



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 97 OF 2002**

**BETWEEN**

**WILSON K. MUNIU .....APPLICANT**

**AND**

**ROSEMARY WANJIKU MUNGAI .....RESPONDENT**

(Application for extension of time to file Notice and record of appeal out of time in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Rawal, J) dated 25th January, 2001

in

H.C.C.C. No. 110 of 199

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**RULING**

The applicant, Wilson K. Muniu, comes to this Court under the provisions of Rule 4 of the Rules of this Court (the Rules) seeking an order to extend time for him to file both, a notice and record of appeal, to enable him to appeal against the judgment of Rawal, J. delivered on 25th January, 2001 by which he was ordered to pay the sum of Kshs.1,207,800/= damages together with costs and interest arising from the death of the respondent's husband.

The grounds upon which the application is brought are many but in my view they all don't relate to the central issue of why the applicant did not file his notice and record of appeal within the prescribed time in the rules.

In that regard, the relevant grounds are that:

"The failure by the applicant to lodge a Notice of appeal within the stipulated period was inherent."

In that it was:

"Due to the factors beyond the control of the applicant as they were only advised of the judgment it is intended to be appealed against on the eleventh day of the said judgment thus rendering it impractical for the applicant's insurers to search for their relevant file and instruct advocates in good time".

Consequently, the blame for the notice and record of appeal not being filed on time, lies on the advocate's laps.

The affidavit filed in support of the application attempts to explain the delay. It is deponed that the applicant was represented in the superior court by a different advocate in H.C.C.C. No. 110 of 2000. A judgment was entered in the matter on 25th January, 2001, the applicant was not informed about it till the 5th day of February, 2002 by letter attached to a copy of the judgment that was not dated. One Maurice Ambuchi, a Legal Assistant to the applicant's Insurers, depones that he was under the impression that the judgment had been delivered the previous day, therefore they had 13 days in which to look for the file and instruct another advocate. He instructed another advocate the following day to lodge the appeal. The record indicates that several letters were exchanged in an effort to obtain the file from the former advocate.

They only came to learn of the fact that judgment had been delivered on 25th January, 2001 upon receipt of their new counsel's letter on 15th February, 2001.

Upon receipt of their file from the former advocate they came to learn that nothing had been done. Had the judgment been dated, they would have been able to lodge the notice on time.

Attached to the affidavit are several copies of letters exchanged between the applicant and his advocates which clearly indicates that the delay from the date of judgment, to the date when the delivery took place, that is 15th February, 2001 was indeed genuine. I see no problem in accepting that as a genuine reason.

There is then the period that lapsed from the 15th of February, 2001 to 2nd May, 2002 when this application was filed. That is a period of over 15 months. There is no indication from the record, or affidavit or submissions to me as to why this application was not filed as soon as the mistake was discovered. While my discretion in terms of rule 4 is very wide, it must be exercised judicially. AND where there is no explanation, I have no material upon which that discretion can be exercised. This Court has ruled on several times that where there is no explanation there can be no indulgence.

On that basis, I find that there is no merit in this application and the same is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 17th day of January, 2003.**

**E. OWUOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**