



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 397 OF 1996**

**MWANGI KINUTHIA ..... APPLICANT**

**AND**

**JOSEPH NJOROGE MWANGI ..... RESPONDENT**

**(An application for extension of time to file an appeal out of time in an intended appeal from Judgment & decree of the High Court of Kenya at Nairobi (Mr. Justice Cockar) dated 16th January, 1986**

**in**

**H.C.C.C NO. 1857 OF 1979)**

**\*\*\*\*\***

**RULING OF THE COURT**

The applicant herein had applied before the single Judge of this Court (Omolo J.A) under rule 4 of this Court's Rules for leave to file:

"A memorandum and record of appeal out of time".

The learned single Judge considered what was urged before him and in the end came to the conclusion that the applicant had failed to convince him that he should exercise his discretion in favour of the applicant and hence dismissed the application for extension of time.

Being dissatisfied by that dismissal the applicant now comes before us by way of reference. The reference was argued before us on 8th October, 2001 when Mr. Kariuki for the applicant took issue with one point only - that the mistake of an advocate should not be visited on the client.

Mr. Ngatia for the respondent in opposing this reference pointed out that the relief sought was for filing a record of appeal out of time and yet there was no valid notice of appeal. In his view this reference ought to be dismissed since it had not been demonstrated that the learned single Judge was at fault.

The issue of advocate's mistake being visited on his client was raised before the learned single Judge and in his ruling he stated:-

*"When I asked the applicant's present advocate, Mr. Kariuki Muigua what caused this delay, Mr.*

*Muigua's simple answer to me was that the delay was the fault of the previous advocate and I ought not to visit it on the applicant. That may be so, but it is to be remembered that a burden lies on a party who seeks the exercise of a court's discretion in his favour to place some material before the court upon which material the discretion is to be exercised. To simply say "it is the mistake of my counsel", is really no answer. As I once said pure and simple inaction by counsel or a refusal by him to act cannot, in my view amount to a mistake which ought not to be visited on a client. In my view the applicant was obliged to give some explanation for the delay between the 13th July, 1995 when his previous appeal was struck out and the 6th October, 1995 when he filed his previous application for extension of time".*

In our view the learned single Judge cannot be faulted in the manner he dealt with the issue of a mistake of an advocate and his client.

It should be pointed out that it was not only the mistake of the advocates that led to the dismissal of the applicant's application for extension of time. The applicant was to blame for having taken too long before challenging the decision of the superior court. And on that point the learned single Judge expressed himself thus:-

*"Again the judgment he seeks to challenge was delivered over ten years ago and he has always been aware that he has lost over three acres of his land. With these facts in mind, he files an application and waits for over one year before going either to his advocate or to the court to find out what happened to his application".*

Here was a long delay which the applicant could not satisfactorily explain.

Lastly, there was the issue of notice of appeal. Mr. Ngatia's argument was to the effect that as there was no valid notice of appeal then the relief sought which was extension of time for filing a record of appeal was for dismissing. On this point the learned single Judge said:-

*"The consequence of my present holding is that even if I were to grant extension sought the appeal to be lodged pursuant to my order would be held to be incompetent and liable to be struck out as having been filed without a valid notice of appeal".*

The position here is that the applicant filed an application for extension of time. He wanted to file a memorandum and record of appeal out of time. But there was no prayer to file a notice of appeal out of time. Since the original appeal was struck out that meant the notice of appeal went out with it. Hence, it was incumbent upon the applicant to start the process afresh. He chose to ignore the issue of notice of appeal. Clearly, even if the learned single Judge had granted an extension of time within which the applicant was to file his appeal (which was sought in that application) the applicant's celebration would have been short lived as such appeal would have been struck out again. In the result, we think that the learned single Judge had neither exercised his discretion arbitrarily nor did he take into account any extraneous matters but acted on matters he was entitled to take into account and came to what in our view, was inevitable conclusion. We therefore dismiss this reference with costs.

**Dated and delivered at Nairobi this 12th day of October, 2001.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**M. OLE KEIWUA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**