



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: BOSIRE, J.A. (IN CHAMBERS))**  
**CIVIL APPLICATION NO. NAI.39 OF 2000**  
**BETWEEN**

**MOHAMED ABDULREHMAN MOHAMED HATIMY .....APPLICANT**  
**AND**  
**1. KALIDAS KANJI (AFRICA) LTD)**  
**2. KALIDAS & COMPANY LTD).....RESPONDENTS**

**An application for extension of time in an intended  
appeal from an order of the High Court of Kenya at  
Mombasa (Lady Justice Ang'awa) dated 15th February,  
1996  
in  
H.C.C.C. NO.29 of 1996)**

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**RULING**

This is a rule 4 application for an order extending the time within which to file and serve a Notice of Appeal and a record of appeal in an intended appeal. The applicant is Mohamed Abdulrehman Mohamed Hatimy, who describes himself in the application as the son of the late Sheikh Abdulrehman Mohamed Hatimy, who was the 1st of two defendants in Mombasa High Court Civil Case No. 29 of 1994. His status was that of executor of the estate of Taher Mohamed Hatimy who would have been the defendant in the aforesaid suit if he was alive.

The decision against which an appeal is intended was given on 15th February, 1996, by Ang'awa J. Civil Appeal No. 18 of 1998, filed in this court by the applicant's late father against the decision was, on 21st July, 1999, struck out as incompetent. Being desirous of appealing afresh the applicant took out a motion under rule 4 of the Rules of this Court for an extension of time and also for an order granting him leave to institute the intended appeal in his name as legal representative of his father, who as at the date of the application had died.

That application was, on 27th January, 2000, dismissed by Kwach JA, for two reasons. Firstly, because the applicant lacked the locus standi as he did not exhibit evidence to show he had been appointed legal representative of the estate of the deceased. Secondly, because the affidavit in support was sworn by his counsel, Mr Khanna, who did not have direct knowledge of the matters which were therein deposed to.

The applicant has not relented. He is still desirous of restarting the appeal process and hence has brought the present application. He now says that he has obtained a grant of Letters of Administration of his father's estate, a copy of which he has exhibited, and that his intended appeal is meritorious. The application was filed on 7th February, 2000, about ten days after his earlier application was dismissed. One of the issues raised by Mr Jiwaji for the respondents, Kalidas Kanji(Africa) Ltd and Kalidas Kanji & Co. Ltd, is whether the dismissal of the applicant's earlier application does not operate as res judicata. It was not considered on the merits in view of the finding by Kwach JA that the applicant lacked locus

standi. Res judicata does not therefore lie.

Mr Jiwaji also raised four other issues. First that the applicant's position since the dismissal of his earlier application has not changed. Mr Jiwaji's submission on the issue is that although the applicant holds a grant of letters of administration, it only relates to his father's estate and not the estate of Taher Mohamed Hatimy which the applicant's father was administering. Mr Khanna for the applicant did not think the issue fell for consideration in this application since the court is not considering the intended appeal. In his view the court does not need to go behind the grant. In absence of evidence that the grant before me does not extend to cover the estate of Taher Mohamed Hatimy, I have no basis for impugning the grant.

The second of the four issues is the submission by Mr Jiwaji that the applicant has failed to comply with court orders, one made by the High Court, and the other by this court confirming the High Court One. Before he died, the applicant's father had been granted conditional stay of execution by Hayanga J. He was allowed 30 days within which to satisfy the conditions which he found difficult to satisfy.

In an application by the respondents herein for the applicant's father to furnish security for the costs of Civil Appeal No.18 of 1998, (before the expiry of the time he was allowed by the Superior Court to satisfy the conditions of stay), this court declined to order security to be furnished and required him instead to comply with Hayanga J's order if he wanted a stay. It is these two orders which the respondents contend have not been obeyed and which in their view deny the applicant the exercise of the court's discretion under rule 4, above. The applicant's case on that score is that his deceased father who was to comply with the conditions died soon after this court's order confirming Hayanga J's order.

Consequently before he obtained grant of letters of administration there was no one to competently comply with the order. When he eventually obtained a grant the order had already lapsed. Besides his counsel contends that the order having lapsed 30 days after it was made it was incapable of compliance. The position in law for conditional orders is that they lapse as soon as the period allowed for compliance expires. Hayanga J's order was made on 26th June 1998. Thirty days from that date would expire on 27th July, 1998. This court's decision confirming it was handed down on 17th July, 1998, and read in pertinent part as follows:-

***"The thirty days have not expired and in the appellant's replying affidavit the respondent/appellant says he intends to comply with the order of Hayanga J. Hearing of the appeal will pre-empt that order and as the period ordered by the learned Superior Court Judge has not expired an application for an order to furnish further security for costs is premature. Consequently the appeal shall be stood over till the orders of Hayanga J. are complied with or otherwise discharged."***

This order was made in light of the pending appeal, which was later struck out as incompetent. In view of that the order went with the appeal. Likewise, Hayanga J's order was made to accommodate the applicant's father in his appeal. Having been a conditional order it lapsed when it was not complied with within the time allowed in it and was therefore incapable of compliance out of time without the consent of the respondents. Contrary to Mr Jiwaji's submission this court did not extend the life of Hayanga J's order but only affirmed it.

The third point is whether the applicant has the locus standi to bring this motion in view of Mr Khanna's concession that no order for his substitution has been made both here and in the superior court. Mr Jiwaji urged the view that the applicant is obligated to move either the superior court or this court for an order substituting him in place of his deceased father. Mr Khanna did not think such order is necessary in view of the provisions of rule 83 of the Court of Appeal Rules. Rule 83(1), provides that:

***"An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative."***

But Mr Jiwaji, retorted that since the phrase "legal representative", is not defined in the Court of

Appeal Rules, it has to be given the meaning given to it in the Civil Procedure Act which is that it is a person in law who represents the estate of a deceased person, etcetera. But section 1(2) of the Act excludes the Court of Appeal, and Section 2 thereof confines the definition solely to that Act. Consequently, the phrase has to be given a meaning given to it by the law relating to estates of deceased persons, namely the Law of Succession Act. That Act does not specifically define the phrase but does define "representation", which means the probate of a will or the grant of letters of administration.

The applicant holds a grant of letters of administration of the estate of his late father, and prima facie, therefore he has the capacity to represent his estate and file an appeal on its behalf. It would appear that under rule 83(1) aforesaid, he may bring an appeal without first seeking substitution. The position would be different if there was any matter pending as he would then be required under rule 83(2) to seek substitution.

The final point relates to the conduct of the applicant. Mr Jiwaji submitted on the basis of a lengthy replying affidavit by his clients setting out in detail the history of the litigation between the parties, that the applicant and his father before him have all along been dilatory in taking the essential steps in the suit since Hayanga J's order granting them a conditional stay. Mr Khanna for the applicant did not share the same view and submitted that where any delay occurred it was explainable and the applicant should not be penalized for what was not within his powers to do or what could not be legally done.

The applicant's father is the one who filed Civil Appeal No 18 of 1998. It was filed on time. Upon it being struck out the applicant herein promptly took out a motion seeking an extension of time to restart the appellate process, as he was perfectly entitled to do. When that motion was dismissed or struck out he took this motion within ten days. The delay in taking out the motion cannot be said to be inordinate. I find no basis for holding that the applicant was in any way dilatory. The matters the respondents have alluded to relating to the failure to or delay in complying with Hayanga J's order are matters which related to the appeal which was struck out and should not, on the facts and circumstances of this applicant, be taken into account in this matter.

In the result I am satisfied that this is a fit case for the exercise of my discretionary and unfettered jurisdiction under rule 4, aforesaid, and I accordingly extend the time within which to file and serve a Notice of Appeal, by 7 days from the date hereof, and by 30 days thereafter for lodging and serving a record of appeal. The respondents shall have the costs of the motion assessed at Kshs.20,000/=.

**Dated and delivered at Nairobi this 9th day of February 2001.**

**S.E.O. BOSIRE**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**