

**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, J.A(IN CHAMBERS))
CIVIL APPLICATION NO.NAI.233 OF 2001**

BETWEEN

KINGSWAY MOTORS (K) LTD APPLICANT

AND

SOUTHERN CREDIT BANKING CORPORATION LTD RESPONDENT

**(An application for extension of time to file and serve
Notice and Record of Appeal from a judgment of the
High Court of Kenya at Nairobi (Lady J. Gacheche,
Commissioner of Assize) dated 18th August 1999**

in

H.C.C.C. NO.21 OF 1998)

R U L I N G

This is an application for an extension of time within which to file and serve a notice of appeal and record of appeal in an intended appeal.

Kingsway Motors (K) Limited, the applicant having been aggrieved by the decision of the superior court given on 18th August 1999, in its civil case No.21 of 1998, promptly lodged a notice of appeal declaring its intention to challenge that decision on appeal. It did not, however, lodge its record of appeal within the prescribed time, and its Civil Appeal No. 245 of 2000 was struck out for having been filed out of time without leave. In the present application it seeks to restart the appeal process arguing that it failed to lodge its record of appeal on time in its earlier appeal because copies of proceedings and ruling were not supplied to it within time.

Mr. Kariuki for the applicant submitted before me that had the superior court furnished the said copies to the applicant in time no doubt the record of appeal would have been lodged timeously. Mr. Munge for the respondent submitted that the applicant is not being candid, and in so submitting he relied on correspondence the applicant's counsel on record had written to the applicant desperately asking for instructions to mount an appeal. In view of that and citing this court's decision in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, Civil Application No. NAI.255 of 1997, he submitted that the applicant having withheld that fact from the court is undesirable. In view of this Court does not in an application for extension of time normally consider the conduct of an applicant before his appeal was struck out as by his appeal being struck out it is taken that he has been sufficiently punished. However, in a case as the present one in which an applicant despite being constantly reminded that time for lodging a record of appeal is fast running out does nothing to instruct its counsel in that regard the court is not obliged to grant it indulgence.

An application under rule 4 of the Court of Appeal Rules, the court exercises discretionary jurisdiction, and utmost good faith must be shown by an applicant if the court is to grant him indulgence. The correspondence annexed to the replying affidavit clearly shows that the applicant deliberately took no steps to lodge its record of appeal in the struck out appeal, and cannot expect sympathy from this or indeed any other court. It is particularly disturbing that its counsel had to threaten to apply for leave to

cease acting for it before it condescended to instruct them to lodge a record of appeal.

This is not a fit case for exercise of my judicial discretion under rule 4, above, and I am not minded to allow this application which I accordingly dismiss with costs assessed at Kshs.5,000/=.

Dated and delivered at Nairobi this 29th day of November, 2001.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR