



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT KISUMU  
(CORAM: O'KUBASU, J.A. (IN CHAMBERS))  
CIVIL APPEAL (APPLI) 342 OF 2001

KOLA CHACHA ..... APPLICANT/APELLANT

AND

KENYA COMMERCIAL BANK LTD.

DAMCO AUCTIONEERS ..... RESPONDENTS

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

of Appeal out of time with such time as would validate the same in an  
Appeal from the judgment and decree of the High Court of Kenya at

Kisii (Mbitio J) dated 4th April, 1996

in

H.C.C.C. NO. 158 OF 1998)

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R U L I N G

This is an application, by way of notice of motion, brought under **rule 4** of the Court of Appeal Rules in which the applicant, Kola Chacha, seeks an order that the time limited for giving and service of the Notice of Appeal and Record of Appeal herein be extended with such time as would validate the same. This application is based on the following grounds:

***“(a) THAT the appellant/applicant being aggrieved by the decision of the learned Judge of the Superior Court made on 4th April, 1996 in Kisii HCCC No. 158 of 1988 filed a notice of appeal against the said decision.***

***(b) THAT the applicant was under the impression that the firm of Nyairo Orora & Company, Advocates, was the one on record for the respondent as they were the ones who used to appear for the respondent while in actual fact they were only holding brief for M/s Hamilton Harrison & Mathews, Advocates.***

***(c) THAT due to the said wrong impression, the applicant erroneously served the said notice of appeal upon the firm of Nyairo, Orora & Co. Advocates.***

***(a) THAT the applicant’s advocate joined a firm which is in the panel of the advocates for the respondent and could not therefore act for the applicant.***

***(b) THAT due to an error in addressing the information to the effect the applicant did not obtain the information in time.***

(c) ***THAT intended appeal is not frivolous.***

(d) ***THAT there is no intention on the part of the applicant to overreach***”.

Mr. K’Owinoh, the learned counsel for the applicant, more or less elaborated the above. He however, brought up the issue of the judgment of the superior court having been delivered by the Deputy Registrar, which, in his view, rendered it a nullity.

This application was strongly opposed by Mr. Magare the learned counsel for the 1st respondent who submitted that the delay had not been satisfactorily explained. He pointed out that while the application refers to the judgment of Mbaluto J the record showed that the judgment was by Mbito J.

The principles to be applied in dealing with an application under rule 4 of the Rules are now well settled. In ***Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*** – Civil Application No. Nai. 251 of 1997, this Court said:

***“It is now well settled that the decision whether or not to extend 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 the 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”.***

The Court continued:-

***“Bearing these principles in mind and applying them to the instant case the appellant took almost three and half months to file the present application after the appeal was struck out for the second time. In our judgment with respect to the period of delay of almost three and half months, in any view of it is substantial. In Samken Limited & Another v. Mercedes Sanchez Rev. Tussel and Another – Civil Application No. NAI 21 of 1999 (unreported) this Court found a delay of about three months long. In Ravashdeh v. Lane (1988) 40 E.G. 100 a delay was said to be much longer – it was six weeks in fact. In addition there is no explanation for delay. None is put forward in the affidavit of that applicant sworn in support of this application on 24th September, 1997”.***

In this application the learned counsel for the applicant has given a long explanation that led to the delay. The facts are rather peculiar in that although the applicant was the successful party in the superior court he intends to challenge not only the quantum of damages awarded but the jurisdiction of that court. It has been pointed out that the judgment was delivered by the Deputy Registrar and not by a Judge of the superior court. **Order XX** the *Civil Procedure Rules* provides:

***“(2)(1) A judge may pronounce a judgment written and signed but not pronounced by his predecessor.***

***(2) A judge of the High Court may pronounce a judgment written and signed but not pronounced by another judge of the High Court.***

***(3)(1) A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it. (2) A judgment pronounced by a judge other than the judge by whom it was written shall be dated and counter-signed by him in open court at the time of pronouncing it.***

***(3) A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review”.***

From the foregoing provisions it would appear that the Deputy Registrar has no power to pronounce a judgment of High Court Judge. Again the judgment which is the subject of intended appeal appears to have been written by Mbito J. but the application refers to a judgment by Mbaluto J.

Having considered the rival submissions, the history of this matter and the relevant legal provisions, I am of the view that it would be in the interest of justice to allow this application. Hence, the application is granted as prayed but the applicant is to pay the costs of this application to the 1st respondent which costs I assess at Shs.10,000/= and must be paid within 21 days of this ruling, in default the application shall stand dismissed.

**Dated and delivered at Kisumu this 24th day of June, 2005.**

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR