



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**CORAM: OWUOR, J.A. (IN CHAMBERS)**  
**CIVIL APPLICATION NO. NAI. 104 OF 2000**

**HAMENDRA MANSUKHALAL SHAH ..... APPLICANT**

**AND**

**1. ALNOOR KARA**

**2. PREMIER SAVINGS & FINANCE LIMITED ..... RESPONDENTS**

**(An application for extension of time to file an notice  
of appeal and Record of Appeal out of time in an intended  
appeal from a ruling of the High Court of Kenya at Mombasa**

**(Waki, J.) dated 21st October, 1997**

**in**

**H.C.C.C. NO. 205 "A" OF 1996)**

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**RULING**

This is an application brought under rule 4 of the Rules of this court, seeking for extension of time by the applicant, beyond the time prescribed under rules 74 and 81, so as to enable him to file and serve a notice of appeal and lodge an intended appeal. The decision sought to be challenged having been given by Waki J, on 16th September 1998. In a ruling delivered on that date, the Judge on a preliminary point urged before him, set aside a third party notice issued by the applicant against Premier Savings & Finance Ltd., the 2nd respondent in this application.

The applicant has given two specific reasons for the delay in lodging the notice of appeal. In that it was lodged and served out of time due to the disappearance of the High Court file in the superior court's registry and due also, to counsels oversight. Mr. Shah counsel for the applicant explained in the affidavit he swore in support of the application and also urged before me, that on the day of the ruling, on 17th September, 1998, he prepared and signed a notice of appeal and a letter requesting the registry for copies of proceedings and ruling. He gave the two documents to his clerk to go and lodge the same at the

registry. He did not look into this matter until he had obtained the proceedings and certificate of delay and was in the process of preparing the record of appeal. That is when he came to realise that indeed and infact, the notice of appeal had been lodged on 17th November, 1998, a good forty-seven days out of time. The explanation given to him by his clerk for the delay was that the superior court's registry, as is its procedure, had accepted the letter requesting for the proceedings and ruling but declined on several occasions to accept the notice in the absence of the file. The numerous occasions that the clerk had gone to the registry in an endeavour to file the notice were endorsed on the cover of counsel's office file, a photocopy which was annexed to his affidavit as "SKS3".

Counsel was not informed of this delay. Nor did he on his part check on what was going on. He accepts his mistake in that the ultimate responsibility rested with him and the applicant should not be made to suffer because of counsel's mistake.

Mr. Mwangi, on behalf of the 1st respondent, Plaintiff in the superior court, has objected to the application on two main grounds in that the delay in this matter of over seventeen months from 16th September, 1998 to 29th March, 2000 when this application was filed has not been sufficiently explained and secondly that the same was inordinate.

In a replying affidavit filed herein Mr. Mwangi contends that the failure to file a notice of appeal was infact not a mistake on the part of counsel, or due to the fact that the file was missing from the registry. It was to the contrary premeditated and deliberate. He says so because according to a chamber summons filed in the superior court registry on 17th November, 1998, but dated 23rd September, 1998 counsel for the applicant sought to withdraw from acting for the applicant for lack of instructions. That application apparently is still pending before the superior court. Therefore the applicant cannot be heard to say that he had at the same time given instructions to the same advocate to institute an appeal. Further, that for the application to be filed the file must have been available to counsel at the registry.

Whereas it is true that both the notice of appeal and the chamber summons for withdrawal from acting were filed on 17th November, 1998, which according to Mr. Shah, supports his story that the file was missing until then; there are other factors to be considered as pointed out by Mr. Mwangi. Apart from the fact that some 'notations' were made on counsels file by his court clerk, who did not bring the delay at the registry to counsels attention, there is the fact that, for counsel to take a decision to prepare an application to withdraw from acting on account of lack of instructions, the matter must have been receiving his attention. It cannot be that he had instruction to lodge a notice of appeal and had no instructions to proceed in the matter at the same time. To my mind this matter could not have been kept away from the attention of counsel until the proceedings had been received and counsel was in the process of preparing the record of the intended appeal. I am inclined to agree with Mr. Mwangi that the explanation given for the 47 days delay has not been sufficiently explained to me. If indeed as claimed by the applicant the fault laid with the registry of the superior court there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged.

The wide discretion that this court has as given by rule 4, of the Court of Appeal Rules is in no doubt, but that discretion as repeatedly stated must be exercised judiciously. Being satisfied as I am that the delay in this matter was not purely the mistake of counsel, I would not in the exercise of my discretion under rule 4 of the Court of Appeal Rules, grant the applicants application. The same is hereby dismissed. The costs occasioned by this application assessed at Kshs.3000/= for each respondent shall be paid by the applicant. The same to be paid within 30 days from today's date failing which execution shall ensue.

Dated and delivered at Mombasa this 28th day of July, 2000.

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR