



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

(CORAM: DEVERELL, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLI)255 OF 2004

BETWEEN

SAMUEL MWEHIA GITAU APPLICANT/RESPONDENT

AND

ELIJAH KIPNG'ENO ARAP BII APPELLANT/1ST RESPONENT

KENYA COMMERCIAL BANK 2ND RESPONDENT

**(Application to strike out the Appeal from the judgment and
decree of the High Court of Kenya at Nairobi (Lady Justice Mugo)
dated 22nd September, 2004**

in

H.C.C.C. NO. 882 OF 2003)

R U L I N G

The application before me is by Notice of Motion dated 7th April 2005 filed on **15th April 2005**. The applicant **S.M.Gitau** was the Plaintiff in the superior court (the **Hon. Lady Justice M.G. Mugo**) and was represented in this court by learned Counsel **B.N.Ngugi**.

The application seeks an extension of the thirty (30) days time limit imposed by the proviso to **rule 80** for applying to strike out a notice of appeal or an appeal. That time limit commences on the date of service of the record of appeal on the respondent which date was **25th November 2004**. That time limit would have expired on **15th January 2005** after taking into account the exclusion of the three weeks Christmas vacation.

The current application was not filed until **15th April 2005** so the delay to be considered by me is three months.

The reasons for that delay as set out in the affidavit of B.N. Ngugi and his submissions before me can be summarised as follows:-

Immediately after the record of appeal was served on 25th November 2004 he was concentrating on attempting to have the appeal fixed for hearing as a matter of urgency on a priority basis. When this failed he turned his attention to perusing the Record and it was then that he noticed that the record did not

include copies of the original pleadings, defence and counterclaim which he believed to be primary documents despite the inclusion in the record of the copies of the amended versions of those pleadings which would include the wording of the original versions. Mr. Ngugi did not specify the date when he noticed this.

He states however that due to pressure of work as well as the Christmas vacation during which his office was closed he was unable to ascertain the full legal implications of the missing pleadings until 1st March 2005 when Counsel for the second respondent Kenya Commercial Bank brought to his attention previous Court of appeal decisions which held that failure to include primary documents in a record of appeal rendered the appeal incurably defective.

He, on some unspecified date, informed his client of this and was instructed to file an application to strike out the appeal. He then read the law more closely and realised that the application to strike out the appeal should have been filed within 30 days of the service of the record of appeal which he calculated to expire on 18th January 2005 after allowing for the Christmas vacation.

There followed a further delay until the current application was eventually filed on 15th April 2005 some two and a half months after the expiry of the Rule 80 time limit.

I consider these reasons for delay to be unconvincing and lacking in cogency. I regard a delay which has the effect of more than doubling the period of 60 days allowed by the rules is inordinate.

I now turn to the consideration as to whether the application is arguable. It is not disputed that the Record of appeal does not contain copies of the original pleadings, defence and counterclaim. It is clear from **Rule 85(1) (c)** that "the pleadings" are mandatorily required to be included in the record unless a direction from a judge or a registrar has been made that the pleadings in question should be excluded from the record pursuant to **Rule 85(3)**. It has not been suggested by either party that any such direction was applied for and made in this case.

However in the replying affidavit of **Mr. N.O.Sumba** learned counsel for the first respondent to the application, **E.J. Arap Bii**, put forward the argument set out in paragraphs 6 to 10 of his Replying Affidavit dated 28th April 2005 which I now quote:-

"6. That the application for striking out the memorandum and record of appeal is not tenable because once the amendments were made to the original pleadings and original defence and counterclaims, the same became extinguished by the subsequent amendments which then took precedence over the original pleadings.

7. That the amended pleadings which in itself includes the original pleadings is annexed and forms part of the record of appeal together with the amended defence and counterclaim which in itself includes the original defence and counterclaim, all of which are annexed to and form part of the record of appeal.

8. That the original pleadings and the original defence and counterclaim therefor became irrelevant to the proceedings in this matter once the amendments were effected. I wish to invite the honorable court to look at the high court proceedings in HCCC No 882 of 2005 to confirm the irrelevance of the said pleadings (original pleadings and original defence and counterclaim) since the said proceedings form the basis of this appeal and the relevance of any document emanates from them.

9. That in as far as the said amendments were effected, the primary documents for the relevance of this appeal became the amended pleadings and the amended defence and counterclaim.

10. That the amended original documents would have only been primary documents relevant to this honourable court if the appeal lying from the superior court would have been about the leave that was granted to allow the said amendments."

I believe that while these arguments have some merit they would best be put to the judge or registrar in an application under **Rule 85 (3)** with a view to having the original pleadings excluded. However the point is not, in my view, unarguable on an application to strike out the record.

I am thus faced with a situation in which the delay to be explained is far from short and the reasons given demonstrate a lack of urgency by the applicant. The application to strike out the appeal, if allowed to proceed, has a reasonable chance of succeeding but the victory may be short lived since an extension may then be applied for and granted to the respondent to file a fresh appeal. If this happened the litigation would drag on for many more months, or more probably, years.

The balance of prejudice is perhaps tilted slightly in favour of the applicant being granted the extension since it will not hurt the respondent while the stay of execution of the judgement remains in place and it may mean that the substantive appeal will be determined finally earlier.

Having weighed up all these factors I, pursuant to **Rule 4** of the Court of Appeal Rules, exercise my discretion in favour of the applicant and grant the application now before me.

I hereby order that the time for filing the application by Samuel Mwehia Gitau dated 7th April 2005 seeking to strike out *Civil Appeal No.255 of 2004* is extended to 15th April 2005 and that the application already filed on that date be deemed to have been filed in time. The costs of this application to be costs in the appeal.

Dated and delivered at Nairobi this 22nd day of July, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR