



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**  
**AT NAKURU**

**CORAM: O'KUBASU, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 93 OF 2000**

**BETWEEN**

**TRIMBORN AGRICULTURAL ENGINEERING LIMITED ..... APPLICANT**

**AND**

**DAVID N. KABAIKO**

**KENYA SHIELD SECURITY LIMITED**

**STEPHEN KIRIAGO T/A**

**HOT GUARD SECURITY SERVICES ..... RESPONDENTS**

**R U L I N G**

This is a Notice of Motion brought under rules 4 and 42 of the Court of Appeal Rules in which the applicant is seeking an order that:

"a)The time allowed for lodging and serving a Notice of Appeal and the Record of Appeal be extended to enable the Applicant to lodge and serve a proper Notice of Appeal with the names of all the parties to the intended appeal and to file the Record of Appeal out of time."

This application is brought on the grounds that:

"1.Failure to file a proper Notice of Appeal in time was due to a typographical error.

2.Further delay was caused by the former Chief Justice's direction pursuant to his ruling in Civil Application No. NAI 95 of 1997."

When this application came up for hearing on 18th February, 2002, Mr Maraga for the applicant submitted that the judgment of the superior court was delivered on 20th June, 1996 and on 21st June, 1996, applicant's advocates applied for proceedings. A notice of appeal was filed on 25th June, 1996 but that notice was defective as it did not include the names of all the parties to be affected by the intended appeal. For that reason a fresh notice of appeal had to be filed. An application for extension of time came before the then Chief Justice Cockar who advised the parties how to proceed and as a result of that advice

there was further delay and confusion. When the matter came up before a full bench of this Court the appeal was struck out and hence this meant starting the process afresh.

Mr Maraga went on to submit that the appellant has an arguable appeal and as he had given sufficient explanation for the delay this application ought to be allowed.

While Mr Miyiinda for 1st respondent did not oppose the application, Mr Kagucia for the 2nd respondent vehemently opposed the application. He came up with the argument that the application was defective as one cannot bring application for both notice and record of appeal. He also pointed out that the delay was inordinate and that the chances of the appeal succeeding were remote.

The background to this application as stated by Mr Maraga for the applicant has not been disputed. It must be pointed out that the applicant's appeal was struck out on 17th March, 2000 as a result of a Notice of Motion filed by 2nd respondent on the grounds that the Notice of Appeal was filed out of time and that the record of appeal was incomplete. Since the appeal was struck out and **not** dismissed that meant the applicant could start the process afresh by rectifying whatever defects that led to the striking out of the appeal. The issue of extension of time in which to file a notice of appeal and or record of appeal is governed by **rule 4 of this Court's Rules** . The application before me was brought under that rule. It should be noted that the appeal having been struck out on 17th March, 2000, the applicant filed this application on 22nd March, 2000.

As it has been stated time and again, this Court has wide discretion under **Rule 4 of the Court's Rules** .

To benefit from this Court's unfettered discretion under that rule an applicant seeking extension of time must explain to the satisfaction of the court what led to the delay. If this explanation is acceptable then the court would exercise its discretion in favour of such an applicant. As Lakha JA said in *PETER MAINA MUNYUA VS DAMARIS NJOROGE* , Civil Application No. NAI 120 of 1999 (unreported) : "When there is no explanation there can be no indulgence."

And in *LEO SILA MUTISO VS ROSE HELLEN WANGARI MWANGI* , Civil Application No. NAI 251 of 1997 (unreported) , this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:

"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 matters 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."

These same principles were considered in greater details in my ruling in **MacWATT ESTATES LIMITED VS MBWANGI LIMITED** , Civil Application No. NAI 247 of 2000 (unreported) which authority was cited by Mr Maraga.

In the present application an explanation has been given as to why there was a delay. There was some confusion which led to a delay following some advice given by the former Chief Justice Cockar. The applicant cannot be blamed for what happened after that advice. It is important to note that as soon as the appeal was struck out the applicant filed this application almost immediately. That explanation for the delay is acceptable.

Mr Kagucia came up with a novel argument to the effect that application for extension of time in which to file a notice of appeal and record of appeal cannot be made in a single application. This argument cannot be accepted since the rules do not say anything to that effect. When the appeal was struck out that meant the appellant had to start the process afresh. The striking out of an appeal wipes out both the record of appeal and notice of appeal. Hence an appellant in that situation must start afresh and the rules provide that a court may extend time in a proper case.

The rules provide and the normal practice has been that application is filed under **rule 4** seeking extension of time in which to file notice of appeal and record of appeal. Having so said I must now come to the issue of the orders to be made. What the applicant is seeking in this application is set out at the commencement of this ruling. Since the explanation given by the applicant is acceptable and in exercise of this Court's discretion this application is hereby granted. The applicant is to file the notice of appeal within seven (7) days from the date of this ruling and to file record of appeal within thirty (30) days from the date the notice of appeal is filed. Costs of this application shall abide the outcome of the intended appeal.

**Dated and delivered at Nakuru this 21st day of February, 2002.**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**