



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

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

Civil Application Nai 241 of 2005

BETWEEN

CALTEX OIL (K) LIMITED APPLICANT

AND

AUTO SPRING MANUFACTURERS LIMITED RESPONDENT

**(An application for extension of time to file and serve record of Appeal
in an intended appeal from the judgment and decree of the High Court
of Kenya at Nairobi (Lady Justice Ang'awa) dated 28th January, 2004**

in

H.C.C.C. NO. 1469 OF 1998)

RULING

This is an application for an extension of time to file the Record of Appeal in an intended appeal from a judgment delivered on 28th January 2004 in *HCCC No 1469 of 1998* by Ang'awa J. The case arose out of a road accident between two vehicles. The superior court found that the Respondent was 100% to blame for the accident and the Respondent is not intending to appeal against that finding. The intended appeal is concerned only with the quantum of damages to be awarded to the Applicant/Plaintiff for damage to the applicant's vehicle. The superior court held that the Applicant/Plaintiff had failed to prove its loss and dismissed the Plaintiff's suit on quantum with costs to the respondent/defendant.

A Notice of Appeal was lodged in good time on 2nd February 2004 and served on the 5th February 2004.

A letter mysteriously dated 11th December 2003, which is 5 weeks before the judgment was delivered, is claimed to have been sent by the Applicants advocates Mbugua & Mbugua to the Deputy Registrar of the High Court bespeaking copies of the proceedings and judgment which letter was copied to the respondent's advocates Anne W. Kimani & Co. Advocates thus apparently complying with the requirements of rule 81 (2) of the Court of Appeal Rules (the Rules).

The letter bears a received stamp from the Respondent's advocates with the date 6th February (presumably 2004 although this is not legible on the copy in the record of the application.). The Certificate of Delay states that the bespeaking letter was lodged on 2nd February 2004.

It was not until 3rd December 2004 that the Deputy Registrar wrote informing the Applicant's advocates that the proceedings and judgment were ready for collection on payment of the fees. There is no evidence before me of any attempts having been made by the applicants to chase up the registry by letters or visits to the registry during the period.

In paragraph 4 of the Certificate of Delay which was issued on 26th July 2005 it is stated that "the time taken by this court to prepare and supply certified copies of proceedings and judgment was from 2nd February 2004 to **9th May 2005**. I note that the applicant had erroneously applied for **certified** copies of the proceedings. It is not required that copies of the proceedings need to be certified in civil appeals.

It is peculiar that the certificate states that the preparation and supply was complete by **9th May 2005** and yet the letter from the Deputy Registrar notifying his readiness to deliver the proceedings and judgment was dated 3rd December 2004 being 5 months earlier.

These discrepancies have not been explained.

The application by Motion now before me was not filed until 18th August 2005 which is three months after **9th May 2005** and eight months after **3rd December 2004**.

The applicant's only explanation for part of the delay is that contained in the supporting affidavit on behalf of the applicants sworn by Ann Muthoni Mbugua on 17th August 2005. She deponed that, having received a letter from the Deputy Registrar dated 3rd December 2004 indicating that the proceeding and judgment were ready for collection on payment of Kshs.1,620, that sum was paid and her office was supplied with certified copies of the proceedings on 14th February 2005. The proceedings and judgment were brought back to her office and handed to her court clerk who handed them to her registry clerk "who instead of bringing them up for action by the advocates filed them away." It would seem that neither of the clerks brought the files up to Mrs. A.M.Mbugua who it would appear had no bring up entry of her own to remind her of the steps to be taken in processing the intended appeal. She further deponed that it was not until 29th June 2005 that the file was brought up to her "for the usual bring up." This would imply that her usual bring up would not cause files, on which appeals were to be filed such as this, to be brought up for four months or so which is indicative of a very poor system.

Such a series of incompetent errors having been made, there should have been immediate action taken to ensure that there were no further errors causing delay and yet it was not until 50 days later that the current Motion was filed. No explanation for this further period has been furnished.

The Notice of Appeal indicates that it is the whole of the decision of the superior court which is being challenged whereas the draft memorandum of appeal makes it clear that it is only the quantum issues which are being challenged. It would appear from the judgement that the Plaintiff has been paid Shs.800,000 by the insurers, Kenindia who are the ultimate possible losers from the decision intended to be appealed against. This is not a case involving any personal injuries so there would not appear to be any special prejudice to either party if the appeal was allowed to proceed. Both parties appear to be commercial organizations.

I have also noted that the application does not seek any extension of time for the filing of a fresh Notice of Appeal which would in my view be necessary since the original Notice of Appeal is deemed to have been withdrawn by virtue of rule 82 (a) upon expiry of the appointed time for instituting the appeal.

The intended appeal may raise some issues which are arguable but there are no issues of public importance involved.

Having taken into account all of the above factors in the exercise of my unfettered discretion in matters of this sort I have come to the conclusion that this is not a case in which the extension sought should be granted.

I hereby dismiss the application with costs.

Dated and delivered at Nairobi this 9th day of December, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR