



**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OWUOR, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 79 OF 2001**

BETWEEN

KIMATU MBUVI T/A KIMATU MBUVI & BROTHERS APPLICANT

AND

AUGUSTINO MUNYAO KIOKO RESPONDENT

**(Application for the extension of time to file the notice
& record of appeal in an intended appeal from the
judgment of the High Court of Kenya at Machakos
(Osiero J) dated 17th March, 1994**

in

MKS. H.C.C.C. NO. 225 OF 1992)

R U L I N G

In this application brought before me under the provisions of **rule 4, of the Rules of this Court** , the applicant **Kimatu Mbuvi T/a Kimatu Mbuvi & Brothers**, seeks an order extending time for filing a notice of appeal and a record of appeal out time.

The grounds upon which the order is sought are contained in an affidavit sworn and filed herein by Counsel for the applicant and basically are that; the applicant's appeal filed in this Court after an extension for filing the same had been granted to it was struck out by the Court on 2nd March, 2001; pursuant to an application brought by the respondent, Augustino Munyao Kioko. Notwithstanding the fact that the decision the applicant wishes to challenge was delivered as far back as 17th March, 1994, in the superior court, the applicant is still dissatisfied with the decision and wants to be allowed to prosecute an appeal in this Court. His appeal, No. NAI 99 of 2000 was struck out on the ground that the record of appeal did not contain the exhibits produced in the superior court. A mistake which counsel, and rightly so, takes responsibility for. The exhibits and certificate from the Deputy Registrar of the superior court at Machakos have now been obtained and he is ready to lodge the appeal. He further states that he acted with speed once the appeal was struck out and filed this application within a period of nineteen days. It is on this basis that he prays that his mistake not to be visited upon the applicant and that the extension of time be granted.

Mrs Mwangangi, counsel for the respondent, strenuously opposed the application both in the replying affidavit she filed in the matter and in her submissions before me. She has urged me not to exercise my discretion in favour of the applicant on the ground that this application is an abuse of the process of this Court. She says so because of the conduct of the applicant since the judgment in the matter was delivered

7 1/2 years ago. According to her, this Court, has leaned towards the applicant and granted it indulgence on more than two times, in order to enable it to mount a successful appeal to no avail. It is not disputed that indeed and in fact two appeals have so far been struck out by this Court on account of some errors by the applicant. Mrs Mwangangi claims that:

"There has been repeated apparent recklessness, repeated mistakes and gross errors and inaction, therefore the history should not be disregarded."

Secondly, that in the prolonged period the matter has been in Court files have been moved from Machakos to Nairobi and back to Machakos Court Registry, in the process - it is very likely that the original record is no longer intact.

Thirdly, that counsel has not explained his mistake sufficiently to warrant my discretion being exercised in favour of the applicant.

While I agree with Mrs Mwangangi that this matter has had indeed a chequered history before this Court, in this particular application I am only dealing with the period from 3rd March, 2001, when this Court struck out the applicant's appeal to the 21st March, 2001, when this application was filed. I am satisfied that this is the position I should take as expressed by this Court in amongst other decisions **GEORGE ROINE TITUS & ANOTHER V JOHN P. NANGURAI CIVIL APPLICATION NO. NAI 249 OF 1998 AND SCENERIES LTD VS NGENGI MUIGAI CIVIL APPLICATION NO. NAI 41 OF 1999 (both unreported)** . In the latter, the Court quoted with approval, Omolo, JA. in **MUCHUGI KIRAGU V JAMES MUCHUNGI KIRAGU & HENRY THARIKU NGANGA , CIVIL APPLICATION NO. NAI 226 OF 1998 (unreported)** :

" In his replying affidavit, Mr Gachoka contends that no sufficient reason has been given as to why the applicant had not included in his previous record the documentary exhibits which led to the previous appeal being struck out. Mr Gachoka repeated this contention in his submission before me. I do not think this would be a good reason for refusing to exercise my discretion in favour of the applicant if I think it is right for me to do so. The applicant was punished for his failure to include the document and the punishment took the form of his previous appeal being struck out. To refuse him an extension on that basis, would in my view amount to double punishment over one fault."

That is my view in this application. No argument has been advanced to me to convince me that there are any special reasons why I should go beyond the activities of the applicant in the period it took to file this application from the time that his previous appeal was struck out.

On this basis I am inclined to exercise my discretion in favour of the applicant and extend time as sought. I hereby order that the notice of appeal be filed within seven (7) days from the date hereof and thereafter the record of appeal be lodged within fourteen (14) days. The respondent shall have the costs of this application assessed at KShs.10,000/= and the same to be paid within fourteen (14) days from today's date. In default, execution to issue.

Dated and delivered at Nairobi this 3rd day of August, 2001.

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR