



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: DEVERELL, J.A. (IN CHAMBERS)
CIVIL APPLICATION NAI 110 OF 2005**

BETWEEN

JOHN KIPKEMBOI KILEL APPLICANT

AND

COMMISSIONER OF INSURANCE RESPONDENT

*(An application for leave to extend time to file and serve
record of appeal out of time from the ruling and order of the High Court
of Kenya at Milimani Commercial Court (Mr. Justice Onesmus
Mutungi) dated 29th April, 2004
in*

WINDING UP CAUSE NO. 21 OF 2003)

R U L I N G

The heading of this application by Notice of Motion dated 22nd April 2005 states that it is an application for leave to extend time to file and serve **Notice of Appeal and Record of Appeal** out of time from the Ruling/Orders of Mr. Justice Onesmus Mutungi dated 29th April 2004 in High Court at Milimani Commercial Court in winding up Cause No.21 of 2003.

The Notice of Motion continues as follows:-

NOTICE OF MOTION

(Under Rule 4 of the court of Appeal Rules)

TAKE NOTICE.....Counsel for the Applicant will move the

Court for **ORDERS:-**

A) **THAT** the time within which to lodge and serve a Record of Appeal be further extended from the time that had been given by **Mr. Justice R.S.C. Omolo (JA) in CA NAI 270 of 2004.**

B) **THAT** the costs be in the cause.

WHICH APPLICATION is supported by the affidavit of John Kipkemboi Kilel attached on the following grounds:-

1. **THAT** an extension of time to file a **Notice of Appeal** and the **Record of Appeal** in this matter had been given on the 14th March, 2005 by **Mr. Justice R.S.C. Omolo** in CA NAI 270 of 2004, and by which extension time was to lapse by **25th March 2005**.

2. **THAT** the applicant counsel filed the **Notice of Appeal** within time but failed to file the **Record of Appeal** within time, and failed to inform the Applicant of this failure until the Applicant came to learn of this on 20th of April 2005 (last week).

DATED at NAIROBI this 27th day of April 2005”

It will be seen from this that prayer A above does not seek an order for extension of time to file the **Notice of Appeal** out of time.

The Ruling given on the 14th March, 2005 by **Mr. Justice R.S.C. Omolo** (hereinafter called “**the Omolo Ruling**”) referred to in ground 1 above ended with the following passage:-

“As I have said, taking everything into account, it would be unjust to the applicant to deny him the orders he seeks. Accordingly, I allow the notice of motion dated and lodged in this Court on 2nd November 2004, and I make the following orders:-

1. **The applicant shall file and serve his notice of appeal within seven days of the date hereof.**
2. **The applicants shall file and serve his record of appeal within fourteen days from the date the notice of appeal is lodged in court.**
3. **The costs 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 notice of motion shall then stand dismissed with costs, no further order of the Court being necessary for that purpose. Those shall be my orders in this motion.”**

As can be seen from ground 2 of the current Motion, Order 1 of the Omolo Ruling was complied with in respect of the Notice of Appeal but Order 2 in respect of the Record of Appeal was not.

Mr. S.B. Ligunya learned counsel for the respondent to the current application raised as one of his submissions before me, the point that, there having been non compliance with order 2 of the Omolo Ruling, all the orders made by Omolo JA in that ruling stood vacated. This had the result that there was now no Notice of Appeal still in existence.

Mr. F. N. Njanja learned counsel for the applicant countered this submission with the argument that because there had been compliance with one of the two conditions, there had not been non compliance “**with conditions (1) and (2)**” (emphasis added by me).

I do not agree with Mr. Njanja’s interpretation of the Omolo Ruling in this respect. I consider that the use of the words “**..... in the event of any such failure**” in condition (4) make it clear that the failure of any one of the two conditions would automatically result in the application for extension standing automatically dismissed in its entirety.

Furthermore the Notice of Appeal would be deemed to have been withdrawn pursuant to rule 82(a) of the Rules at the time when the applicant failed to comply with the new appointed time set by the Omolo Ruling for the lodging of the Record of Appeal.

This means that the present position is the same as it was before the application giving rise to the Omolo Ruling was heard except that the length of delay has grown considerably. In calculating the length of delay in respect of the Notice of Appeal I will treat the date of judgment as being 27th July 2004 for the

same reason as Omolo JA did in his Ruling. On that basis the Notice of Appeal should have been lodged on **10th August 2004** and served no later than 17th August 2004. The current application was filed on 27th **April 2005** approximately **eight and a half months** later.

Alternatively if the delay is taken to have run from the time when the Notice of Appeal should have been lodged in accordance with the Omolo Ruling then the period of delay would be from **11th March 2005** which would mean that the current application was filed 46 days later resulting in **46 days delay** which needs to be explained.

The explanation for the 46 days proffered by the applicant in his affidavit dated 27th April 2005 would appear to be that despite his promises to do so the applicant's advocate Mr. Letangule failed to file the Record of Appeal before the due date, set by the Omolo Ruling, for its filing or at all. There has been no explanation as to why this happened from Mr Letangule in person or indeed from the applicant as to what he was told by Mr. Letangule. The applicant depones in paragraph 14 of his supportive (sic) affidavit as follows:-

13. That upon seeking to see Mr. Letangule I could not find him and I was advised to see him next day.

14. That it was until (sic) the morning of Friday 22nd April 2005 I was able to get Mr. Letangule and after an angry exchange of words, he had no explanation why he had deliberately cheated me about filing the Record and why he allowed time to elapse without telling me. He only released my files to me and gave no explanation for his conduct.

15. That I had paid the said advocate all the filing fees and disbursement he had asked for the filing of the Appeal and I was unable to understand why they did not do their part. No explanation came from Mr. Letangule. I refer to document "JKK 3" receipts for payment of fees for the Appeal paid by myself.

In the replying affidavit sworn by Wilfred Ritho Njeru, the liquidator of Lakestar Insurance Company, he depones that he was informed by his counsel that Mr. Letangule informed his counsel that:

"i) Allegations by the applicant are fallacious, and that failure to prosecute the application was due to the insincerity of the applicant who refused to pay counsel's fee and continually offered false promises to pay.

ii) The annexed receipt J.K-3 in the current motion and affidavit is a falsified receipt and the alleged Kshs. 110,000/- was never remitted to him by the applicant, and we will seek the indulgence of the Honourable Court compel (sic) the applicant to produce the original receipt."

This part of the Njeru affidavit was double hearsay and cannot be relied upon.

The respondent did not produce the original receipt dated 7th April 2005 exhibited as JKK3 to his affidavit and it would appear from the version of the receipt produced in the record of the current application at page 123 that the narrative has been overwritten at some stage.

I have considered all the evidence and submissions made before me and have reached the conclusion that the explanation of the delay has not been adequately explained.

If all the facts relied upon by the applicant are true the applicant may well have a remedy against his former advocates but it would not be fair to the respondent for further indulgence to be granted to the applicant by way of extensions of time on the basis of the evidence before me.

Delay in litigation of this nature is very prejudicial to the Liquidator and the creditors of the company in liquidation.

I have also considered whether the intended appeal raises arguable issues or whether it is frivolous. No view as to this aspect was expressed in the in the Omolo Ruling.

The applicant has included in the record of the current application a Memorandum of Appeal, which is not described as a draft and is dated 2nd November 2004 signed by Letangule & Co Advocates.

In my view there are some arguable issues raised sufficient to render the intended appeal not frivolous.

Having weighed up all of the above factors and being of the view that the application to extend the time for filing only the Record of Appeal without any application to extend time to file a Notice of Appeal is futile I have decided, in the exercise of my unfettered discretion under rule 4, that this application should fail.

The application is hereby dismissed with costs.

Dated and delivered at Nairobi this 13th day of October, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR