

**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 351 OF 2000**

BETWEEN

NIMA INVESTMENTS LIMITED APPLICANT

AND

STEPHEN MBUKI KIMANI RESPONDENT

(An application for extension of time to file and serve a
fresh notice & record of appeal in an intended
appeal of the High Court of Kenya at Nairobi
(Anga'wa J) dated 21st October, 1998

in

H.C.C.C. NO. 3039 OF 1996)

R U L I N G

Nima Investments Limited, the applicant before me, has always wanted to appeal to this Court against the judgment of the superior court (Ang'awa, J) which was delivered on 21st October, 1998. I gathered from what was before me, that the applicant had in fact lodged in this Court **Civil Appeal No. 122 of 1999**, but that when that appeal came up for hearing on 26th July, 2000, the Court struck it out because certain documents had been left out of the record of appeal. Mr Iseme for the applicant and Mr Kimani for Stephen Mbuki Kimani, the respondent herein, also made me to understand that following the striking out of the appeal, the applicant filed an application for extension of time and on 7th November, 2000, Lakha, JA made orders granting the extensions sought and I understand further that time for lodging the notice of appeal was extended by seven days from the date of the order while time for lodging the record of appeal was extended by twentyone days from the date of lodging the notice of appeal. The notice of appeal was actually lodged on 9th November, 2000 and so the record of appeal was to be lodged within twenty-one days from 9th November, 2000. The applicant was unable to comply with that deadline and on 30th November, 2000, be once again returned to the Court with its present motion asking that:

"... the Court be pleased to exercise its unfettered discretion in favour of the Applicant and extend the time, within which the applic ant should lodge and serve its Notice and Record of Appeal."

When I asked Mr Iseme what happened to the notice of appeal lodged on 9th November, 2000, pursuant to the Court's order of 7th November, 2000, Mr Iseme told me he thought that notice had lapsed because of their failure to lodge the record of appeal within the time stipulated in the order of 7th November, 2000. I have looked for and obtained the orders made by Lakha, JA on 7th November, 2000. The learned Judge did not say in that order that if the record of appeal was not filed within the twenty-one days he had granted, the notice of appeal already filed would automatically lapse or stand dismissed. The respondent has not made any application for the striking out of the notice of appeal and in my view, there is already a valid notice of appeal in existence and there is, accordingly, no occasion for me to extend time for filing another notice of appeal.

Why was the record of appeal not filed in time?

Mr Iseme told me he was unable to obtain from the superior court the documents the absence of which had led to the striking out of Civil Appeal No. 122 of 1999 . Mr Iseme says the superior court record was unavailable at the time the current motion was filed. Mr Kimani conceded that the superior court file became available in December 2000, and that only after a request had been made to the superior court to reconstruct the file. I agree with Mr Kimani that Mr Iseme's affidavit in support of the motion leaves a lot to be desired, but I think it would be unjust, in the circumstances of the matter, to deny the applicant the extension it seeks. It is to be noted that the applicant filed the current motion for extension even before the twenty-one days given by the order of 7th November, 2000, had expired.

In the event, I exercise my discretion in favour of the applicant and extend the time within which the record of appeal is to be lodged by a period of seven days from the date of this ruling. The applicant shall pay to the respondent the costs of this motion which I assess at Shs.5,000/= and such costs shall be paid within seven days of the date hereof. If the costs are not paid within the stated time, this motion shall stand dismissed with costs thereof to the respondent. Those shall be my orders in this matter.

Dated and delivered at Nairobi this 25th day of May, 2001.

R. S. C. OMOLO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR