



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: DEVERELL, J.A. (IN CHAMBERS)**  
**CIVIL APPLICATION NAI 92 OF 2005**

**BETWEEN**

**MOHAMED ALI )**

**NIMO ALI ) ..... APPLICANTS**

**AND**

**SAGOO RADIATORS LTD ..... RESPONDENT**

*(Application for extension of time to file the record of appeal  
out of time in an intended appeal from the judgment and decree  
of the High Court of Kenya (Lady Justice M. A. Ang’awa) dated  
23rd March, 2004*

**in**

**H.C.C.C. NO. 149 OF 1995)**

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**R U L I N G**

This is an application under **rule 4** of the Court of Appeal Rules (the Rules) for an extension of time to file the record of appeal out of time. The intended appeal is from the Judgment and Decree of the High Court (*the Honourable Lady Justice M.A. Ang’awa) dated 23rd March 2004 in which the defendants/applicants Mohamed and Nimo Ali (the Ali’s)* were, jointly and severally, ordered to pay to the plaintiff/respondent Sagoo Radiators Ltd (Sagoo) Shs. 312,294.40 as special damages together with interest thereon at 12% per annum.

The Notice of Appeal was lodged on 25th March 2004 being two days after the delivery of the judgment so it was in good time.

The letter from the Ali’s advocates to the Deputy Registrar of the superior court requesting copies of the proceedings and judgment was dated 24th March 2004 and is date stamped as having been received on 25th March. The letter was duly copied to Sagoo’s advocates who received it on 26th March 2004. Four and a half months later, on **10th August 2004** a reminder letter was written by the Ali’s Advocates

to the Deputy Registrar emphasising that ***“time is of the essence.”***

Three and a half month’s later on ***30th November 2004*** the Deputy Registrar wrote a letter which was posted on 2nd December 2005 to the Ali’s advocates informing them that copies of the proceedings and judgment were ready for collection upon payment of the fees. Based on this development a certificate of delay of approximately 8 months could be expected.

Such a certificate was, however, never issued.

According to Sagoo’s advocates, they did not receive the Deputy Registrar’s letter and were unaware that the copies were ready and so took no action to pay for and obtain delivery of the copies of the proceedings. Nothing of relevance happened until 3rd February 2005. No further reminders were sent to the High Court registry and no visits to the registry to chase up or enquire about progress were made. The applicant’s advocates were completely inactive for about five months from their August 2004 reminder letter.

When they did at last have a clerk visit the registry to make inquiries on 3rd February 2005 the discovery was made that the record had been ready for collection since two months previously.

In Paragraph 5 of his affidavit in support of the application ***Mr. Munyu*** describes his efforts in pursuit of the typed proceedings as being ***“spirited”***. I would not describe one reminder letter to the deputy registrar four and a half months after the request for the proceedings and the first visit of a clerk to the Registry four and a half months after that letter as being spirited efforts in pursuit of the proceedings.

The applicants did not at this stage request the Registry to issue a certificate of delay. ***Mr. M. Munyu***, learned counsel for the applicants said that there was no point in doing so since by the time they discovered that the proceedings were ready 60 days from the expiry of the time which would have been certified had expired so that they would not have been in time even if the certificate was issued in February.

The current application for extension was not filed until ***12th April 2005*** which was two weeks after the applicants received the letter dated ***3rd March 2005*** in which the Deputy Registrar stated that the court’s records showed that the letter notifying the readiness of the proceedings had been sent to the applicant’s advocate’s postal address by ordinary mail. I do not consider that there was any good reason for the applicant to wait until after receiving the letter dated 3rd March 2005 before filing the application and even less reason for taking another ***forty days*** after receiving that letter before filing the application.

I will now turn to the issue as to whether the intended appeal has a reasonable chance of succeeding.

The main ground of the intended appeal as stated in the draft Memorandum of Appeal exhibited to the supporting affidavit and as expressed in ***Mr. Munyu’s*** submissions before me was that the superior court awarded special damages amounting to ***Shs.312, 294.40*** despite there being no pleading and no proof of these special damages.

The facts of the case can be briefly summarised. Sagoo was the owner of a motor cycle. It was being ridden by a 19-year-old employee of Sagoo when it was involved in an accident with a vehicle driven by Nimo Ali. She was found by the superior court to be wholly responsible for the accident jointly and severally with Mohamed Ali her employer.

There is no intention to appeal against the decision as to liability expressed in the draft Memorandum and the award of the special damages seems to be the only issue for appeal.

The contention of ***Mr. Munyu***, as I understood it, can be summarised as follows:-

***“Special damages need to be pleaded. The Plaintiff gave particulars of the special damages claimed. These were calculated by taking the pre-accident value and deducting there from the***

**salvage value. The assessors fees for establishing these two figures were then added plus the Police abstract fee. The result of using this method was a claim for Shs. 653,215.20 pleaded as special damages.**

**This pleading however did not reflect what actually happened because Sagoo decided not to accept from the insurers the sum resulting from this method of calculation and instead decided to repair the motor cycle themselves. This should have led to an amendment to the Plaint to reflect what actually happened so as to claim the difference in the value of the motor cycle between its pre-accident value and its post repair value. The Plaint was never so amended and the actual cost of repair was never pleaded or proved.**

**As a result of this the award of special damages was wrong and the appeal has good chances of succeeding.”**

All I need to say at this stage is that I consider that the applicant has shown that the appeal is not frivolous and it is indeed arguable.

In my view there is unlikely to be any significant prejudice to either party if the application were to be granted.

I now reach the difficult part of my task which is to decide whether, in the circumstances of this case in which the applicant has not been as diligent as he should have been in dealing with the situation caused only partly by the failure of the letter indicating the readiness of the copies of the proceedings to reach its destination, and yet the case is one in which there is an arguable appeal which the applicants ought to have the opportunity to pursue.

After considering all these factors I exercise my discretion by deciding to allow the application.

I therefore make the following orders:-

- 1. That the applicant do file and serve a fresh notice of appeal within seven days of the date of this ruling.*
- 2. That the applicant do file and serve its record of appeal within fourteen days from the date the notice of appeal is lodged in Court.*
- 3. That the costs of this application shall be in the intended appeal.*
- 4. If the applicant fails to comply with conditions (1) and (2) within the stated periods then in the event of any such failure the orders above shall automatically stand vacated and the application shall stand dismissed with costs, no further order of the court being necessary for that purpose.*

***Dated and delivered at Nairobi this 12th day of September, 2005.***

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**