

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 291 OF 1999

BETWEEN

EXPRESS (K) LTD.....APPLICANT

AND

MANJU PATEL.....RESPONDENT

(An application for leave to file an appeal out of time in an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Ole Keiwua, J.) dated 23rd April, 1997

in

H.C.C.C. NO. 2979 OF 1996)

R U L I N G:

In this Notice of Motion the applicant seeks extension of time within which to lodge a fresh Notice of Appeal and the record of appeal.

The applicant's **Civil Appeal NO. 75 of 1999** was struck out on 29th September, 1999 by this Court for the reason that it was lodged out of time. According to the supporting affidavit of counsel for the applicant, certified copies of the proceedings and ruling were paid for and collected on 17th September, 1997. Certified copy of the order intended to be appealed from was not, however, received until 27th April, 1999 and thereafter the aforesaid appeal was lodged in this Court on the following day, 28th April, 1999.

On receipt of certified copies of the proceedings and ruling on 17th September, 1997 the time within which to lodge the above mentioned appeal, if the proviso to **rule 81(1)** of the Court of Appeal Rules, hereinafter called the Rules, was complied with, started to run with effect from that date. From the annexure marked AOW5 to the affidavit in support of the applicant's present application, counsel for the applicant had in his possession as on 25th November, 1997 copies of the Notice of Appeal and the order intended to be appealed from. By the latter date, 69 days had elapsed since the date of the receipt of certified copies of the proceedings and ruling as is mentioned above. Counsel's explanation for the delay of over 18 months in lodging the applicant's original appeal was that he misread **rule 81** of the Rules. Indeed, according to paragraph 13 of the supporting affidavit to the present application, he depones that he was under the impression that the requisite 60 days period within which to lodge the record of appeal in this Court started to run from the date of the certificate of delay which mistaken impression ought not to be visited upon counsel for the respondent, rule 81 of the Rules is simple and its misreading or misinterpretation was not an excuse for failing to lodge the applicant's original appeal within the prescribed period. Indeed, according to counsel, the delay in question could only be attributed to inaction.

Although the present application was made without delay after the applicant's original appeal was struck out, the delay of over 18 months in lodging the applicant's original appeal is without sound explanation. In the circumstances, I decline to exercise my discretion under rule 4 of the Rules. Consequently, the applicant's application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 31st day of January, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR