



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 211 OF 2000
BETWEEN**

STEPHEN NDUNGU KIMARI APPLICANT

AND

DEVKESH GENERAL STORES LTD. RESPONDENT

Application to file Record of Appeal out of time in an
intended appeal from the High Court of Kenya at Nairobi
(Mr. Justice Khamoni) dated 17th March, 2000

in

H.C.C.C. NO. 1586 OF 1993)

R U L I N G

This is the plaintiff's application under **rule 4** of the **Court of Appeal Rules** for an extension of time to file and serve a notice of appeal from a decision of the superior court (Khamoni, J.) given on 17 March, 2000 in High Court Civil Case No. 1586 of 1993 (the suit).

The plaintiff's suit was dismissed on 17 March 2000 for want of prosecution and, unknown to the plaintiff, his then advocate applied for a review which was dismissed on 15 May, 2000. The plaintiff also filed an application for review which was also dismissed on 19 July 2000. On 31 July, the plaintiff applied for copies of proceedings which I understand have not yet been supplied to him.

The application is opposed by the defendant mainly on the grounds that no appeal lies and, if it does, there is inordinate delay on the part of the plaintiff which has not been satisfactorily explained.

I have carefully considered the three authorities relied upon by Mr. Ndege for the respondent. They are as follows:-

(a) William Karani & 47 Others vs. Michael Wamalwa Kijana & 2 Others,

Civil Appeal Nos. 43 and 153 of 1986 (Consolidated).

(b) Richard Saidi vs. Sembi Motors, Civil Appeal No. 9 of 1991.

(c) Kisya Investments Limited vs. Attorney General & Another,

Civil Appeal No. 31 of 1995.

In my judgment, none of these authorities shows that merely because an application for review has been dismissed an appeal cannot be preferred. If an appeal had been decided, a review may not lie but the contrary is not the case. I am so satisfied in the circumstances of this case. It is now open to the plaintiff to seek to file an appeal

It, therefore, becomes necessary to consider if there has been any delay. This application was filed on 31 July 2000 and the intervening period has in my view been explained. The plaintiff's advocate clearly had been misleading the plaintiff who took reasonable steps once he learnt of the true position. I do not consider that the delay in this case has been in any way inordinate.

That being the view that commends itself to me, I have considered the factors which have to be taken into account. Mr. Ndege for the respondent has not relied on any prejudice arising from the short delay. I am aware that the existence of such broad approach was not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them.

In applying the criterion to the facts of the present case, it was, in my judgment, clearly one which required an extension to be granted since the delay was short, there was no prejudice to the respondent and I do not think that there will be any adverse effect on public administration. Having regard to all the circumstances I consider that this is a fit and a proper case for the exercise of my discretion and an extension to be granted as sought.

Accordingly, the application is granted. I order that the applicant may file a notice of appeal within ten days from today and serve the same upon the respondent within seven days of its filing. For the sake of completeness, I also order that the record of appeal be filed within forty-five days from the date of the filing of the notice. The applicant shall pay to the respondent the costs of this application in any event.

Dated and delivered at Nairobi this 5th day of February, 2001.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR