



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OWUOR, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 200 OF 2000

BETWEEN

COSMAS KYALO MUTHEMBWA APPLICANT

AND

EUNICE M. KYALO RESPONDENT

**(An application for extension of time to file Notice &
record of Appeal in an intended appeal from Judgment
of the High Court of Kenya at Nairobi (Mr. Justice**

Hayanga) dated 2nd July, 1999

in

H.C.C.C NO. 2562 OF 1994)

R U L I N G

The applicant, Cosmas Kyalo Muthembwa, in this Notice of motion brought under rule (4) of the Court of Appeal Rules (the Rules) seeks two orders namely:-

i. That the time for lodging a Notice of appeal against the Judgment dated 2nd July, 1999 by the Honourable Mr. Justice Hayanga be extended by 21 days from the date of the order.

ii. That the time for filing a late Memorandum of appeal and record of appeal against the aforesaid ruling be similarly extended.

The applicant (defendant in the superior court) being aggrieved by the judgment of the superior court, Hayanga J. delivered on the 2nd day of July, 1999 filed a Notice of appeal within the prescribed time in the Rules. However, he failed to comply with rule 81 (2) of the Rules. Consequently his appeal was incompetent and the same struck out by this Court on 27th June, 2000. On the 21st day of July, 2000 this Notice of motion was lodged seeking the orders that I have referred to above. The reason given for the

non-compliance with rule 81(2) by not copying the letter of 2nd July, 1999 to the respondent (a fact not deponed to anywhere in the affidavit in as far as the date of the letter is concerned) is that at that time, the applicant was acting in person and was ignorant of the demands of the rules pertaining to this Court. Mr. Ranji, for the respondent, in opposing the application has urged me on this particular point not to accept this reason as a genuine explanation of the delay. He says so because a Notice of appeal filed, and on record herein, clearly indicates that the applicant was up to that time still being represented by his former counsel therefore the question of him having to request for the proceedings and judgment from the registrar by himself personally could not have arisen. Secondly, the said letter was not availed to the Court.

My view of this matter is that whatever past mistakes or sins committed by the applicant by not complying with rule 81(2) were sufficiently punished by the drastic step that the Court took by striking out the appeal and thereby compelling the applicant to start the process afresh, if he was still desirous to mount his appeal. Therefore the lack of that material does not affect my decision either way. I agree with Omolo, J.A's statement in **George William Engineering Company Ltd. vs. Leonard Kimeu Kimathi** Civil Application No. Nai 37 of 1998 (ur 1/98).

"The applicant is entitled to seek these extensions and as far as I am concerned, the only point I have to consider when deciding on which my direction ought to go is the period between the 31st October, 1998 when the previous appeal was struck out and the 5th February, 1998 when this motion was filed".

Mr. Ranji computes that period to be 24 days and further asserts that no credible explanation has been given for that delay and that the applicant failed to move with speed and alacrity after the appeal had been struck out. According to the affidavit sworn in support of the Notice of motion, counsel was still taking instructions from the applicant. I am unable to find that the explanation given in the circumstances of this case lacks merit or was not genuine. Therefore the period of 24 days does not amount to inordinate delay as to make me not exercise my unfettered discretion so granted to me by rule (4) in favour of the applicant. In the result, I grant both prayers in the Notice of motion save that the Notice of appeal (a very simple document indeed) shall be filed and served within 7 days from today's date, while the memorandum of appeal and record of appeal shall be filed within 14 days from the date of filing the Notice of appeal.

Costs of this application shall be to the respondent.

Dated and delivered at Nairobi this 6th day of April, 2001.

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR