



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 344 OF 2000**

BETWEEN

DORCAS WANGARI MACHARIAAPPLICANT

AND

TERRY WACHEKE MUIGAI 1STRESPONDENT

AGNES WAMBUI MUIGAI 2NDRESPONDENT

**(Application for extension of time to file a Notice of Appeal
and Record of Appeal and to serve the same in an Intended
Appeal from the Ruling & Order of the High Court of Kenya
at Nairobi (Shaikh Amin, J.) dated the 26th day of
October, 1995**

in

H.C.SUCC.CASE NO. 590 OF 1985)

RULING

There is an application before me made under rule 4 of the Rules of this Court for time to be enlarged within which to file a notice of appeal and to file and serve the record of appeal and to provide for the costs of this application. The facts leading to the application are as follows.

The applicant was the first Petitioner in Succession Cause No. 590 of 1985 in the superior court in which ruling was delivered in October 1995. Being dissatisfied with the said decision the applicant intended to appeal to this Court. Such an appeal, however, was on 29 September 2000 struck out as there was an error in the date in the notice of appeal. Assuming, without deciding, that such an error was due to the fault on the part of the applicant, an application was made on 17 October 2000 to the superior court to correct the date when ruling had been delivered. The ruling on such an application was delivered on 7 November 2000 whereupon this application was made on 24 November 2000.

The application was opposed by the first respondent, broadly speaking, on three main grounds: first, that there was an inordinate delay on the part of the applicant, secondly, that the first respondent was being kept away from enjoying the fruits of the judgment and, thirdly, that the discretion should not be exercised in favour of the applicant. I shall now deal with each of these objections in the same order in which they were presented. At this stage, I mention that the second respondent whilst associating herself with the submissions made on behalf of the first respondent, stated that she was not submitting that the

applicant had been at fault.

The time relevant in considering the delay is the time taken in making the present application from the date the appeal was struck out. This is the time between 29 September 2000 and 24 November 2000 making a total of 57 days, 3 days short of 2 full months. Having regard to all the circumstances of the case, I do not consider this is an inordinate delay. If I am wrong and the delay is inordinate, I am satisfied that it has been reasonably explained in that the proceedings before the superior court to obtain a correction took in itself 21 days. I consider these proceedings were necessary and did not entail any inordinate delay. I may here add that it was conceded that the error on the part of the applicant was forgivable.

Secondly, it was said that if the application is allowed, it will further delay the respondent from enjoying the fruits of the judgment bearing in mind that these proceedings commenced way back in 1985. This is true but inevitable. It has not, however, been shown to me that it was the applicant's fault for the whole of the period commencing from 1985 which was taken for the disposal of the suit.

Thirdly, it was submitted that the discretion of the Court should not be exercised in favour of the applicant. The application has been made under rule 4 of the Rules of this Court and it requires an order to be made if it is just so to do. It has not been shown that the applicant's conduct has been such as to deprive him of an extension. Nor has it been shown to me that the respondents will suffer any prejudice if an extension is granted as sought. I remind myself that at the present time hearing dates are easily available at early dates and further delay, if an extension is granted, will entail a few months and a final disposal of the appeal before the end of this year is not unlikely.

Having regard to all the circumstances of the case, I am satisfied that this is a proper and fit case for the exercise of my discretion in extending time to the applicant.

Accordingly, I order that a notice of appeal be filed within seven days from today and the record of appeal within thirty days thereafter.

The applicant shall pay to the respondents the costs of this application in any event.

Dated and delivered at Nairobi this 15th day of May, 2001.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR