



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**civil misc appl 329 of 01**

**LILIAN NJOKI KARUBIU ..... APPLICANT**

**AND**

**STEPHEN GICHANGI MITHAMO ..... DECEASED SUBSTITUTED BY CHARLES MUNENE  
GICHANGI ..... RESPONDENT**

**RULING:**

This is an application on behalf of the unsuccessful plaintiff, Lilian Njoki Karubiu, under rule 4 of the Rules of this Court. It seeks for an extension of time to file a notice of appeal and a record of appeal from the decision of the Superior Court (Juma, J.) delivered on 28th January, 2001 in H.C.C.C. NO. 84 of 1994. The application was filed on 29th of August, 2001. The obvious and admitted long and accumulative delays in filing the record of appeal and the present application are explained and contained in the affidavit sworn in support of the application and submission of Counsel for the applicant to me. They are as many as they are varied.

The application expressly states the ground for seeking the extension to file and serve a notice and a record of appeal to be:-

"that there was an oversight on the part of the Advocates' Court Clerk who failed to file it in Court on time and the same was already late as per provisions of the Court of Appeal Rules in regard to computation of time."

The applicants explanation which she gives in the affidavit sworn in support of the application is:

"That I am informed that the Notice of Appeal was prepared well in time but the Court Clerk failed to file and serve the same within the time allowed until 21st February, 2001 perhaps thinking that there were 30 days from the time of judgment to the date the notice was required to be filed."

The Court-Clerk, (Purity's) explanation in her affidavit filed in this matter is that her employer M/s. Kariithi gave her a notice of appeal on 30th January, 2001 together with a letter applying for the proceedings to serve the notice upon M/s. Kagondu and Mukunya Advocates,

"4. That I thought the notice was to be filed when all copies of proceedings were supplied by the Court and I left behind the notice of appeal and kept it out of the file."

Later, the employer looked at the file, upon asking her whether she had filed the notice or not, she answered in the negative. It was then that she was ordered to file the notice which she did in February, 2001.

In his submission before me, Counsel stated that the delay was due to the clerks oversight. He did not discover that the notice had not been filed and served till 29th August, 2001 after he had just received the proceedings from the Court and was in the process of preparing the record of appeal. This is when he filed the present application. Mr. Mukunya, Counsel for the respondent has strenuously objected to the application mainly on the ground that the delay in this matter which is more than six months is inordinate and completely unexplained and that the Court clerks mistake cannot be a good enough reason for this Court to grant the extension. It is further contended in the respondent's affidavit filed in reply to the application that:

"The letter applying for proceedings has never been served upon my lawyers to the best of my information.

That if the mistake of not filing the notice in time was discovered on 21st February, 2001 then, this application ought to have been filed immediately."

Since the clerk says that the mistake was discovered in February 2001 while Counsel submits that the mistake was discovered by him when he began preparing the appeal on 28th August 2001, the two averments cannot be true. I am of the view that the explanations given in the application for the delay cannot be genuine. I am more inclined to agree with Mr. Mukunya that what prompted the applicant into bringing the application was when the parties appeared before the Deputy Registrar on 28th August, 2001 on an application to show cause why the applicant should not be arrested and committed to civil jail for not paying the costs of the suit.

The many varying explanations for the delay that I have alluded to earlier cannot be in my view all correct nor is the applicant being candid with the Court. In that regard, I am satisfied and do hold that the delay herein is inordinate, it has not been explained to my satisfaction. Where there is no excuse or candid explanation there can be no indulgence. Having regard to all the circumstances of this matter, I am satisfied that this is not a fit or proper case for the exercise of my discretion. The application fails and is accordingly dismissed with costs.

**Made at Nyeri this 2nd day of November, 2001.**

**E. OWUOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**