



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Shah JA)**

**CIVIL APPLICATION NO NAI 110 OF 2003 (59-2003 UR)**

**MWANGI & ANOTHER .....APPLICANT**

**VERSUS**

**MACHIRA T/A MACHIRA & CO ADVOCATES.....RESPONDENT**

(An application for extension of time to file and serve the Notice of Appeal and Record of Appeal, respectively, out of time in an intended appeal from a judgment of the High Court at Nairobi (Kasanga Mulwa, J) delivered on the 7th day of September, 2001 in HCCC No 1709 of 1996)

**RULING**

By a notice of motion dated 25th April, 2003 and lodged in this Court on 28th April, 2003, the applicants, Wangethi Mwangi and Nation Newspapers Limited, seek leave to file their notice of appeal and record of appeal out of the time.

The application is lodged as a result of an appeal filed by the applicants against the respondent, J P Machira Esq, having been struck out by this Court on 11th April, 2003. In other words the applicants wish to put their house in order and mount a competent appeal. The original appeal, being Civil Appeal No 303 of 2002, was struck out as a result of it having been filed some 46 days out of time. The reason why it was filed late was that instead of applying for an uncertified copy of the judgment to mount the appeal the advocates for the applicants applied for a certified copy thereof.

This Court whilst striking out the appeal said:

“There is no requirement whatsoever that a copy thereof (that is judgment) required by rule 85(1)(g) to be included in the record of appeal must be certified and the long wait referred to in the replying affidavit between August 5, 2002 to September 2, 2002 when a certified copy was awaited cannot be discounted under the proviso to rule 81(1).”

Purely and simply the extra time taken to file the struck out appeal was taken as a result of wishing to include a certified copy of the judgment in the record of appeal although it is not so necessary.

The applicants, having suffered the inevitable fate on 11th April, 2003 applied for extension of time which is now the application before me. The Court's Easter vacation had begun on 10th April, 2003. 11th April, 2003 was a Friday. Discounting that weekend this application was filed some two weeks later. Despite Mr Machira's valiant attempts to convince me that the delay (he said 17 days) in filing this application was inordinate,

I am not able to agree with him. A period of two weeks or so to mount an application like this is not too long as to qualify for the epithet "inordinate delay". I am satisfied that the application was lodged within a reasonable time.

Mr Machira's objection to this application is that he also deserves consideration. I must point out that all parties to any application or appeal deserve consideration. He asked me to take into account the fact that the struck out appeal was filed some 46 days out of time. I do not see how I can now take into account that 46 day delay when the applicants have already been punished in that behalf by having their appeal struck out with costs. Mr Machira did not quote any authority directly on this issue, that is to say, that the previous delay has to be taken into account in considering an application for extension of time after an appeal has been struck out.

In the case of *Kuwinda Rurinja & Company Limited v Kwindu Holdings Limited & Others* (Civil Application No NAI 243 of 1998)(unreported), decided in December last year this Court said:-

"In the present reference it is to be noted that the appeal was struck out on 29th September, 1998 and the application for extension of time was filed on 16<sup>th</sup> October, 1998 – within a period of two weeks. Clearly there was no delay in filing that application for extension of time. We would observe that since the applicant had already been penalized for its counsel's mistake by the entire appeal being struck out what the learned single judge ought to have done was to consider whether there was inordinate delay from the time the application for extension of time was filed."

In that case (*Kuwina Rurinja*) this Court stated further:-

"With respect to the learned judge, we are of the view that the learned single judge did not consider the events which took place after the striking out of the appeal but went into the merits of the intended appeal, and in his zeal to bring this litigation to an end almost determined the intended appeal. This was a misdirection which resulted in his improper exercise of his discretion the consequence of which is an injustice to the applicant".

In view of what I have just set out I am not able to agree with Mr Machira when he says that I ought to take into account the earlier 46 days delay plus the 17 days taken in filing this application in refusing to grant the application. It is appropriate at this stage to set out another of Mr Machira's objections to the effect that there is no merit in the intended appeal and that a litigation commenced in 1996 ought to be terminated now. If I were to refuse the application I would be disintitling the applicants from arguing an appeal, which hinges on a very substantial award of damages for libel.

The award is by no means a mean award and, I think, qualifies for consideration by this Court more so in view of the importance of the matter. Large awards in libel cases have been the subject of discussion in Kenya and the print as well as electronic media ought to know where they finally stand. I am unable to say that the intended appeal is unmeritorious or frivolous.

I have set out why I would not take into account the earlier 46-day delay and I would add that it is indeed the mistake of counsel when a certified copy of the judgment was sought to mount an appeal. It is a mistake (perhaps a careless mistake) often made by advocates. Even Mr Machira's own advocate whilst wanting to appeal against the ruling of Aganyanya J sought, to mount an intended appeal, uncertified copy of the proceedings and a certified copy of the ruling. See page 45 of the record now before me.

It does seem to me that even experienced advocates are of the view-albeit mistaken – that a certified copy of the judgment or the ruling sought to be appealed against is necessary for inclusion in the record of

appeal.

Often in the hurry to seek such copies the word “certified” is used and I would not want to punish an ordinary litigant for such a mistake on part of his/her counsel. However, the earlier 46-day delay, in any event, is not so inordinate, in all the circumstances here, as to disentitle the applicants from appealing yet again.

Mr Machira went ahead to suggest that an application, such as is before me, could be filed within two to three days. I cannot subscribe to that argument. Any proceedings to be lodged in this Court are to be properly looked at, considered, record bound etc. It is also a fact that advocates have other matters to attend to as well as taking deserved rests. They are human beings. Not automatons.

The most serious of Mr Machira’s objections is that the applicants ought to have moved the Court soon after they were served with the application to strike out the notice of appeal, that they did not do so until after the appeal was struck out. In effect what Mr Machira is saying is that between the period when the application to strike out was served upon the applicants and the date of hearing thereof the applicants ought to have applied for extension of time to validate the appeal already filed. This of course amounts to being wise after the event. Whilst the applicant’s advocate was labouring under a belief that a certified copy of the judgment was necessary to mount the appeal she could not have in the same breath conceded that she was wrong. Obviously if that course was taken it would have been, in hindsight, the correct step but I do not see how the advocate could have blown hot and cold at the same time. In any event being wiser after the event does not connote such negligence as ought to be visited upon the advocate and therefore on the client.

Another serious objection by Mr Machira is the age of the suit in the superior court. It was filed in 1996. The issue of liability was decided by this Court on an appeal where after the suit went back to the Superior Court for assessment of damages. Such assessment was done on 7<sup>th</sup> September, 2001. The appeal filed against the assessment was struck out on 11th April, 2003. I cannot say that the age of the suit, considering all circumstances, is such as to qualify for closure of the file. Mr Machira relied upon the case of *Kamau & Another v Mwachigi* (Civil

Application No NAI 26 of 1999) (unreported) to say that counsel ought to have known that certified copies were not necessary to amount an appeal.

In that case the Court was probably influenced by its doubt as to the veracity of a statement by counsel as regards when he received a letter from the Registry.

The case of *Kungu v Kungu & 2 Others* (Civil Application No NAI 306 of 1996) (unreported) turned on facts peculiar to that case. The letter bespeaking copies of proceedings and judgment was not copied to the other side. There was a delay from 1990 to 1997. That case has no relevance here.

In the case of *Davdra & Another v Davdra & Others* (Civil Application

No NAI 146 of 1998) (unreported) the application for extension of time was not lodged for some seven months after the applicant had been given copies of proceedings and ruling. The counsel in that case thought time ran from the date he received a certificate of delay. That case has no bearing on the application before me.

As I pointed out earlier the intended appeal is in respect of a large award of damages for libel and there is an outcry against such large awards. It is but right that this Court ought to look into the complaint. I think that it is in Mr Machira’s interests in the long run to know where he stands. If he succeeds eventually, and he is not a poor man, he will get damages plus 12% interest thereon whereas these days the banks give half that interest. He will suffer no prejudice. But I am more concerned about defeat of a litigant on purely technical basis when the technical defect can be put right. There was a slip, a mistake no doubt, or even a misunderstanding but Nation Newspapers Limited and Wangethi Mwangi are not responsible for that. I adopt and reiterate what I said in the case of *Lt Col Igweta v M’Ethare & Another* (Civil Application No

NAI 270 of 2001) (unreported) at pages 9 and 10 of the ruling.

I grant this application and order that the applicants do file a fresh notice of appeal within the next seven days and a record of appeal within 30 days of lodgment of the notice of appeal. I make no order as to costs as Mr Machira appeared in person.

Dated and delivered at Nairobi this 4<sup>th</sup> day of June, 2003

**A.B.SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**