



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

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

CIVIL APPLI NAI 113 OF 2005

BETWEEN

1. STANDARD CHARTERED BANK LIMITED

2. WAFULA NABUTOLA.....APPLICANTS

AND

1. PETER OGUKO ABOK

2. PETRONILA AKECH.....RESPONDENTS

(Application for extension of time within which to lodge and serve the

**Notice of Appeal and the Record of Appeal in an intended appeal from the
decision of the High Court of Kenya at Kisumu (Warsame, J) dated 19**

th

October, 2004

in

H.C.C.C. NO. 135 OF 11996)

RULING

The application now before me is made under **Rule 4** of the Rules. It seeks orders to extend time within which to lodge and serve a Notice of Appeal and Memorandum of Appeal, the applicants having being aggrieved by the decision of Warsame, J made on 19th October, 2004 and wish to challenge it in an intended appeal. As this is the third time for this Court to deal with this matter, I need not rehash the facts and circumstances giving rise to the application as they are now wellknown. However, I need to restate that before the Court can exercise its unfettered discretion in favour of the applicants, the applicants should satisfy the court, inter alia, that there is merit in the intended appeal; that there has not been inordinate delay in lodging the application and that the respondent will suffer no undue prejudice if the applicants are allowed to lodge an appeal out of time – (see **WASIKE VS. SWALA [1984] KLR 591**).

Judgment the subject matter of the intended appeal was given on 9th July, 2004 in which the learned Judge, Tanui, J assessed damages on agreed liability for a road accident case and awarded Shs.332,232.00 and Shs. 290,411.20 for the 1st and 2nd respondents respectively. As no Notice of Appeal was lodged

within the prescribed time, the applicants invoked **Section 7** of the **Appellate Jurisdiction Act Cap 9 Laws of Kenya (the Act)** and they asked the High Court at Kisumu to extend time for them. *Warsame J* rejected their application on 19th October, 2004. Though they obtained leave to appeal they did not do so and instead lodged a fresh application before this Court under rule 4 of the Court's Rules. Waki, J.A., on 3rd December, 2004, as a learned single Judge held:-

“I think, it is also an abuse of court process when a party, without exhausting an existing, valid legal process simply abandons it, and goes, as it were, looking for another way of skinning the cat. I am reluctant to sanction such procedure and I think I have said enough to explain my finding, which I now make, that the application before me is res judicata and therefore incompetent. It is also an abuse of court process and is for striking out. I so order.”

A reference by the applicants against his decision was dismissed on 22nd April, 2005.

The main reason given by the applicants through their counsel *Mr. Kuloba* for failure to lodge and serve the Notice of Appeal and the Record of Appeal within the time limited by the rules is what is termed genuine misinterpretation of Section 7 of the Act and the Rules of the Court and partly due to non-availability of judicial authority on the issue but which is said to have now been settled by this Court.

Mr. Kasamani for the respondents has opposed the application on a variety of grounds. Firstly, that the applicants have become vexatious litigants in that they have lodged many and varied applications without any justifiable cause; and, that there must be an end to litigation, secondly; that no reasons have been given for misreading the Rules and the Act and; thirdly, that the decree has been fully settled and the intended appeal is merely academic.

It is true that for some time there were conflicting views on whether it was mandatory for applications for extension of time to be filed before the superior court first, as provided for in **Section 7** of the Act and **Rule 41**, or this Court had the original jurisdiction to entertain such applications under Rule 4, **Section 7** and **Rule 41** notwithstanding.

The confusion and misreading reigned among the judges of both courts as well as legal practitioners. I am satisfied therefore that the applicants have explained to my satisfaction why they did not perfect the appeal within the time set by the rules. The explanation is indeed reasonable and I accept it. Moreover, there are weighty issues arising from the decision of *Warsame J.* thus rendering the intended appeal meritorious.

In my view, the applicants have not been guilty of any laches in that they have acted expeditiously in the pursuit of leave to appeal out of time, albeit proceeding in a wrong direction. As they have shown a determination to canvass their intended appeal before this Court, I think there is no justifiable reason to deny them their quest. After all the respondents will not suffer any undue prejudice if the applicants are allowed to lodge an appeal out of time. The decretal sum has been fully paid to them and they will be compensated for by way of costs if the appeal does not succeed.

For these reasons I grant the application and extend time as prayed. The Notice of Appeal shall be filed within 14 days hereof and the Record of Appeal shall be lodged within 21 days after the date of service of the Notice of Appeal. Costs of this application assessed at Shs.7,500/= shall be paid by the applicants within 10 days hereof.

DATED and DELIVERED at KISUMU this 15th day of July, 2004.

P.K. TUNOI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR