



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, LAKHA & KEIWUA, J.J.A.)
CIVIL APPLICATION NO. NAI. 173 OF 1999 (67/99UR)**

BETWEEN

**FIRST AMERICA BANK OF KENYA LIMITED 1ST APPLICANT
ANDREW DOUGLAS GREGORY 2ND RESPONDENT
AND
GRANDWAYS VENTURE LIMITED RESPONDENT**

**(Application to file record of appeal out of time from the
Ruling of the High Court of Kenya at Kisumu (Justice
Wambiliangah) dated 29th April, 1999**

**in
H.C.C.C. NO. 23 OF 1999)**

RULING OF THE COURT

This is a reference to the Court under **rule 54** of the Rules of this Court (the Rules) to vary, discharge or reverse the order of a single Judge of this Court (Owuor, J.A.) given on 4 August, 1999 whereby she extended time for the filing of the notice of appeal and the record of appeal.

The grounds upon which that application was made to her were that the appeal filed by the applicants was struck out on 1 July, 1999 for non-compliance with **rule 85(1)(h)** of the Rules in that the record of appeal did not contain a certified copy of the order appealed against. In support, it was urged before her that this was an honest mistake on the part of the advocate. This the learned single Judge accepted, as she well might, but the complaint on this reference is that there was, with respect, no material before the learned single Judge upon which she could exercise her discretion. That there should be such material is clear from the Privy Council Case of **RATNAM V. CUMARASAMY** [1964] 3 ALL E R 933 in which Lord Guest, giving the advice of the Board (Lord Hodson, himself and Lord Donovan) in a case where the plaintiff sought an extension of time for the filing of record of appeal, stated as follows in an appeal from the Supreme Court of Malaya:

"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that t he

discretion of the Court of Appeal was exercised on any wrong principle"

In **SAVILL V SOUTHEND HEALTH AUTHORITY [1995] 1 WLR** 1254, Balcombe LJ, having considered various authorities, stated as follows at 1259:

"I have to say that the authorities are not all entirely easy to reconcile. I prefer to go back to first principles and to the statement made by Lord Guest in the Ratnam case that in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. He went on to say, and it is worth repeating: "If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation." Nevertheless, there must be some material on which the court can exercise its discretion. There was no such material before the judge. In my judgment, therefore, it cannot be said, as this court would have to say, that in exercising his discretion to refuse to extend the period of time for appeal in the case he was acting contrary to principle. It seems to me that he was acting in accordance with the principles laid down by Lord Guest. I would dismiss the appeal."

Mann LJ said (at 1259):

"I agree. The Rules of the Supreme Court are the rules for the conduct of litigation. They are there for the benefit of plaintiffs and the protection of the defendants. Here, the rule was not complied with. We are asked to exercise our discretion to waive the application of the rule. There is no material put before us on which we should grant a waiver. I do not see how one can exercise a discretion without material upon which to consider it. If I went beyond that point I would regard the way in which this litigation has been conducted as entirely antipathetic to the exercise of discretion....."

In the instant case there is no affidavit in support by the advocate who allegedly committed the mistake. Nor is there any material by way of any explanation. As a matter of common sense, though not making it a condition precedent, the Court will want to take into account the explanation as to how it came about that the applicants found themselves with an appeal that was incompetent. If the omission was deliberate and not due to accident the Court would, in our view, be unlikely to grant an extension. But, again, with respect, there was no material before the learned single Judge. Nor was there any material before her to show that the omission was the result of any inadvertence or accident to enable her to exercise her discretion.

We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the Court that despite their default, the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants have not discharged.

Accordingly and, for the reasons abovestated, this reference is allowed with costs and the order made by the learned single Judge is set aside and substituted by an order dismissing with costs the applicants' Notice of Motion dated 20 July, 1999.

Dated and delivered at Nairobi this 21st day of January, 2000.

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

M. KEIWUA

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JUDGE OF APPEAL

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