



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT KISUMU  
(CORAM: OMOLO, J.A (IN CHAMBERS))  
CIVIL APPLICATION NO. NAI. 183 OF 2004 (KSM 17/04)**

**BETWEEN**

**THE MANAGING DIRECTOR**

**NATIONAL CEREALS & PRODUCE BOARD ..... APPLICANT**

**AND**

**FRANCIS OCHIENG' OGUTU ..... RESPONDENT**

(Application for extension of time to file and serve notice and record of appeal out of time in an intended appeal from the judgment of the High Court of Kenya at Kisumu (Wambilyangah, J) dated 23rd October, 2002

in

H.C.C.C. No. 337 of 1995)

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**R U L I N G**

This being a motion under rule 4 of the Court of Appeal Rules, I am aware I have an unfettered discretion in deciding whether or not to grant the same. I am also aware that in exercising the discretion, I have to base the exercise on reason and not caprice and that as far as is humanly possible, parties ought to be allowed to ventilate their grievance in all possible courts.

The judgment the applicant proposes to appeal against was delivered way back on 23rd October, 2002. The applicant was aggrieved by the judgment and wanted to appeal. Mr. Siganga, the applicant's counsel, filed on the applicant's behalf a notice of appeal. This was done on 18th December, 2002 nearly three months after the date of the judgment. The respondent moved the Court to strike out the said notice of appeal as it was filed way out of time and without the leave of the Court. On 16th June, 2004, some six or so months after the filing of the notice of appeal, the applicant filed a notice of motion under rule 4 seeking extension of time to file a notice of appeal. The respondent's notice of motion to strike out the notice of appeal came up for hearing on 18th June, 2004 and this Court duly struck out the notice of appeal which had been filed on 18th December, 2002. Faced with that position, the applicant then filed the current motion before me seeking extension of time to file a fresh notice of appeal and the record of appeal. The applicant was entitled to do so but the current motion was not filed until 15th July, 2004, nearly one month after the notice of appeal was struck out.

The applicant was bound to explain the delay between 18th June and 15th July, 2004. The purported explanation is to be found in paragraphs 7, 8 and 9 of Mr. Siganga's affidavit where he depones as follows:

**"7. I subsequently wrote to my client and informed them of the outcome. I sought further instruction on the matter.**

**8. The applicant has indicated that they wish to proceed with the appeal. They have asked my firm to take all necessary steps to have the appeal reinstated.**

**9. The application has been filed expeditiously and without undue delay."**

Now Mr. Siganga had known right from 18th December, 2002 when he filed the ill-fated notice of appeal that the applicant intended to appeal.

That position was reconfirmed on 17th June, 2004 when the applicant filed the notice of motion No. 148 of 2004 in which he sought to have the notice of appeal validated by the Court. The Court refused to do so and struck out the notice of appeal on 18th June, 2004. Then Mr. Siganga waits until 15th July, 2004 before filing the present motion and the explanation offered for that delay is that he was seeking fresh instructions. Nothing could have possibly changed between 17th June, 2004 when the first motion for extension of time was filed and the 15th July, 2004 when the present motion was filed. The averment in paragraph 9 of the supporting affidavit that the motion has been brought expeditiously and without undue delay does not really provide an explanation as to why it took the applicant nearly thirty days to file the motion. This Court has repeatedly held that whenever there is a delay, then irrespective of the length of the delay, some explanation must be given to enable a single Judge exercise the discretion in the applicant's favour. The explanation given for the delay by Mr. Siganga is not tenable and that being my view of the matter, the applicant's motion must fail. I dismiss with costs to the respondent the notice of motion dated and lodged in Court on 15th July, 2004. Those shall be my orders.

**Dated and delivered at Kisumu this 26th day of November, 2004.**

**R. S.C OMOLO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**