

**REPUBLIC OF KNYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OWUOR, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 172 OF 1999**

**BETWEEN
MR. & MRS DOROTHY S. ANDREAS APPLICANTS
AND
MICHAEL KIVAI RESPONDENT**

**(Application for extension of time to lodge an intended
appeal from the order of the High Court of Kenya at
Machakos (Mr. Justice Etyang) dated 22nd July, 1998**

**in
H.C.C.C No. 222 of 1995)**

R U L I N G

In the course of hearing this application brought under rule 4 of the Rules of this Court, I granted Mr. Kasyoka, counsel for the respondents, leave to make his objection in respect of certain documents contained in the record of Notice of motion, with a view to having the same struck out before the substantive hearing of the application.

The documents he wished struck out are copies of letters exchanged between Mr. Owuor, counsel for the applicant, and one Mr. Ngombo, former counsel for the applicant. They are annexures to a further affidavit of Mr. Owuor sworn on 13th day of July, 1999 and marked Exh. MO2, MO3, typed as MO 3A. Mr. Kasyoka's objection is based on two grounds. Firstly that the letters were written subsequent to the ruling subject matter of this application and secondly that they offend rule 85(j) of the Rules of this Court. They are not documents that are required to be contained in the record.

Mr. Owuor on his part contends that rule 85(j) of this Court only applies to what should be contained in the record of appeal and not in the record in respect of a Notice of motion. Further that the alleged offending documents were relevant annexures to his further affidavit sworn in support of the application.

Without deciding on whether rule 85(j) is applicable to Notice of motion or applications to this Court and assuming the affidavit filed herein is properly before the Court, I will now consider whether the documents are relevant and should form part of the affidavit. I am satisfied that the documents that are attached to the further affidavit of Mr. Owuor cannot find their rightful place in this application. I say so for the following reason.

The objective of the affidavit sworn in support of the application is to satisfy me and enable me to exercise my discretion so as to extend time for the applicants to be able to lodge their appeal out of time. The ruling subject matter of the appeal was delivered on 22nd July, 1998. The learned Judge of the superior court was satisfied that the applicants had been sufficiently notified of the hearing of the case before him. Subsequent to that ruling, counsel for the applicants then sought to have the previous counsel confirm whether or not he had been notified of the hearing. This confirmation is what Mr. Kasyoka is objecting to, in that they did not form part of the record of proceedings before the superior court nor can they form part of an affidavit envisage by rule 43 of the Rules of this Court.

I agree with Mr. Kasyoka that this is a count of record. These documents were not material before the learned Judge of the superior court, neither do they explain the delay in the filing of the appeal. To that extent, they are not relevant to this application and shall be accordingly struck out.

Dated and delivered at Nairobi this 16th day of February, 2000.

E. OWUOR

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JUDGE OF APPEAL

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