



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

**CIV APPLI 204 OF 2006**

**MOHAMMED OLUNGA ODUORI ..... APPLICANT**

**AND**

**MUMIAS OUTGROWERS COMPANY (1998) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time from the Ruling and Order of the High Court of Kenya at Kakamega*

*(Mr. Justice G.B.M. Kariuki) dated 18<sup>th</sup> May, 2006*

**in**

**H.C.C.C. NO. 93 OF 2001)**

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**R U L I N G**

**Mohammed Olunga Oduori**, the applicant, has moved this Court under **rule 4** of the Court of Appeal Rules (the Rules), for an order extending the time within which to file and serve a notice of appeal and a record of appeal. The application is opposed.

The applicant filed a plaint in the High Court, at Kakamega. A verifying affidavit to that plaint was found to be defective, but the Court upon application extended the time within which a proper verifying affidavit would be filed. He allowed the applicant **21 days** to do so. The applicant was represented by legal counsel, Mr. Kasamani. The evidence before me shows that an affidavit was filed on **1<sup>st</sup> August, 2005**, which was within the 21 days the applicant had been allowed. For some reason a copy of the same affidavit was again filed on **12<sup>th</sup> August, 2005**, which was outside the time the court had granted the applicant. The applicant has deponed in his affidavit in support of the application before me that he does not understand why his counsel did that. He submitted before me that he suspects his counsel colluded with the respondents to defeat his case.

Be that as it may, on the basis of the late affidavit, the respondents successfully moved the superior court for an order striking out the applicant’s plaint on the ground that he had failed to comply with the court order allowing him 21 days to file a proper verifying affidavit to the plaint. The court allowed the application and struck out the plaint.

Being aggrieved by the order, the applicant instructed his counsel Mr. Kasamani, to lodge an appeal. Learned counsel did not do so although on several occasions he told the applicant he would do so. The time within which under the Rules the notice of appeal needed to be filed expired before the notice was filed. It was then that the applicant decided to bring this application in person.

Miss Lusinde, appeared for the respondents, at the hearing of this application. Although she conceded that the applicant had indeed filed an affidavit on *1<sup>st</sup> August, 2005*, which was within time, she opposed this application arguing that the applicant had not placed sufficient material before this Court to entitle it to exercise its unfettered discretion in his favour. She had in mind the fact that the record of the application did not include copies of the plaint, the defence and other pleadings. With due respect to her, the plaint having been struck out, a copy thereof could not possibly have been made part of the record of the application. Besides, the stage had not reached for the plaint to be served upon the respondents. Consequently, no defence or other pleading had been filed or could have been filed.

The applicant has reasonably explained why he did not file a notice of appeal within time. There are matters on record which cannot be explained except by counsel who represented the applicant in the court below, and from outward appearances, the said counsel appears to have been deliberately uninterested in helping the applicant.

Besides, the applicant's intended appeal appears to me to be arguable. He brought this application promptly.

In the result, I am inclined to grant the applicant the extension of time within which to file and serve a notice of appeal by **14 days** from the date hereof, and the time for lodging and serving a record of appeal by a further **30 days**. I make no order as to costs. I so order.

***Dated and delivered at Kisumu this 23<sup>rd</sup> day of November, 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**