



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: O’KUBASU, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 318 OF 2003

BETWEEN

CHARLES GITONGA GAKUU

AIR TRAVEL & RELATED CENTRE

WILFRED KARIUKI APPLICANTS

AND

LEE EUN HEE RESPONDENT

**(Application for leave to file and serve Notice of Appeal out of
time in an intended appeal from the Judgment of the High
Court of Kenya at Nairobi (Lady Justice Ang’awa) dated 22nd
May, 2003**

**in
H.C.C.C. NO. 1059 OF 1999)**

R U L I N G

I have before me an application by way of Notice of Motion brought under Rules 4 and 42 of the Court of Appeal Rules (the rules) in which the applicants herein seek the following orders:-

- “1. **THAT** this Honourable Court be pleased to enlarge time for filing and serving Notice of Appeal.
- 2. **THAT** the costs and incidentals to this Application do abide the result of the said intended appeal.

The grounds upon which this application is brought are as follows:-

- “a) The delay in filing the Notice of Appeal was caused by the fact that the firm of Kimani & Michuki Advocates was required to formally apply for leave to go on record in place of the previous Advocates M/s. A.G.N. Kamau Advocates.***
- b) That the second part of the delay was caused by filing a Notice of Appeal which erroneously indicated that the Judgment was delivered on 5 th May 2003 instead of 22 nd May, 2003.***

c) That the delay is not inordinate and is excusable.

d) That the delay is not in any event prejudicial as the Respondent has also filed a Notice of Appeal.

e) That the Applicants intend to appeal against the judgment and decree of the superior court and has a strong and arguable appeal with the high chance of success.”

In his submission before me, Mr. Nyakeno, for the applicants, gave a detailed explanation of events that led to the delay. He pointed out by the time he received instructions he was already out of time as he received instructions on 13th June 2003 while the judgment to be appealed from was delivered on 22nd May, 2003 .

In opposing the application, Mr. Munene, for the respondent, contended that the applicants have not come to court in good faith as they failed to appear during the hearing and yet they had been aware of the hearing date. He pointed out that the applicants came to know of the judgment on 10th June, 2003 and so they should have filed a Notice of Appeal immediately thereafter. He also referred to the fact that earlier notices of appeal had been withdrawn. But on this issue of withdrawn notices of appeal, I find that Mr. Nyakeno has given acceptable explanation.

Rule 4 of this Court’s Rules under which this application is brought provides:-

“The Court may on such terms as it thinks just by order extend the time limited by these Rules, or by any decision of the court or of a superior court for the doing of any act authorized or required by these Rules whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

An application under Rule 4 of the Rules seeks this Court’s exercise of its unfettered discretion. In **SAMKEN LIMITED, ABERCROMBIE & KENT LIMITED VS. MERCEDES SANCHEZ RAU TUSSEL & MOHAMED OSMAN MAALIM** - Civil Application No. NAI. 21 of 1999 (unreported) this Court stated inter alia:-

“We said at the beginning of this ruling that rule 4 under which the applicants went before the single Judge gives an unfettered discretion to the single Judge in deciding whether or not to grant an extension sought. Though the discretion is unfettered, like all judicial discretion, it must be exercised on reason, not caprice, and the exercise must not be arbitrary or oppressive. Accordingly, the Courts have over the years put down guidelines on how the exercise of a discretion ought to be done.”

As if to give these guidelines, in **LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI** – Civil Application No. NAI. 255 of 1997 (unreported), this Court in dealing with an application under rule 4 of the Rules said:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matter which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and, fourthly, the degree of prejudice to the respondent if the application is granted.”

Hence, this application before me has to be considered in accordance with the guidelines set out above. The reasons for the delay have been given by Mr. Nyakeno in his submission before me and in his own affidavit. It is clear that when the applicants came to know of the judgment it was their clear intention to appeal against that judgment of the superior court. There were slight hiccups here and there but all these were in endeavour to file an appeal. This was a clear demonstration that the appellants’ intention was to appeal right from the time the applicants came to know of the judgment. It would

therefore be wrong to shut out of Court a party who has demonstrated his desire to exercise the right of appeal.

In **MUCHUGI KIRAGU VS. JAMES MUCHUGI KIRAGU & ANOTHER** – Civil App. No. NAI 356 of 1996 this Court had the following to say as regards this Court’s discretion under rule 4 of the Rules:-

“Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

In the present application it has been shown that the applicants made attempt to file Notice of Appeal soon after they came to know of the judgment. There were minor problems which led to some delay but it cannot be said that the delay was inordinate. There has been serious efforts to mount an appeal but this cannot be done without filing a Notice of Appeal.

Having regard to all the circumstances, I consider that this is a fit and proper case for the exercise of my discretion and an extension to be granted. Accordingly, the application is granted. I order that a notice of appeal be filed within seven days from today and be served on the respondent within seven days of its filing. The applicants shall pay to the respondent the costs of this application in any event.

Dated and delivered at Nairobi this 11th day of December, 2003.

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR