



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

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

CIVIL APPLICATIONS NO. NAI.176 OF 2000 (NYR.8/2000)
BETWEEN

1. JOSEPH YUMBYA KIME

2. JACKSON MUSEMBI.....APPLICANTS

AND

1. ROBERT NZISSI

2. STEPHEN JAMHURI NZISSI

3. LILIAN NZISSI (a minor suing through ROSIINA M. NZISSI

(who is her mother and next friend.....RESPONDENTS

**(An application for extension of time of filing and serving Record of
appeal against the judgment in the High Court of Kenya at Nyeri
(Juma, J) delivered on 15th November, 1999**

in

H.C.C.C. NO. 193 OF 1995)

RULING

The applicants, Joseph Yumbya Kimeu and Jackson Musembi, were the unsuccessful parties in a damages claim against them, by Robert Nzissi, Stephen Jamburi Nzissi and Lilian Nzissi. The judgment against the applicants was pronounced on 15th November, 1999. The Judgment on liability had been by consent, and the judgment of November, 15th was therefore confined only to quantum of damages. The applicants having been dissatisfied with the award, their counsel filed a notice of appeal, on the same day the judgment was pronounced declaring their intention of challenging the award on appeal. The applicant did not, nor have they to date, applied for copies of proceedings and judgment. Nor have they filed a record of appeal.

In this application under rule 4 of the court of appeal rules, the applicants pray that I exercise my discretion under the rule and grant them an extension of time within which to file a record of appeal. An earlier similar application was, on 19th May, 2000 struck out because the applicants had failed to take an

essential step in the matter.

The respondents were injured in a road traffic accident involving the 2nd applicant's motor vehicle which I suppose was being driven by the first applicant. The said motor vehicle was insured by Blue Shield Insurance Company Limited, which appears to me to have exercised its right of subrogation in the respondents' suit against their insured and his driver to wit Nyeri High Court **Civil Case No. 193 of 1995**. After final judgment was pronounced as aforesaid, counsel for the applicants advised Blue Shield Insurance Company Ltd., (under the Insurance Company) of the judgment and asked it to instruct him on whether or not to challenge the decision on appeal. It is not clear from the affidavit in support of this application when exactly the advocate did that. What is, however, clear is that on 4th January, 2000 he telephoned the Insurance Company to prompt them to respond to his earlier inquiry. The said company thereafter addressed a letter to the said advocates, dated 5th January, 2000, which in pertinent part read as follows

“You indicated you had already filed a notice of appeal and it was agreed that you go ahead and file the memorandum on perusing the judgment further we note the issue of liability was not addressed yet our investigators says it ought to be 50 -50.”

I observe in passing that the question of liability cannot properly be the subject of the intended appeal as judgment in that regard was entered by consent, and I suppose the Insurance Company was aware of that fact. It is therefore quite strange that both the Company and the applicants' advocates say they propose to challenge judgment on liability in the intended appeal. In absence of an explanation as to why liability will be an issue in the intended appeal one can only conclude that the applicants' application is lacking in bona fides.

Besides, the applicants have not taken any steps, and if they have done so, they have not explained what steps they have taken so far to prepare a record of appeal. Mr. Kilukumi for the respondents, stated from the bar, and he was not challenged in that, that the applicants have not to date taken any steps to apply for copies of proceedings and judgment for purposes of the intended appeal. In absence of any evidence to the contrary I am constrained to agree. It is conduct which shows that the applicants are not serious about their intended appeal. If they had been, one would have expected that by now they would be in possession of all the essential documents and possibly prepared the record ready for filing.

Besides, the applicants have not accounted for the delay between the date of the judgment and the date when their insurers wrote to instruct counsel to lodge an appeal. The applicants appear to have been more concerned with seeking stay of the execution of the decree against which an appeal is intended, but not so in taking the essential steps in lodging the appeal itself. One of the factors a court considers in an application of this nature is whether the applicant brought the application with due dispatch and whether he has explained satisfactorily any delay in taking the essential steps in lodging his appeal. The applicants, with all due respect to them, have not satisfied these requirements.

The power of the court under rule 4, aforesaid, being discretionary, it is incumbent upon an applicant under the rule to place material before the court sufficient to enable the court to exercise its discretion in his favour. The applicants, have not, with due respect to them, shown why I should exercise my judicial discretion under that rule in their favour. If anything the material before me clearly shows that the applicants are underserving of any discretion in their favour, and notwithstanding their counsel's plea that they have a meritorious appeal, I do not think I should indulge them in view of the foregoing reasons.

In the result, I dismiss the applicants' application with costs assessed at Ksh.10,000/=.

Dated and delivered at Nyeri this 24th day of October, 2000.

S.E.O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR