

REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

CIVIL APPLICATION NO. NAI. 110 OF 2000

**A. H.
NURANI.....
.....
.....
...APPLICANT**

VERSUS

**1. B.H. LALJI
2. D. H. NURANI
3. SAMVIR
MANAGEMENT
SERVICES LIMITED
4. ATTA (KENYA)
LIMITED
.....
.....RESPON
DENTS**

**(An application for extension of time to file Record
of Appeal out of time in an intended Appeal from a
Ruling and Order of the High Court of Kenya at Nairobi
(Hon. Lady Justice Aluoch) dated 19th February, 1998
in
H.C.C.C. NO. 3484 OF 1995)**

RULING

This is an application under rule 4 of the Court of Appeal Rules (*the Rules*) for extension of time to lodge a Notice of Appeal and a Record of Appeal. The decision against which A.H. Nurani (the appellant) wishes to appeal was given by Aluoch J on 19th February, 1998. The applicant filed an appeal (Civil Appeal No. 52 of 1998) but this was struck out by this Court on 7th April, 2000 because it was incompetent. The applicant then took out this Notice of Motion six days later on 13th April, 2000. The supporting affidavit was sworn by Mr Akbar Esmail who also appears for the applicant in this application. The Notice of Motion as drawn did not specifically seek an order for extension of time to lodge a Notice of Appeal.

Mr. Esmail applied informally to amend the Notice of Motion to include a prayer for extension of time to lodge a Notice of Appeal. Mr Satish Gautama for the second, third and fourth respondents did not object to Mr Esmail's application for amendment but *Mr Ochieng' Oduol*, for the first respondent, did object, on the ground that such an application has to be made formally. I reject Mr Ochieng' Oduol's

objection because I believe that such an application can be made in the course of a hearing under rule 42(3) of the Rules where the Court is satisfied that no prejudice will result to the other side.

Civil Appeal No. 52 of 1998 lodged by the applicant was incompetent because the formal order extracted by the applicant's Advocates did not include the order made by the Judge in respect of costs. Apparently when the draft order was submitted to the superior court registry, someone inserted this in long hand without either initialing the alteration or having the document retyped as amended. There is no doubt that the Court was right, albeit by a majority, to reject this document. The second reason why the appeal was struck out was because the order granting leave to appeal was incorporated into Mtrh eE sfmoarimla l acoredpetrs. responsibility for the debacle although I think he is not entirely to blame for the alteration. As regards the order for leave to appeal, it was a genuine mistake which any advocate regardless of his seniority could have made. Mr Ochieng' Oduol submitted that because the mistake was deliberate I have no power to exercise my discretion in favour of the applicant. The mistake was not *deliberate* as *Mr Esmail* did not purposely set out to commit it.

Having dealt with the reasons which led to the appeal being struck out, I must now consider whether there has been any delay. This application was filed within a matter of days after the appeal was struck out. So there was no delay. In the result, I see no reason why I should decline to exercise my discretion in favour of the applicant. Accordingly I grant the application and extend the time for filing the Notice of Appeal by seven days from today and for lodging the Record of Appeal by 14 days from the date of filing the Notice of Appeal. Costs of the application to be in the appeal.

Dated and delivered at Nairobi this 6th day of July, 2000.

R. O. KWACH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR