



**IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: O'KUBASU, J.A. (IN CHAMBERS)  
CIVIL APPLICATION NO. NAI 260 OF 2001 (UR 140/01)  
BETWEEN**

**FIRST AMERICAN BANK OF KENYA LIMITED**

**ANDREW DOUGLAS GREGORY ..... APPLICANTS**

**AND**

**GRANDWAYS VENTURE LIMITED ..... RESPONDENT**

**(An application for enlargement of time for service of  
the notice of appeal in an intended appeal from a  
ruling of the High Court of Kenya at Kisumu (Tanui  
J) dated 2nd July, 2001  
in  
KSM. H.C.C.C. NO. 93 OF 1999)  
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**R U L I N G**

This is an application by way of notice of motion brought under Rule 4 of the Court of Appeal Rules in which the applicants are seeking orders that:

***"1. The time for service of the Notice of Appeal be extended.***

***2. The notice of appeal dated and filed on 5th July, 2001 and served on the respondent's advocates on the 19th July, 2001 be deemed to be properly served."***

The application is supported by sworn affidavits of Ancut Muumbi Munyao, a court clerk and Beryl Anyango Ouma, one of the advocates appearing on behalf of the applicants.

Ms Ouma in her submission during the hearing of this application on 2nd August, 2001, explained that a notice of appeal was filed on 5th July, 2001 and that when the court clerk (Munyao) went to serve the respondent's advocates with application for stay, he thought that he had served both the application for stay and the notice of appeal as well. The clerk was not aware that he had not served the notice of appeal and it was only later when this was pointed out by the respondent's advocates that this matter came to the applicants' advocates attention. This was pointed out on 18th July, 2001 and on 19th July, 2001, the notice of appeal was served on the respondents' advocates. This was, however, one week out of time and it is due to that mistake that the applicants have come to court for enlargement of time.

Mr Nagpal for the respondent, opposed the application. In his view, no satisfactory explanation has been given. While conceding that this is a matter for the discretion of the court, Mr Nagpal pointed out that this discretion has to be exercised on judicial grounds.

As correctly pointed out by counsel appearing in this matter in an application of this nature the Court is being asked to exercise its discretion. Although this is unfettered discretion but like all judicial discretion, it must be exercised on reason not caprice, and the exercise must not be arbitrary or oppressive - see SAMKEN LIMITED & ANOTHER VS MERCEDES SANCHEZ RAU TUSSEL & ANOTHER, Civil Application NO. NAI 21 OF 1999 (unreported). How does this Court deal with such matters? We have guidelines given in the decision of this Court in LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI, Civil Application NO. NAI 255 OF 1997 (unreported), in which it was stated:

*"It is now well settled that the decision whether or not to extend 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 de lay, secondly the reason for the delay, thirdly (possibly) the chances of the appeal succeeding and fourthly the degree of prejudice to the respondent if the application is granted."*

In the present application the delay was one week only. The reason for not serving the respondent's advocates has been given as a mistake on the part of the clerk who went to serve. He had two volumes of an application for stay and one sheet of a notice of appeal. While he served the bulky document in respect of application for stay, he forgot to serve the single document relating to notice of appeal. It has not been said that this was not so. In my view, the explanation given is sufficient as the mistake or error was not deliberate.

In view of the foregoing, I am satisfied that this is a proper case for me to exercise my discretion in favour of the applicants. Hence the application is granted and it is now ordered that the time for service of the notice of appeal on the respondent is extended and that the notice of appeal dated and filed on 5th July, 2001, served on the respondent's advocates on the 19th July, 2001, is hereby deemed to be properly served. The costs of this application shall abide the intended appeal. Those shall be my orders.

**Dated and delivered at Nairobi this 7th day of August, 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**