



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O'KUBASU, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 369 OF 2000**

BETWEEN

MANSUR JIWANI (Sued wrongly as T/a COMPUTER CITY.....APPLICANT

AND

OVIDIAN ADVERTISING AND DESIGN LIMITED RESPONDENT

An application for extension of time to file Notice of Appeal and Record of Appeal in an intended Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Justice Keiwua) dated 15th February, 1999

in

H.C.C.C. NO. 459 OF 1997)

R U L I N G

I have before me an application by way of Notice of Motion brought under Rule 4 of the Court of Appeal Rules in which the applicant is seeking the following orders:-

- 1.THAT time for filing a Notice of Appeal against the above ruling be extended.***
- 2.THAT a time be stated within which the said Notice of Appeal is to be filed and served.***
- 3.THAT a time for filing a Record of Appeal be extended.***
- 4.THAT a time be stated within which such Record of Appeal to be filed.***
- 5.THAT the proposed appeal be heard on priority basis.***
- 6.THAT the costs of this application abide the result of the said Appeal or be dealt with as the justice of the case shall seem to require."***

The facts giving rise to this application appear quite simple. The applicant's appeal to this Court being Civil Appeal No. 147 of 1999 came up for hearing on 27th November, 2000 and the same was struck out. The order of this Court which struck out the said appeal was as follows:

"Mr. Ngunjiri learned counsel for the appellant concedes that their appeal is incurably

defective. The respondent has made an application that the record of appeal be struck out. We grant the notice of motion dated the 2nd June, 2000 and lodged in Court on the same date and order that Civil Appeal No. 147 of 1999 be and is hereby struck out but with no order as to costs of the appeal and the motion."

Mr. Ngunjiri for the applicant stated that there was a defect in the Notice of Appeal filed earlier and he conceded that fact hence he had to start again. But Mr. M'Inoti for the respondent argued that no explanation had been given as to why the appeal was filed out of time to which Mr. Ngunjiri answered that this delay was only four days. In this application we note that the appeal which was struck out on 27th November, 2000 was defective because the Notice of Appeal had errors in its dates and also due to the fact that it was filed four days out of time without leave of the Court. For the applicant to be allowed to come up again for hearing it must obtain leave of this court pursuant to Rule 4 of this Court's rules. Under that rule this Court would be exercising its discretion which discretion although unfettered must be exercised on reason not caprice. In ***Samken Limited and Another vs Mercedes Sanchez Rau Tussel and Another***, Civil Application No. NAI 21 of 1999 (unreported) this, Court made the following observation:

"We said at the beginning of this ruling that rule 4 under which the applicants went before the single Judge gives an unfettered discretion to the single Judge in deciding whether or not to grant the extension sought.

Though the discretion is unfettered, like all judicial discretion it must be exercised on reason not caprice and the exercise must not be arbitrary or oppressive. Accordingly, the courts have over the years put down guidelines on how the exercise of a discretion ought to be done."

And in its earlier decision 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 thus in ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi***, Civil Application No. NAI. 251 of 1997 (unreported): "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 present application we find that when the applicant filed the appeal which was struck out on 27th November, 2000 it had not sought leave to file appeal out of time. There was a delay of only four days. Then after the appeal was struck out this application was filed within three weeks. In my view, the delay has been adequately explained to warrant me to exercise my discretion in favour of the applicant.

In view of the foregoing, this application is allowed and the applicant is given 15 days from the date of this ruling in which to file and serve Notice of Appeal and 21 days from the date of filing the Notice of Appeal to file and serve the Record of appeal.

The costs of this application shall abide the intended appeal.

Dated and delivered at Nairobi this 18th day of April, 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.