



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 53 OF 2001 (UR. 32/2001)**

**BETWEEN**

**PETER KAMAU NJUGUNA ..... APPLICANT**

**AND**

**STEPHEN MAGICHU**

**JOSEPH WARARI**

**JULIUS NJOROGE**

**FRANCIS MAGICHU ..... RESPONDENTS**

(An application for the extension of time file and serve

Notice of Appeal and Record of Appeal from the

judgment of the Honourable Lady Justice Ang'awa

delivered on 3rd,1998

in

H.C.C. SUCC. CAUSE NO. 1014 OF 1993)

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**RULING**

The applicant, Peter Kamau Njuguna, has moved the Court by a notice of motion under rules 4 and 42 of the Rules of this Court seeking the following orders:-

"1.That time for filing and serving Notice of Appeal may be extended.

2.That time for instituting the appeal may be extended.

3. Time for service of the Memorandum of Appeal and the Record of Appeal may be extended.

4. That for the purpose of Rule 81 of the Court of Appeal Rules this Honourable Court do order that time for instituting the appeal do run from the date of lodgement of the Notice of Appeal".

What is stated above really seeks this Court's order for extension of time in which to file a notice of appeal and record of appeal since as of now the applicant is out of time.

The previous appeal which must have been filed in time was struck out on 16th January, 2001 when this Court made the following order:-

"The record of appeal omits certain documentary exhibits which were tendered in evidence at the trial. The documents being primary documents, they cannot be brought on record under rule 89 of the Court of Appeal Rules in view of the clear provisions of rule 85 (2A) of the said Rules. Consequently, the record of appeal is incurably defective and renders this appeal incompetent. It is therefore ordered struck out but with no order as to costs".

It was after the above order that the applicant filed this notice of motion. It is to be noted that the previous appeal was struck out because the applicant's counsel omitted certain primary documents. This was a mistake by counsel.

Mrs. Kinyanjui for the applicant, in urging this Court to allow the application pointed out that the omission of primary documents was not deliberate and that the intended appeal raises substantial issues of law.

Mr. Mburu for respondent opposed this application on the ground that this is an old matter which should be brought to an end. In Mr. Mburu's view, the omission of primary documents was a case of pure negligence. He also stated that this application was not presented with due diligence since the previous appeal was struck out on 16th January, 2001 and this application was not presented immediately.

In Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil application No. NAI. 255 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".

In the application before me it has to be appreciated that the previous appeal was struck out for omission of primary documents in the record of appeal. Once that appeal was struck out the appellant/applicant had to start the process afresh. And that is why this application was filed. The applicant would now like to be granted an extension of time in which to file a notice of appeal and record of appeal.

What explanation has been given for the delay? The applicant's counsel has explained the circumstances leading to the presentation of this notice of motion. The previous appeal was struck out on 16th January, 2001 while this application was filed on 26th February, 2001 or soon thereafter. I do not think the applicant can be faulted for any delay. There was sufficient explanation as regards getting instructions.

As regards the chances of appeal succeeding I would only say that the dispute relates to land, and as we know such disputes raise emotions hence a careful handling of the matter is called for. In my view, it is only proper that the applicant should be given the last chance to engage his opponents in this dispute. He ought not be shut out from exercising his statutory right to be heard on appeal.

In view of the foregoing, this application is allowed and I hereby grant extension of time so that the applicant has seven (7) days from the date of this ruling to lodge and serve a fresh notice of appeal and 21 days thereafter to lodge and serve a record of appeal. The costs of this application will abide the outcome of the intended appeal. It is so ordered.

**Dated and delivered at Nairobi this 23rd day of March, 2001.**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**