

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL**

**AT KISUMU
(CORAM: KEIWUA, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 360 OF 1999 (UR 150/99)**

**BETWEEN
PHARMACY & POISONS BOARDAPPLICANT
AND
SIPRI PHARMACEUTICAL LIMITED 1ST RESPONDENT
COMMISSIONER OF CUSTOMS & EXCISE2ND RESPONDENT**

(Application for extension of time to file and serve

**Notice of appeal and record of appeal out of time in
an intended appeal from the Ruling and Order of the
High Court of Kenya at Kisumu (Mr. Justice
Wambilyangah) dated 2nd December, 1997**

**in
H.C.MISC. APPLICATION NO. 101 OF 1997)**

R U L I N G

The applicant on December 21, 1999, filed this application in this Court and it is principally brought under rule 4 of this Court's Rules "the Rules", and for the application to be certified urgent in terms of rule 47 of the Rules and for it to be heard during the Christmas court vacation. By the order of the Hon. Mr. Justice Akiwumi, J.A given by him on January 11, 2000 the application was not certified urgent and was therefore not to be heard during the court's Christmas vacation and that the applicant's counsel's attention was to be called to the fact that some of the pages of the documentation in the application were illegible and which information was conveyed to him on January 14, 2000, because the counsel on March 30, 2000, filed a further affidavit with which he lodged the legible certified copies which were supplied to him by the superior court at Kisumu. The application seeks leave under rule 4 aforesaid for time to be extended to 30 days from the date leave is granted for the applicant to file and serve a fresh Notice of appeal to enable it appeal against the ruling of the superior court at Kisumu (Wambilyangah J.) given on December 2, 1997 in H.C.C. Misc. Application No. 101 of 1997. The applicant has also sought leave for time to be extended to allow it to lodge the appeal and file and serve the record of appeal within 30 days from the date the fresh Notice of appeal is filed.

The original record of appeal and appeal lodged in this Court, was struck out on November 25, 1999, for nonconformity with the requirements of the Rules which defects were due to an inadvertent lapse on the part of the applicant's counsel and the appeal is stated to raise serious issues of law, among which is the issue whether an application for the orders of prohibition and mandamus can be brought and entertained by the court without the leave of a judge having been granted as required to be sought under Order 53 of the Civil Procedure Rules. The original appeal was struck out on November 25, 1999, and this application was made on December 21, 1999, which was 25 days from the date when the appeal was struck out and those days were explained by the applicant to have been taken in getting the required certified copies of the part of the record of appeal documentation from the superior court at Kisumu. The 2nd respondent does not oppose the application for enlargement of time but it is opposed by the 1st respondent which is of the view that the applicant has been guilty of inordinate delay in bringing the application because the applicant as far back as November 24, 1998 became aware that its appeal was incompetent and ought to have moved to have it withdrawn to save time rather than to hope after this respondent's application to strike out the appeal was itself struck out by the court, that its appeal would not be sought to be struck out again. The applicant ought to have sought to withdraw the appeal at that stage and because it did not do so, the applicant disentitled itself to the exercise of the court's discretion to grant leave for the Notice of

appeal, the memorandum of appeal and record of appeal to be filed afresh and out of time. It has been contended by the 1st respondent that the time to be considered by the court in the exercise of its discretion is the time from November 24, 1998, when its application warned the applicant, to the time when this application was brought on December 21, 1999, which, this respondent submits has not been explained. This respondent also urges that the proposed appeal is academic and will not serve any purpose because those drugs which had been tested and found not to have expired have been sold by the 1st respondent and those that had been found to have expired had been destroyed by the applicant. It has also been contended that because the applicant did not complain at the hearing of the Notice of motion that leave for prohibition and mandamus had not been granted, the applicant cannot now be heard to raise that point in an appeal to this Court.

I agree with Mr. Mwenesi, counsel for the applicant, that the applicant had already been punished, for filing and insisting on going on with a defective appeal, by the fact that that appeal was struck out, for the very defects, that the 1st respondent now urges that the applicant ought to be punished for. I am satisfied that the only period to be considered is the aforementioned 25 days which counsel for the 1st respondent did not direct his efforts to and in the exercise of my discretion, I am of the view that that delay had been satisfactorily explained. It is also my view that the fact that the applicant participated at the hearing of the Notice of motion and did not complain about absence of leave, is no bar in my view to the grant of leave to file a fresh appeal in view of the fact that the order served on the applicant intimated that leave to bring an application for the order of prohibition and mandamus had been granted ex-parte by the learned judge of the superior court in chambers.

This being, my considered view of the matter, the application is granted with costs and the Notice of appeal must be filed in court within 30 days of this ruling and the memorandum of appeal and record of appeal must also be filed and served within 30 days from the date the fresh Notice of appeal is filed in court.

Dated and delivered at Kisumu this 21st day of June, 2000.

M. KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR