

**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: SHAH, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 187 OF 2001**

BETWEEN

SAMUEL KAMAU MACHARIAAPPLICANT

AND

DAIMA BANK LTD.....RESPONDENT

**(Application to extend time to appeal out of time from the judgment of
the High Court of Kenya at Nairobi (Onyango Otieno, J) dated 18th
May, 2000**

in

H.C.C.C. NO. 628 OF 1988)

R U L I N G

On 19th day of May, 2000 the applicant lodged a notice of appeal in the superior court intending to appeal against the judgment and decree of the superior court (Onyango Otieno, J). Unfortunately for the applicant the date of lodgment of the said notice of appeal was inserted as 19th May, 1999 instead of 19th May, 2000. It was a slip on the part of either the Deputy Registrar of the superior court or of the advocate. Upon an application by the respondent that notice of appeal was struck out, not on the ground that the appeal itself was not yet filed, but on the ground that it was lodged one year ahead of time. It can be seen straightaway that the insertion of the year 1999 was a slip as there was no judgment to be appealed against until 18th May, 2000.

Having suffered that fate the applicant lodged this application on 19th June, 2001. I would point out at once that the ruling of the Court striking out the notice of appeal having been delivered on 15th June, 2001, this application has been lodged without any delay. Mr. Njuguna who appeared for the respondent states that this application was lodged on 19th July, 2001 but that is not correct. The application was lodged, as ascertained, on 19th June, 2000.

Mr. Njuguna laments that this application coming as it is some two years after date of judgment does not qualify for the exercise of my discretion. But that is not correct. The delay is four days. Mr. Njuguna also laments that this application coming up some half an year after the first notice of appeal was struck out does not qualify for the exercise of my discretion. Yet it is only after 4 days that this application was filed. I do not think well of wild statements unsupported by facts.

Mr. Njuguna also contends that the applicant has not shown any real desire to lodge the appeal itself, that is to say, he has not shown that he has shown any alacrity on his part to lodge the appeal. Obviously once the notice of appeal is struck out the applicant cannot file an appeal until time is extended. I am not prepared to say, on what is before me, that the applicant is sleeping on his rights. I was told the proceedings after judgment are still awaited and it is not for an appellant to decide what not to place on record. Mr. Njuguna takes issue with the applicant on his "delaying tactics" not to pay the decretal sum. He has obtained a stay of execution of the decree from the superior court. It is not for me to say that such stay order was wrongly obtained, if at all so obtained.

Mr. Njuguna's worry is that the original loan of Shs.7,000,000/= may go up overShs.100,000,000/= if an appeal is lodged and dismissed. It is not for me to inquire into that. It will be for the full court to decide, in the appeal, if the interest rate of 4% per month compounded with monthly rests was agreed. The applicant's complaint, amongst others, is that in four years the seven million loan stands at over Shs.67,000,000/=. I cannot say that the intended appeal is frivolous.

I am satisfied that this application has been brought without any delay. I am not inclined to consider the implications which arise should the intended appeal not succeed. I grant the application and order that a fresh notice of appeal be lodged within the next seven days and that the record of appeal be lodged within 40 days thereafter. The respondent will have costs of this application which I assess at Shs.10,000/=. These costs must be paid within the next 30 days failing which execution may issue.

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

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.