



**IN THE COURT OF APPEAL  
AT NAIROBI**

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

**CIVIL APPLICATION NAI NO. 153 OF 2004**

**BETWEEN**

**TERESIA NJERI (Suing as the legal representative**

**of the Estate of KARANJA KINYATHA alias DANIEL (DECEASED)..... APPLICANT**

**AND**

**THE HONOURABLE ATTORNEY GENERAL ..... RESPONDENT**

***(An application for leave to lodge a memorandum and record of appeal of time against the ruling of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 30th October, 2002***

**in**

**H.C.C.C. NO. 982 OF 1998)**

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**RULING**

This is an application by notice of motion dated June 18, 2004 for leave to lodge a Memorandum and Record of Appeal in an intended appeal against the decision of Angawa J delivered on 30th October 2002.

This decision arose out of a preliminary objection that the plaintiff's suit in High Court Civil Case No.982 of 1999 was statute barred. The plaintiff in the superior court Teresia Njeri Karanja ("the widow") was the widowed wife of Karanja Kinyatha who was a passenger in a motor vehicle that was involved in an accident on September 11, 1996 with another vehicle belonging to the Government of Kenya.

Karanja Kinyatha ("the deceased") died as a result of the accident. The date of his death was May 20, 1997. He thus died approximately eight months after the accident occurred.

The widow on behalf of the deceased's estate sued the Attorney General, on May 2, 1998.

When the suit came for hearing in the superior court on October 29, 2002 State Counsel for the defendant raised a preliminary objection claiming that the suit was statute barred under the Public Authorities Limitation of Actions Act Cap. 39 since the suit had not been filed within 12 months from the date of the accident.

The Superior Court accepted State Counsel's submission that time runs for limitation purposes from the date of the accident and not from the date of the death caused by the injuries suffered in the accident as was submitted on behalf of the plaintiff widow.

The judgment of the Superior Court was delivered on October 30, 2002. In that judgment Angawa J upheld the preliminary objection and found that the suit was indeed filed out of time. The suit was accordingly struck out with costs to the defendants.

It is well settled that the factors to be taken into account in deciding whether or not to grant an extension of time such as this are, firstly, the length of the delay, secondly, the reason for the delay, thirdly, (possibly) the merits of the appeal and, fourthly, the degree of prejudice if any to the respondent if the extension applied for is granted.

The notice of appeal was lodged on November 6, 2002. The letter requesting supply of certified copies of the proceedings and judgment dated November 5, 2002 was addressed to the Deputy Registrar High Court of Kenya Nairobi and copied to the Attorney General's Chambers Sheria House.

The 60 days prescribed by **rule 81 (1)** for the institution of the appeal by lodging the Memorandum of Appeal and Record of Appeal expired on January 5, 2003. However by a certificate of delay issued by the Deputy Registrar of the High Court an additional 496 days were certified as required for the preparation and delivery of the copies of the proceedings. As a result of this the time for filing was extended to May 11, 2004.

The application now before me was filed on the 18th of June 2004, which is 37 days after the extended time expired.

In my view a delay of this length is one that does require explanation. The reason given in the affidavit in support of the application is that the applicants advocates did not notice that the formal order embodying the ruling on the preliminary objection was missing from the record until they were preparing the record for filing after collecting the copy of the proceedings on March 17, 2004. This explanation does not give a very convincing excuse for not being in a position to file the complete record of appeal within the extended time. There is no reason why an intended appellant should take no action to have the formal order drawn until the Court has furnished copies of the proceedings.

The intended appellant advocates did not need the copy of the proceedings in order to learn that the formal order had not yet been drawn .

Furthermore it should not have taken from the March 17, 2004 until the 24th May 2004 to extract the formal order and no details have been given by the applicant as to when steps were taken to achieve this.

It will be clear from what I have said above that I do not consider that the applicant has made out a good case on the issues of the length of the delay and the reason for such delay.

On the issue of possible prejudice to the respondent if the application for extension is allowed I do not consider that such prejudice exists in a situation such as this. If the appeal is heard and decided in favor of the applicant appellant the hearing of the suit in the High Court will proceed after a long delay when the memories of the witnesses may well have faded but this is a factor which will affect both parties equally. The main cause of the delay will have been the respondent having put forward an invalid preliminary objection in the superior court. If the appeal is heard and disallowed the respondent will not have prejudice other than any irrecoverable costs of the appeal.

There remains the issue as to the merits of the appeal.

There are two statutory provisions relevant to the preliminary objection taken by the respondent before Angawa J in the superior court. One is the Public Authorities Limitation Act Cap 39 which requires an action founded on tort against the Government to be brought within 12 months of the date when the cause

of action arose. The other is the Fatal Accidents Act Cap. 32, which provides that every action under the Fatal Accident Act shall be commenced within three years after the death of the deceased person.

Without going too deeply into the merits of the appeal it does seem to me that the chances of upsetting the decision of Angawa J which followed that of Simpson J as he then was in *Makau and others vs Attorney General & Another* 1974 EA 534 are remote. Neither the Applicant nor the respondents cited any law in relation to the merits of the appeal.

Having weighed up all these factors and in the exercise of my unfettered discretion which must be exercised judicially and not capriciously I have come to the conclusion that this application should be dismissed and I hereby so order. In the circumstances, I make no orders as to the costs of the application.

*Dated and delivered at Nairobi this 10th day of November, 2004*

**W. S. DEVERELL**

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**AG. JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**