

REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, SHAH & OWUOR, J.J.A.)

CIVIL APPLICATION NO. 291 OF 1999

BETWEEN

EXPRESS (K) LTD.APPLICANT

AND

MANJU PATELRESPONDENT

**(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 (Justice Keiwua)
dated 23rd April, 1997**

in

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

RULING OF THE COURT

The reference to this Court is in respect of the Ruling of the learned single Judge of this Court (Gicheru JA), in which he refused to extend time for the lodging of a fresh Notice of Appeal and record of appeal by the Applicant. The Applicant's original appeal had been struck out on the ground that it had been lodged out of time. Indeed, it had been lodged 18 months out of time.

When the application for extension of time for the lodging of a fresh Notice of Appeal and record of appeal came before the learned single Judge, one of the explanations given for the delay and upon which the learned single Judge based his decision, was that counsel for the applicant had misapprehended Rule 81 of our Rules and had thought that the 60 days allowed for the lodging of the appeal began to run from the date of the certificate of delay.

The learned single Judge having considered this reason for the delay then conclusively held as follows:

"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."

If the misapprehension of Rule 81 had been the only reason for the delay in the lodging of the original appeal, it would have been a different matter.

As it is, there was relevant evidence contained in the affidavit in support of the application before the learned single Judge and which was not contested, to the effect that the court file and other documents had gone missing for some considerable time in the High Court Registry and which had led to the delay in obtaining certified primary and other relevant documents. This, according to the learned single Judge's notes, was also raised before him. This is an issue which the learned single Judge should have taken into

consideration when exercising his discretion. On this issue of failure to consider relevant matters in the exercise of discretion, this Court in the case of Samaki Industries (Nairobi) Limited v. Samaki Industries (K) Limited Civil Application No. NAI 260 of 1996 (98/96 UR) (unreported), had this to say:

"Because the single Judge is exercising discretion, a full bench of three judges can only interfere with that exercise if it be shown that in the exercise of the discretion the single Judge failed to take into account a relevant matter which he ought to have taken into account ...".

The failure of the learned single Judge to take into account the delay caused by the alleged missing of a primary and other relevant documents in the High Court Registry, we regret, compels us to set aside his ruling and extend time for the applicant to file his Notice of Appeal within the next seven days and the record of appeal within fourteen days thereafter. Costs will be in the intended appeal.

Dated and delivered at Nairobi this 23rd day of June, 2000.

A. M. AKIWUMI

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR