



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: O'KUBASU, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 247 OF 2000**

**BETWEEN**

**MACWATT ESTATES LIMITED ..... APPLICANT**

**AND**

**MBWANJI LIMITED ..... RESPONDENT**

**(An application for extension of time to file Notice of Appeal and Record of Appeal out of time in an intended Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Justice Mbogholi) dated 31st July, 1998**

**in**

**H.C.C.C. NO. 2971 OF 1991)**

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**RULING**

This is an application by way of Notice of Motion brought under Rule 4 of the Court of Appeal Rules. The applicant seeks an order for leave to file a Notice of Appeal and Record of Appeal out of time. The application is brought on the grounds that:

"1.The Applicant's appeal herein Civil Appeal No. 260 of 1999 MACWATT ESTATES LIMITED vs. MBWANJI LIMITED was struck out on the 25th July, 2000 on the grounds that some Exhibits which were exhibited in the superior court were omitted in the Record of Appeal and the proceedings in the Record of Appeal were incomplete.

2.The subject matter of the intended appeal being land and therefore fundamental all litigants deserve to be heard on merits without unnecessarily being knocked out on technicalities.

3.The applicant has an arguable appeal and it is in the interest of justice and fair play that it is granted leave to lodge a Notice of Appeal and Record of Appeal.

4.The Applicant would suffer irreparable loss and deprivation unless it is allowed to file and serve a Notice of Appeal and Record of Appeal out of time.

5.The extension of time within which to lodge the Notice and Record of Appeal will not prejudice nor work any injustice upon the Respondent.

6.Delay is not inordinate in the circumstances."

Mr. Wagara for the applicant gave a brief background to this matter in a bid to explain the delay. He stated that the appeal was struck out because the appeal bundle was incomplete. The other reason for the delay was that there was a previous counsel handling the applicant's matter and when the present counsel took over the matter it was discovered that there were certain deficiencies which had to be rectified but even then the appeal was struck out for failure to file a complete bundle. Finally, Mr. Wagara contended that the appeal was struck out on 25th July, 2000 and this application was filed on 23rd August, 2000 which was a period of three weeks. In his view, this period of three weeks cannot be described as inordinate delay.

Mr. Machira for the respondent opposed this application. He was of the view that there was no sufficient material in this application to enable the court grant or refuse the application to enable the court grant or refuse the application. For example, there was no plaint or defence annexed to the application. These (plaint and defence) were annexed to the replying affidavit.

The second point to be raised by Mr. Machira was that the transaction between the parties was caught up by the Land Control Act and hence this makes the application hopeless.

This application is before me as result of an earlier appeal being struck out. On 25th July, 2000 this court made the following order.

"The respondent by its application dated June 9 2000 has applied to have the appeal struck out because essential steps have not been taken and also that the appeal had been filed out of time and without leave of the court. In view of the fact that Mr. Wagara for the appellant does not resist the application the appeal is struck out with costs to the applicant."

It was after the above order that the applicant came to court and filed this Notice of Motion on 23rd August, 2000. I have already set out the grounds upon which this application is brought. Those grounds set out the reasons that led to the delay. Mr. Wagara for the applicant made submissions in a bid to explain even more clearly what led to delay in filing Notice of Appeal and Record of Appeal. He talked of having taken over the matter from a previous counsel who was appearing for the applicant in the superior court.

This Court has wide discretion under Rule 4 of this Court's Rules in dealing with extension of time. In an application of this nature the Court is being asked to exercise its discretion. It is therefore upon an applicant to explain to the satisfaction of the court that this discretion should be exercised in its favour. The issue here is whether the explanation given for this delay is acceptable. If the explanation is acceptable then this court would exercise its discretion in favour of the applicant. As Lakha JA said in Peter Maina Munyua v. Damaris Njoroge Civil Application No. NAI. 210 of 1999 (unreported).

"When there is no explanation there can be no indulgence."

I would humbly add that even when there is explanation but the explanation is found to be unacceptable then there can be no indulgence.

And in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. NAI. 251 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 present application we find that when the applicant filed the appeal which was struck out on 25th July, 2000 it had not sought leave to file appeal out of time. When this application came up for hearing on 29th March, 2001 Mr. Wagara for the applicant said the earlier appeal was struck out because the record was incomplete since some essential documents were not included in the record. As to what caused the delay and what happened before the matter was brought to this court there was no material placed before this court to give us an explanation as to what happened. Actually it was the replying affidavit of Mr. Njoroge Wachira sworn on 13th November, 2000, that throws some light on what had happened. There was annexed to that affidavit the plaint defence and the judgment of the superior court. The plaint was filed soon after 2nd June, 1992 (the date of the plaint). The judgment of the superior court was delivered on 31st July, 1998.

From the foregoing it is to be noted that judgment to be appealed against was delivered in July 1998. There has been no explanation why a Notice of Appeal was not filed soon after judgment was delivered by superior court. While there may be need for time to prepare record of appeal there can be no reason why a Notice of Appeal could not be filed within time. In this matter we now know that judgment of the superior court was delivered on 31st July, 1998. Apart from being told that there was another counsel handling this matter on behalf of the applicant there has been no explanation as to what led to the long delay between the date of judgment of the superior court and the date of filing appeal in this Court. And it must be remembered that when that appeal was filed it was filed out of time and without leave of this Court. What is before me is an application for such leave. In Samken Limited and Another vs. Mercedes Sanchez Rau Tussel and Another - Civil Application No. Nai. 21 of 1999 this Court made the following observations:-

"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."

I have already stated the guidelines given by this Court in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Supra), which guidelines should be followed in considering this application before me. In Samken Limited and Another vs. Mercedes Sanchez Rau Russel and Another (Supra) this Court also stated:-

"We think it is now settled that where there is such a long delay or inaction or whatever else it may be called there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter the applicants placed before the learned single Judge no material upon which he could exercise his discretion."

In the present application Mr. Machira for the respondent in his opening remarks stated that there was no sufficient material placed before me to enable me grant or refuse the application and on that score asked me to dismiss the application. It is indeed true that the application before me had only scanty material and it was the replying affidavit of Mr. Wachira that provided background material to this application. Mr. Wagara was quite contented with stating that the superior court did not provide a complete record of the proceedings. But the applicant did not need proceedings for it to file a Notice of Appeal.

Having carefully considered what has been placed before me, the submissions by counsel for both parties and having regard to guidelines to be followed in an application of this nature I am of the view that there was inordinate delay in bringing this matter to this Court. This long delay has not been explained to the satisfaction of this Court. I would say nothing about the chances of the appeal succeeding but all I can say is that litigation whether relating to land or aircrafts must have an end.

Taking into account the long delay and absence of acceptable explanation I find no merit in this application. It is, therefore, accordingly dismissed with costs to the respondent.

Dated and delivered this 5th 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**