



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**  
**Civil Appli 133 of 2005**

**TRANS NATIONAL BANK OF KENYA.....APPELLANT**

**AND**

**HASAM SAID AMDUN.....RESPONDENT**

*(Appeal from the judgement of the High Court of Kenya at Mombasa*

*(Maraga, J.) dated 11<sup>th</sup> February, 2005*

**in**

**H.C.C.C. NO. 156 OF 1998)**

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**RULING**

The applicant, Trans National Bank of Kenya, was 1<sup>st</sup> defendant in Mombasa High Court Civil Case No 156 of 1998, with Hisham Said Hamdun as the plaintiff and the Attorney General the 2<sup>nd</sup> defendant. Judgment in the suit was pronounced on 11<sup>th</sup> February, 2005, but the applicant contends that it was not notified of the terms of the judgment until 21<sup>st</sup> March, 2005, by which date the time for lodging a notice of appeal had expired. It blames its then advocate Buruka Obonyo of Buruka Obonyo & Co Advocates, for the delay in giving it the full terms of that judgment.

In the application before me for an extension of time within which to file a fresh notice of appeal, expressed to be brought under **rule 4** of the Court of Appeal Rules, the applicant prays that I exercise my unfettered discretion under that rule and enlarge the time within which it should lodge a notice of appeal. Jacqueline Makiya Onsando, the Legal and Human Resources Manager of the applicant bank has sworn the affidavit in support of the application and deposes in that affidavit, *inter alia*, that she repeatedly demanded from their erstwhile advocates some information as to the terms of the judgment without success. It was not until after she pestered him that he was able to give the information she was looking for. She also deposed that she had to seek the services of their present advocates who upon perusing the court record advised her that an appeal was necessary. Mr U. Khanna for the applicant submitted on its behalf that since the applicant’s former advocates were to blame for the delay in lodging a notice of appeal, the applicant should not suffer for that mistake. He cited the case of **Kiarie v Njoroge [1986] KLR 412** in support of that preposition.

The case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi** Civil Application No. Nai 255 of 1997, lays down the principles which guide the Court in an application under **rule 4** of the Court Rules. In that matter this Court rendered itself thus:

**“ It is now well 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 in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for 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.”**

I have gone through the affidavit in support of this application. It is quite clear from it that the applicant was aware by about 21<sup>st</sup> February, 2005 that there was a judgment against it. It might not have been aware of the terms thereof. However, there was nothing to prevent it from checking the court record for the judgment to appreciate its terms and effect. There is no explanation given on this, and Mr Khatib for the respondent was therefore right when he submitted that the respondent did not explain why it did not give instructions as to the filing of a notice of appeal.

Besides, from 21<sup>st</sup> March, 2005 when the applicant says it learnt of the terms of the judgment, there was a lapse of a month before this application was filed. The applicant contends that it took time before they got second opinion on the need for an appeal. The law does not give allowance to parties to obtain legal advise. It is upon litigants to act within the time allowed by the law to take such essential steps in a matter. Additionally, that delay is not blamable on the applicant’s former advocate.

Another issue which arises from this application is the fact that on 7<sup>th</sup> April, 2005, before this application was filed, the applicant filed, out of time, without leave a notice of appeal. That notice is still on record and it is not proper, in my view, to allow the filing of another notice of appeal.

In the result, I find no basis for exercising my discretion in favour of the applicant and therefore decline to extend time as prayed. The applicant’s application is accordingly dismissed with costs.

**Dated and delivered at Mombasa this 21<sup>st</sup> day of July 2006.**

S.E.O. BOSIRE

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR