



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 100 OF 2004**

**BETWEEN**

**MUSTAFA LORO ..... APPLICANT**

**AND**

**CALTEX OIL (K) LIMITED .....1ST REESPONDENT**

**SALER MOHAMMED .....2ND RESPONDENT**

(An application for leave to serve Notice & Record of Appeal out of time in an appeal from the Judgment of the High Court of Kenya at Nairobi (Rawal, Comm/Assize) dated 15 th June, 2000

in

H.C.C.C NO. 963 of 1996)

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**RULING**

By this motion expressed to be brought under rules 4 and 76(I) of the Rules of this Court the applicant craves for orders for extension of time within which to file and serve a Notice of Appeal and Record of Appeal. However, at the hearing of the application, Mr. Khaminwa, for the applicant informed me that there was a valid Notice of Appeal on record and I should hold so. He averred that he was only interested in the second limb of the application – that is for leave to serve the Notice of appeal out of time together with the record. On 7th March, 2003, the learned single Judge of this Court dismissed an application brought under the same two rules (Rules 4 and 76(I) of this Court. He held: -

*“However, the applicant has not produced any evidence to show that a Notice of Appeal was indeed filed, it cannot be said that any notice of appeal was filed in the matter. It was the duty of the applicant to produce that evidence which duty he failed to discharge.”*

Mr. Khaminwa states that after the dismissal of the application he perused the file of the former advocates and discovered that indeed a Notice of Appeal had been filed on 21st June, 2000 and Bosire J.A had acted in ignorance of that fact. He urged me to hold so and grant the application.

I find that the application before me is similar to the one dismissed by Bosire J.A. I cannot in the

circumstances review his decision nor can I sit on appeal on it. Moreover, what Mr. Khaminwa is trying to do is to introduce new evidence which is expressly forbidden by rule 54(2 ) of the rules of this court.

Having lost before a learned single Judge of this Court, I doubt whether the applicant can resurrect such an application wherein due diligence is shown not to be have been exercised.

Judgment the subject matter of intended appeal was delivered on 15th June, 2000. Bosire J.A dealt with the matter on 7th March, 2003. The Notice of Appeal was discovered actually to be in existence on 10th February, 2004, but, this application was lodged three months afterwards. The applicant, in my view, has been guilty of laches all the way through the prosecution of the application. As he is guilty of inordinate delay. I cannot exercise any discretion in his favour in any event.

I dismiss the application with costs, which I assess at Shs.10,000/-.

This shall be paid to the first respondent only.

Dated and delivered at NAIROBI this 23rd day of September, 2004.

**P.K. TUNOI**

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**JUDGE OF APPEAL**