



**IN THE COURT OF APPEAL
AT NAIROBI**

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

CIVIL APPLICATION NO. NAI 3 OF 2002

BETWEEN

SALTEC INTERNATIONAL LIMITED

SALT MANUFACTURERS (K) LIMITED APPLICANTS

AND

INDUSTRIAL DEVELOPMENT BANK

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION

MINORITY SHAREHOLDERS RESPONDENTS

(An application for extension of time to file Notice and

Record of Appeal out of time in an intended appeal

from a Ruling of the High Court of Kenya at Nairobi

(Mr. Keiwua) dated 21/6/95

in

H.C.C.C. NO. 2096 OF 1991)

R U L I N G

This is an application under Rules 4 and 42 of the Court of Appeal Rules (the Rules) in which the applicants are seeking the following orders:

- "1.THAT the time for lodging a notice of appeal against the ruling dated the 21st day of June 1995 by the Hon. Mr. Moijo Ole Keiwua be extended by 21 DAYS from the date of the order.
- 2.THAT the time for filing the Memorandum of Appeal and a duly re-constituted Record of appeal against the aforesaid ruling be suitably extended.
- 3.THAT the costs of and incidental to this application abide the result of the intended appeal."

This application is brought on the following grounds:-

"1.THAT the Applicant filed Civil Appeal No. 288 of 1997 against the said ruling but the said appeal was struck off on 21/12/2001 for inter alia the reason that the record filed therein was incomplete hence incompetent and inadequate.

2.THAT the said record was complied by the Applicants' counsel on record and if at all any error is attributable to counsel then the applicants ought not to be punished for the mistake/error of their counsel.

3.THAT the Applicant has an arguable appeal with merit and overwhelming chances of success."

When the application came up for hearing before me on 18th July, 2002 Mr. Kilonzo Jr submitted that there was no delay in filing this motion since the same was filed on 15th January, 2002 while the previous appeal was struck out on 21st December, 2001.

This application was vehemently opposed by Mr. Mwangi for 1st respondent, Mr. Keyonzo for 2nd respondent and Mr. Nyamu for 3rd respondent. It was pointed out by Mr. Mwangi that this was the second time the applicants were seeking leave to file appeal out of time. Mr. Keyonzo on his part stated that the earlier appeal was struck out because certain documents were missing and that when the High Court record was called for the missing documents were not in that record.

Mr Nyamu pointed out that the order to be appealed against was a consent order and hence in his view this application was an abuse of the court process.

In dealing with this application we must go back to the previous appeal which was Civil Appeal No. 288 of 1997. That appeal was struck out on 21st December, 2001. In striking out that appeal this Court expressed itself thus:

"Having carefully considered the rival submissions made to us we are left in no doubt that the record of appeal as filed is incompetent and inadequate and offends, for example, the mandatory provisions of rule 85 (1) (b) (c) (d) and (f) of the Rules of this Court some of which omissions are incurable. That being so, the application to strike it out dated 9 May, 2000 succeeds. Accordingly, Civil Appeal No. 288 of 1997 is hereby struck out with costs including the costs of the notice of motion dated 9 May, 2000."

The above meant that the applicants' appeal was no more. It meant the applicants had to mount a fresh appeal. This is why this application under Rule 4 of the Rules was filed. How does this Court deal with applications under rule 4? In **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI Civil Application No. NAI 255 of 1997 (unreported)** this Court observed:

"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."

It is to be noted that the earlier appeal was struck out on 21st December, 2001 and by 15th January, 2002 this application for extension under rule 4 was filed. Clearly, bearing in mind that the Court was on Christmas vacation it cannot be said that there was any delay in bringing this application. The reason for this application being brought was that the earlier one was struck out due to omission of vital documents in the record of appeal. In the current application the applicants contend that they have now put their house in order and were ready to mount a competent appeal. In my view, they should be allowed to do so.

In view of the foregoing I allow this application, order that the notice of appeal be lodged within seven

days from today and the Memorandum of Appeal be lodged within thirty days from the date of this ruling. The respondents will have costs of this application which I assess at Shs.10,000/= for each respondent which must be paid within the next thirty days failing which execution to issue.

Dated and delivered at Nairobi this 2nd day of August, 2002.

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR