



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civ Appli 34 of 2006**

**ELIZABETH CHEPTALAM NDIWA ..... 1<sup>ST</sup> APPLICANT**

**JOHN CHEMWANGON NDIWA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ELIZABETH JEMUTAI NDIWA ..... RESPONDENT**

*(Being an application for extension of time for the Applicants to lodge and serve Notice of Appeal and Record of Appeal out of time from the judgment of the High Court of Kenya at Eldoret (Nambuye, J) dated 16<sup>th</sup> January, 2002*

**In**

**H.C. P & A No. 72 of 1995**

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**RULING**

Both Elizabeth Cheptalam Ndiwa and John Chemwangon Ndiwa, the 1<sup>st</sup> and the 2<sup>nd</sup> applicants herein, ask me under **Rule 4** of the Court of Appeal Rules, to exercise my unfettered discretion conferred by that rule and enlarge for them the time within which they are to lodge and serve upon the respondent Elizabeth Jemutai Ndiwa, the notice of appeal and the record of appeal. The applicants propose or intend to appeal against the decision of Nambuye, J. which was made way back on 16<sup>th</sup> January, 2002. They lodged a notice of appeal against the decision on 29<sup>th</sup> January, 2002; that was within the fourteen days prescribed under **Rule 74(2)** of the Court's Rules. That notice of appeal has neither been withdrawn nor struck out by the Court. It is still subsisting and I do not know why the applicants should want to file a fresh one. Be that as it may, though the discretion conferred by **Rule 4** is unfettered, yet the Court has settled certain perimeters within which it is to be exercised. One of those perimeters is that where there has been a delay of whatever period, some explanation for the same must be furnished. The judgment, as I have said, was delivered on 16<sup>th</sup> January, 2002; the present motion for enlargement of time was not filed in this Court until 7<sup>th</sup> February, 2006; that is a period of some four years. What explanation is offered for that delay?

First, it is said that upon the judgment being delivered, the applicants applied to the learned trial Judge for leave to appeal to this Court. The motion for leave to appeal was dated 12<sup>th</sup> February, 2002, and was argued on 8<sup>th</sup> March, 2002. The ruling was, however, not delivered until 4<sup>th</sup> April, 2003. Mr. Cheruiyot, learned counsel for the applicants, told me, and Mr. Ngala for the respondent concurred in this, that no

leave to appeal was required. I do not think I am called upon to decide on the issue of whether leave to appeal was or was not required. It is agreed that the application for leave to appeal was in fact filed, heard and determined. If that was a mistake of counsel, it is the kind of mistake which the Court would not normally visit on a litigant and I am not prepared to do so. I am satisfied on this material that the applicants have furnished an acceptable explanation for the delay between the date of the judgment, i.e. 16<sup>th</sup> January, 2002 and the date of the ruling on the application for leave to appeal, i.e. 4<sup>th</sup> April, 2003. But the period from 4<sup>th</sup> April, 2003 to 7<sup>th</sup> February, 2006 must also be explained.

The notice of appeal was lodged on 29<sup>th</sup> January, 2002 and after the decision on the application for leave to appeal was given on 4<sup>th</sup> April, 2003, the next step taken in the process was the letter dated 26<sup>th</sup> May, 2003 written by the applicants' then advocates to the applicants. That letter was written more than two months after the decision on 4<sup>th</sup> April, 2003. No explanation is given for that delay of two months. Another letter was written on 25<sup>th</sup> August, 2003. It was contended before me that the first letter of 25<sup>th</sup> May, 2003, was not received by the applicants; that may well be so. But the second letter dated 25<sup>th</sup> August, 2003 was received; it is not stated when it was received. Mr. Cheruiyot told me the applicants only went to see him in December, 2005; that would be some two years from the date of the second letter of 25<sup>th</sup> August, 2003. As I have said, there is no material before me as to when the letter was received by the applicants but it would clearly be unreasonable to conclude that the letter reached them after two years. But even if that were so, it was clearly their duty to say that the letter reached them two years from the date it was written. There is no such averment before me.

It is said the applicants saw their advocates in December, 2005 but Mr. Cheruiyot studiously refused to say which date in December the applicants saw him. Clearly, that date was easy to establish. From whatever date in December, 2005, there was another delay upto 7<sup>th</sup> February, 2006 when this motion was filed.

In my view and with the greatest respect to Mr. Cheruiyot who did all in his power on behalf of the applicants, I cannot but agree with the respondent when she swears in her replying affidavit:-

***“THAT the Applicants are the authors of their own misfortune and they should take responsibility for the delay which they are attempting to shift to the court”*** - see paragraph 10 of the replying affidavit.

Clearly, the applicants are guilty of inordinate and unexplained delay and on that basis alone, their application for extension of time must fail. Both Mr. Cheruiyot and Mr. Ngala cited to me various authorities, but I have not dealt with them because no legal authority can offer an explanation for the inordinate delay. I accordingly order that the notice of motion dated 6<sup>th</sup> February, 2006 and lodged in the Court on 7<sup>th</sup> February, 2006 be and is hereby dismissed. Taking into account the relationship between the parties, I order that each party shall bear its own costs of the dismissed motion. Those shall be my orders on the said motion.

Dated and delivered at Eldoret this 13<sup>th</sup> day of October, 2006.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**