



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

**CORAM: GITHINJI J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 339 OF 2004**

BETWEEN

PRUDENTIAL ASSURANCE COMPANY OF KENYA LIMITED.....APPLICANT

AND

SUKHWINDER SINGH JUTLEY.....1ST RESPONDENT

FALCON INSURANCE AGENCIES LIMITED.....2ND RESPONDENT

(Application for extension of time to file Notice and Record of appeal

*out of time in an intended appeal from the judgment and decree of the
High Court of Kenya at Nairobi (O’Kubasu, J) dated 31 st May, 2002*

in

H.C.C.C. NO. 589 OF 1994)

R U L I N G

This is an application under Rule 4 and 5(2) (b) of the Court of Appeal Rules for the following orders:

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4 THAT the applicant be granted leave to file a Notice of Appeal and record of appeal out of time

5 THAT the Notice of Appeal annexed hereto be deemed to be filed and served on the first and second respondents respectively.

6 THAT there be a stay of execution of the judgment and Decree of the High Court of Kenya delivered on the 31st May, 2002 pending the hearing and final determination of the intended appeal.

By Rule 5(2) (b) of the Court of Appeal Rules, an application for stay of execution would be competent if before its presentation to court a Notice of Appeal has been lodged in accordance with rule 74. In this case, the applicant has sought leave to file a Notice of Appeal out of time and further seeks an order

deeming the annexed Notice of Appeal as filed and served. The application for stay of execution is not competent as the court has not yet disposed of the application relating to the Notice of Appeal Secondly, by virtue of Rule 52(2) of the Court of Appeal Rules, a single judge has no power to deal with an application for stay of execution.

The applicant intends to appeal against the decision of O’Kubasu J.A in High Court Civil suit No. 589 of 1994 delivered under section 64 (4) of the Constitution of Kenya on 31st May, 2002.

By the amended plaint filed in the superior court the first respondent, Sukhwinder Singh Jutley claimed against Prudential Assurance Company of Kenya Ltd (applicant) indemnity under a personal accident policy for temporary partial disablement as a result of a road traffic accident. The respondent sought indemnity at the rate of Kshs. 100,000 per week for a maximum period of 104 weeks-total shs. 10.4 million and shs. 100,000 medical expenses. The first respondent raised several defences to the claim. He denied that the first respondent was involved in an accident and that he had suffered temporary total disablement for a period of 728 days. The first respondent further pleaded that the indemnity of shs. 100,000 per week contained in the policy was a mistake in law and fact and that the indemnity should have been shs. 10,000 per week on which the premium paid by the first respondent was based.

The learned judge made five findings, inter alia, that, the first respondent was involved in a road traffic accident and suffered an injury within the definition of temporary total disablement; that although the applicant had amended its records showing weekly indemnity as shs. 10,000 (and not shs. 100,000) first respondent was not aware of that alteration and the policy in his possession had not been amended; that the first respondents had proved that he was entitled to shs. 100,000 indemnity per week. However, the learned judge only allowed indemnity for a period of 150 days and not for 104 weeks as claimed and thus allowed the first respondent claims for shs. 2,142,852 only.

The applicant was not satisfied and filed an Appeal to this court. That appeal was struck out on 28/2/2003 on the ground that the record of appeal was defective. The applicant then applied for and obtained extension of time to file a fresh appeal. I do not have details of the first appeal or of the application as they were not provided. I am relying on the facts contained in the ruling of this court in civil application no 62 of 2004. After the first appeal was struck out, the applicant filed a second appeal Civil Appeal No. 62 of 2004. That appeal was however struck out on 10/12/2004 on the application of the first respondent on the ground that the record of Appeal was defective as the proposal form which was the genesis of the litigation and which was an exhibit at the trial was omitted from the record. This application was filed on 7/12/2004, a week after the appeal was struck out.

It is trite that this court has jurisdiction to entertain an application for extension of time to enable an appeal which has been struck out and not dismissed to be re-instated. See **Murai –v- Wainaina (No 3) [1982] KLR 33 and Ochieng –v- Ranmal Merag [1984] KLR 361**

The present application is supported by the affidavit of Antony Fredrick Gross, the learned counsel for the applicant. He deposes, inter alia, that the proposal form was left out of the record of appeal out of inadvertent and regrettable omission by his office due to confusion in the proceeding of the superior court itself referring to the exhibits and that the applicant has an arguable appeal. He has set out in para. 10 seven grounds of appeal that the applicant intends to raise in the appeal.

The application is opposed. It is contended by Mr Khamati, the first respondent’s counsel, inter alia, that the omission to include the proposal form in the record of appeal was due to lack of diligence and is not excusable and that the intended appeal is frivolous as the applicant paid the first respondent for the material damages caused in the accident.

I have considered all the circumstances of this application.

The applicant has all along manifested an intention to appeal against the decision of the superior court. The first appeal was filed in time and even after the first appeal was struck out the applicant successfully sought leave to file a second appeal. The second appeal was filed but was again struck out due to failure

to include the proposal form in the record of appeal. After the second appeal was struck out, the present application was filed within 7 days.

I have perused the pleadings, the decision of the superior court and the proposed grounds of appeal. I have also taken into account that, in extending time to file the second appeal which was struck out, this court must have been satisfied that the intended appeal was not frivolous. The intended appeal raises both factual and legal issues. I am satisfied that the intended appeal is not frivolous.

The court in its ruling dated 10/12/2004 accepted the explanation by Mr Gross that the failure to include the proposal form in the record of Appeal was unintentional but nevertheless, struck out the appeal. It was certainly an inadvertent mistake of a counsel to omit the proposal form from the record.

The applicant has already been punished twice in having his previous two appeals struck out with costs. This application was filed, in the words Mr Gross, with utmost dispatch after the second appeal was struck out.

The first respondent is not likely to suffer any great prejudice if the application is allowed other than delay in the recovery of the judgment sum. It is not disputed that the proposal form which was omitted from the record was the first respondent's exhibit. It is also apparent from the ruling of this court delivered on 10/12/2004 that although the applicant's appeal was struck out, the first respondent had given notice of a cross-appeal seeking the enhancement of the award of indemnity to the original shs. 10.4 million. There is no evidence that the notice of cross-appeal has been withdrawn. The applicant will suffer great injustice if the first respondent prosecutes the cross-appeal whilst the applicant is denied a chance to appeal against the same judgement. In the above circumstances, the interest of justice will be better served if the applicant is allowed to lodge a competent appeal.

For those reasons, I allow the application in terms of prayers 4 and 5. The Notice of Appeal is deemed as filed and served. The record of Appeal to be filed and served within 21 days from date hereof. The cost of this application is given to the respondents.

Dated and Delivered at Nairobi this 14th day of January, 2005.

E. M. GITHINJI

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JUDGE OF APPEAL