



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: LAKHA J.A. (IN CHAMBERS)  
CIVIL APPLICATION NO. NAI. 58 OF 1999  
BETWEEN**

**KITALE ELGON CO-OPERATIVE UNION LIMITED ..... 1ST APPLICANT**

**MICHAEL F.C. KITIYO ..... 2ND APPLICANT**

**JONH CHEPSIGOR ..... 3RD APPLICANT**

**AND**

**SETH NYAWARE OMAMO ..... 1ST RESPONDENT**

**AGRICULTURAL FINANCE CO-OPERATION ..... 2ND RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mr. Justice Akiwumi) dated 31st July, 1990**

**in**

**H.C.C.C. NO. 1412 OF 1988)**

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**RULING**

The applicants apply to a single Judge of this Court under **rule 4** of the Court of Appeal Rules (the Rules) for an extension of time to file the notice of appeal and the record of appeal from the judgment of the superior court (Akiwumi, J., as he then was) given on 31 July, 1990. The applicants' appeal from that judgment being **Civil Appeal No. 109 of 1998** was, on 7 December, 1998 struck out and the present application was filed on 10 March, 1999. i.e. a few days after three months to file a simple motion such as this one cannot, in my view, be considered as so short a time that no explanation is to be given for it. I agree there was Christmas Vacation in between but even then, that leaves, according to Mr. Okeyo for the first respondent, some seventy days unaccounted. In **REV. JOSEPH MUGO MUCHIRA V. NJERI ZAINABU JUMA & ANOTHER, Civil Application No. NAI. 326 of 1995 (unreported)** where there was also a delay of 75 days in an application similar to the present one, Gicheru, J.A. said:-

"Whilst **rule 4** of the Rules of this Court gives me unfettered discretion (subject to requirements of fairness to both sides) to extend time, it does not give me power to grant such extension for the asking. The interests of the respondent must also be considered. ....

It was incumbent upon the applicant to move with speed and alacrity after its appeal was struck out. The 75 day period taken up in the application, in my view, is inordinately long and disposes me towards not granting the application."

With respect, I fully agree. As was said by this Court in SAMKEN LIMITED & ANOTHER V. MERCEDES SANCHEZ RAU TUSSEL & ANOTHER, Civil Application No. NAI. 29 of 1999:-

"The "inaction" which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4."

Applying these principles, I am satisfied that there is inordinate delay which the supporting affidavit leaves wholly unexplained. Although the copy of the decree issued on 17th February, 1999 is not a document required to form part of the application it took the applicants another 21 days to file the application which is again wholly unexplained.

In these circumstances, I must exercise my discretion in refusing to the applicants the extension they seek and that being my view of the matter, this application fails and I dismiss it with costs.

There is, however, one other matter. I have dealt with the application on the basis of the two reliefs sought in the notice of motion. The supporting affidavit in paragraph 14, however, seeks an extension of time to serve on the first defendant's advocate the notice of appeal. This relief cannot be granted since it is not prayed for in the notice of motion nor was its amendment sought to include such a prayer. Secondly, the main application for extension having failed, there is no foundation on which an extension to serve a notice of appeal out of time can rest. Thirdly, such a relief is sought on the ground that the applicants' advocate's predecessor inadvertently failed to serve the first defendant's advocate who was intended to be made the second respondent. Apart from the fact that there is no affidavit from such advocate, this is an afterthought. With respect, I say so because as Mr. Kibuthu for the second respondent, rightly in my view, submitted that notice of appeal was not intended to be served as the first defendant. I take it from the notice of appeal itself which, inter alia, states as follows:

"It is intended to have this notice served upon M. M. OMBOGO & COMPANY ADVOCATES who are acting for and on behalf of the Plaintiff (i.e. Seth Nyamwera Omamo) herein.

The applicants, fourthly, have come to this Court seeking an exercise of the Court's discretion. They come, unfortunately, with unclean hands. The applicants must fail on this limb for all these four reasons and their application is on this limb also dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 24th day of February, 2000.**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR