



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 34 OF 2002**

**BETWEEN**

**AYUB WANGONDU KIBII .....APPLICANT**

**AND**

**NATIONAL INDUSTRIAL CREDIT BANK LTD .....RESPONDENT**

**(An application for extension of time to file Notice of  
f & Record of Appeal in an intended Appeal from Ruling &  
Order of the High Court of Kenya at Nairobi (Mr. Ransley,  
Commissioner of Assize) dated 28th June, 2001**

**in**

**H.C.C.C. NO. 1307 OF 2000)**

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**RULING**

This is an application under rule 4 of the Court of Appeal Rules (*the Rules*) to file and serve a Notice of Appeal and Record of Appeal. The decision *Ayub Kibii (the applicant)* wishes to appeal against was given by Commissioner of Assize *Ransley* on 28th June, 2001.

The applicant was represented by an Advocate in the superior court. In flagrant breach of **rule 74(2)** of the Rules and without bothering to obtain leave of the Court, the applicant filed a Notice of Appeal on 25th July, 2001. The Notice of Appeal was not served on the respondent until 7th August, 2001 again out of time and without leave of the Court.

According to the Certificate of Delay dated 25th January, 2002, application for copies of proceedings and ruling was made on 26th July, 2000 (*sic*). It is stated in the Certificate that the time required for preparation and delivery of certified copies of proceedings was from 26th July, 2000 (*sic*) to 28th November, 2001. A copy of the letter to the superior court bespeaking copies of proceedings and ruling has not been exhibited so I cannot tell whether it was copied to the respondent. Fortunately there is a replying affidavit sworn by *Mr Eric Masese* on 29th May, 2002 in which he states that the letter was

never copied to them. I accept that as the truth on that point.

After being supplied with copies of proceedings and ruling on 28th November, 2001 the applicant took no steps to lodge an appeal because he was still waiting for a copy of the Certificate of Delay. This was received on 25th January, 2002 although in paragraph 6 of *Mr John Mwangi's* affidavit sworn on 20th February, 2002, the date of receipt of the copy of Certificate of Delay is stated to be **25th January, 2001** . Even then the applicant sat back for almost another month before filing this application which was not lodged until 22nd February, 2002.

A certificate of delay is not a primary document within the meaning of **rule 85(1)** of the Rules so there was nothing to stop the applicant filing his appeal before a copy of it was received by his Advocates. The applicant's Advocate asserts in his affidavit (paragraph 8) that the intended appeal raises substantial points of law but, again, he does not bother to annex a copy of the ruling of the learned Commissioner of Assize so that I can also confirm whether or not what he says is true.

So in the end there is nothing I can say in favour of the applicant. There is no basis on which I can exercise my discretion in his favour. The application is utterly hopeless. It is for dismissal, and it is hereby dismissed with costs to the respondent assessed at *Shs 5,000/-*, to be paid within 14 days from today and in default execution to issue.

**Dated and delivered at Nairobi this 3rd day of June, 2002.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**