

REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: BOSIRE J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 60 OF 2000

DR. EDWIN SIMON PETER OTIENO NYAURAAPPLICANT

INCE MICHAEL JULIANRESPONDENT

(An application for extension of time to file an intended
appeal from the judgment and decree of the High
Court of Kenya at Nairobi (Hon. J.V. Juma J.) dated
on 7.11.1996

in

H.C..C.C. No.2748 of 1989)

RULING

This is the applicant's third attempt to file a competent appeal. His first appeal was dismissed because his counsel then appearing for him did not attend court. It later transpired that the appeal was in any event incompetent as the counsel, Mr Orieyo, signed the Notice of Appeal and memorandum of appeal when he did not hold a practising certificate. The applicant thereafter successfully moved this court for an order extending the time within which to file and serve a fresh notice of appeal and a record. He acted promptly and filed the same. When his appeal came up for a hearing it was discovered that his advocates did not certify the record of appeal as is mandatorily required under rule 85(5) of the Court of Appeal Rules. The appeal was struck out for being incompetent. Thereafter within seven days, the applicant brought this application.

I sympathize with the applicant who has all along shown a desire to challenge the decision of the superior court given on 7th November, 1996, by Juma, J. in its civil case No. 2748 of 1989. He has twice been let down by his advocates. The power of the court under rule 4 of the Court of Appeal Rules being discretionary and regard being had to the fact that the applicant has all along been acting expeditiously to seek the aid of the court, I consider this to be a fit case for exercising my unfettered discretion under the aforesaid rule.

I have not lost sight of the respondent's complaint that the application is an attempt to delay the soon realization of the fruits of the decree in his favour. However, where as here counsel's mistake is excusable, the court's discretion should be exercised in favour of granting the litigants an opportunity of fully ventilating their respective cases through a hearing. In the result I grant the application, extend the time within which to file and serve a fresh notice of appeal by 7 days from the date hereof, and a further 30 days to file and serve a record of appeal. I will, however, make no order as to the costs of the application.

Dated and delivered this 12th day of June, 2000.

S.E.O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR