**result of any inadvertence or accident to enable her to exercise her discretion.**

**We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the Court that despite their default, the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants have not discharged.”**

Each case of extension of time must obviously depend on its own facts. But those facts should be made available by the applicant for consideration. I am afraid in this matter I do not find the material on which I ought to base my discretion fairly, and I consequently dismiss the application with costs.

*Dated and delivered at Kisumu this 19<sup>th</sup> day of June., 2006.*

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR