



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: OWUOR, J.A (IN CHAMBERS))**  
**CIVIL APPLICATION NO. NAI. 3 OF 2000**

**BETWEEN**

**1. MICHAEL KIRUMBA NJENGA**

**2. MUSIARA LTD. ....APPLICANTS**

**AND**

**DAVID FIELDING SMITH .....RESPONDENT**

**Application for extension of time to file Notice of  
 appeal and Record of appeal out of time in an  
 intended appeal from a judgment and decree of the  
 High Court of Kenya at Nairobi (Mr. Justice Shields)  
 dated 23/3/94**

**in  
 H.C.C.C No. 3349 of 1991)  
 \*\*\*\*\***

**R U L I N G**

The applicants, Michael Kirumba Njenga and Musiara Ltd. have brought this application under rule 4 of the Rules of this Court seeking that I exercise my unfettered jurisdiction in their favour and extend time for them to file a Notice of appeal and Record of appeal in an intended appeal out of time.

The judgment in H.C.C.C No. 3349 of 1991 which they are dissatisfied with was delivered as far back as 23rd March, 1994. The applicants were sued for general and special damages arising out of a traffic accident involving a collision between them and the respondent, David Fielding Smith. The judgment entered in favour of the respondent was for a total sum of **Ksh.2,030,800/=**. Immediately thereafter on 24th March, 1994 M/s Joshi & Joshi Co. Advocates acting on behalf of the applicants applied to the court to be furnished with "certified copies of ruling/ judgment/ decree and Exhibits" for the purpose of filing an appeal. While within still time he lodged a Notice of appeal on 28th March, 1994. It is evident that nothing happened in the 60 days that followed. Come the 4th of October, 1994 the applicant now having changed their advocates, filed an application for stay of execution. They were granted the same on 16th of November, 1994 with a condition inter alia that:

"The applicant do collect the typed proceedings and judgment, put the same in order for retyping

and get a certificate of delay and file an appeal within the permitted rules".

That was not done. Upon an application by the respondent, the Notice of appeal filed on 28th March, 1994 and deemed to have been withdrawn in terms of rule 82(a) was struck out by this Court on 6th day of December, 1999. Hence the filing of this application on 7th January, 2000.

Mrs. Maangi has sought to explain the delay of six years before lodging the intended appeal in this way. Firstly that she was not able to comply with the order of Shah J. (as he then was) that is to collect the proceedings, which she never had asked for and thereafter obtain a certificate of delay from the court. Secondly that she had not noticed that she had not requested for the proceedings. When she did, she consented to the Notice of appeal being struck out.

The objection to the application is based mainly on two grounds. Firstly that the applicants are being less than candid with the Court and secondly that they have failed to sufficiently explain their six years delay in lodging the intended appeal. Therefore the delay is neither explained nor is it justified to warrant this Court to exercise its discretion in their favour.

I agree with the respondent. The feeling that one gets in this matter is that the applicants right from the beginning after promptly intimating that they had an intention to appeal by filing their Notice of appeal promptly, they decided thereafter to take their sweet time. There is no explanation as to why the 'proceedings' were never requested for, nor has any certificate of delay been produced to explain the happenings at the Registry as indicated in the letters produced by the applicants' advocate. Up to the time of hearing of this application, Mrs. Maangi by her own admission, had not obtained the proceedings from the court.

The issue of the applicant not having applied for the proceedings could not have been discovered only when the application for striking out the Notice of appeal was made. I say so because as far back as 24th November, 1994 Shah (J) (as he then was) had pointed this out. Similarly, in a letter written to counsel for the applicants, Vohar & Gitao advocates, acting on behalf of the respondent had brought the matter to the attention of counsel for the applicants

"In your letter of 19/01/96 you confirmed that you had "just recently received the copies of the proceedings and judgment". To-date, we have not been served with the record of appeal. How do you intend to circumvent rule 81 of the Court of Appeal Rules (1972)?

Notice was given that if they did not reply, counsel for the respondent would apply to have the Notice of appeal struck off. Even this did not seem to jolt the applicants into action. They cannot be heard to say that they were still waiting for the proceedings from the court, hence their not being able to lodge the intended appeal.

I am inclined to agree with Mr. Oyatsi in that the applicants have not been candid with the Court. They have not sufficiently explained the six years delay in lodging this appeal. I am not satisfied that the delay was justifiable. The annual remainders to the court cannot be construed as a serious enough effort on their part to obtain the record if they had not obtained the same. I see no good reason upon which I can exercise my discretion and extend the time sought for filing the Notice of appeal and lodging the appeal out of time.

Hence this application is hereby dismissed with costs.

**Dated and delivered at Nairobi this 18th day of February, 2000.**

**E. OWUOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**