



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

**CORAM: O'KUBASU, J.A. (IN CHAMBERS)  
CIVIL APPLICATION NAI 251 OF 2005**

**BETWEEN**

**ROMANUS OKENO .....APPLICANT**

**AND**

**BANK OF BARODA .....RESPONDENT**

*(An application for extension of time within which to file notice  
of appeal out of time from the judgment and decree of the High  
Court of Kenya at Kisumu (Mr. Justice B. K. Tanui) dated 26th January, 2005  
in  
H.C.C.C. NO. 255 OF 2000)*

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**R U L I N G**

This is an application by way of Notice of Motion stated to have been brought under “*The Court of Appeal Rules including **Rule 4 and 41** of the Court of Appeal Rules, **Section 3** of the Appellate Jurisdiction Act **Section 3A** of the Civil Procedure Rules and all other enabling provisions of the Law.*”  
The orders sought are that:-

- “1. This Honourable Court be pleased to grant an extension of time for the lodgement of Notice of Appeal from the Judgment and decree of the superior court delivered on 26th January, 2005.***
- 2. A time be named within which the said Notice be filed.***
- 3. The time for filing a Record of Appeal be extended;***
- 4. A time be named within which such record be filed.”***

The application is brought on the following grounds:-

- “a) Judgment was not read on the scheduled date and the applicant only became aware of it in March 2005, and notified his advocate to commence appeal proceedings.***
- b) It is the applicant’s wish and intention to appeal from the decision of the superior court made on 26th January, 2005.”***

There are then two supporting affidavits sworn by Mr. Aloys Obunga Aboge, the applicant’s current

counsel and Mr. Collins Odhiambo Adipo the applicant's previous counsel.

In urging me to grant this application, Mr. Aboge the learned counsel for the applicant gave a detailed explanation as to what led to the delay in filing the notice of appeal and record of appeal. It was pointed out that the case in the superior court was heard by Gacheche J. and judgment date was given as 1st July 2004. The judgment was however, not delivered on 1st July, 2004 as indicated. The applicant's counsel waited until 27th January, 2005 when he wrote to the Deputy Registrar of the superior court inquiring when judgment would be delivered. In that letter dated 27th January, 2005, counsel for the applicant stated:-

***“Kindly let (sic) know when the judgment in this matter is scheduled to be delivered. This matter was last in court on 1st July, 2004 for delivery of judgment.”***

It was later discovered that the judgment had actually been delivered on 26th January, 2005. This information was given to the applicant's counsel in March 2005 who then wrote to the court asking for proceedings and judgment. The applicant's current counsel was then approached in July 2005 and instructed to commence appeal proceedings on his behalf.

It was Mr. Aboge's contention that the delay was not inordinate and that there was sufficient explanation. He further argued that the intended appeal raises substantial issues of law as can be seen from the Draft Memorandum of Appeal.

In opposing this application Mr. Akinyi the learned counsel for the respondent was of the view that this was a misconceived application since this Court cannot grant the prayers sought. He submitted that there was no candid disclosure as to why the applicant failed to know when judgment was delivered. He further argued that there was lack of due diligence on the part of the applicant and his lawyer. The delay was too long and unexplained contended Mr. Akinyi. Finally, Mr. Akinyi submitted that there was no sufficient material placed before the court to warrant its exercise of discretion in favour of the applicant; and that the respondent would be prejudiced since the intended appeal is not arguable.

The gist of this application is that the applicant and his then advocate (Mr. Adipo) were not aware of the date when the judgment of the superior court was delivered. To support that contention there was the affidavit of Mr. Adipo and a letter written to the Deputy Registrar of the superior court inquiring about the said judgment. That contention has not been disputed. The applicant came to know about the judgment much later and informed his advocate. There was then change of advocates from Mr. Adipo to Mr. Aboge. All that has not been disputed.

It is now settled that in an application under **rule 4** of this Court's Rules the single Judge of the Court is being called upon to exercise his unfettered discretion. The matters which are to be considered whether to grant an extension of time are first the length of the delay, the reason for that delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In ***Patel v Waweru & 2 Others*** [2003] KLR 361 at pp.362-3 this Court had the following to say in respect of rule 4 of this Court's Rules:-

***“This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application NO. NAI. 251 of 1997 (unreported) this court stated:-***

***“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”***

And in Pothiwalla v Kidogo Basi Housing Co-operative Society Limited & 31 Others [2003] KLR 74 I had the following to say on rule 4:-

*“I think, it is now settled that an application of this nature (under rule 4 of this Court’s Rules) the Court is being asked to exercise its unfettered discretion and that for an applicant to succeed he must satisfy the Court that the delay was not inordinate and that the delay has been sufficiently explained. The other issue to be considered is whether the intended appeal is arguable. Lastly, the applicant has to show that no prejudice would be caused to the respondent if the application to extend time is allowed. This discretion, like any other judicial discretion must be exercised judicially.*

*In Muchugi Kiragu v James Muchugi Kiragu & Another – Civil Appliation NO. NAI. 356 of 1996 this Court had the following to say as regards this Court’s discretion under rule 4:-*

*“Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”*

In the present application it has been shown that the judgment of the superior court was delivered on 26th January, 2005 when the applicant and his lawyer were not aware of that date of judgment. When the applicant came to know of the judgment he informed his lawyer who immediately wrote to the superior court asking for copies of proceedings and the judgment. From that stage the process of filing notice of appeal and lodging record of appeal was commenced.

I have now considered all that has been placed before me and taking into account the explanation given for the delay I am satisfied that this is an appropriate case in which I should exercise my discretion in favour of the applicant.

For the foregoing reasons this application is allowed and I direct that the applicant do file and serve the Notice of Appeal within seven (7) days from the date hereof and the Record of Appeal be lodged and served within 30 days from the date the Notice of Appeal is filed. Costs of this application shall be in the appeal.

***Dated and delivered at Kisumu this 2nd day of December, 2005.***

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**