



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: O'KUBASU J.A, IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 48 OF 2003**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COMMISSIONER OF EXCISE AND CUSTOMS**

**EXPARTE - RACHEL N. KAIGI ..... RESPONDENT**

(Application for extension of time to file Notice and record of Appeal, from the order of the High Court of Kenya at Nairobi (Mr. Justice Githinji) on the

12th December, 2002

in

H.C. Misc. Application No. 1025 of 2002

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**R U L I N G**

This is an application by way of Notice of Motion brought under Rules 4 and 42(2) of the Court of Appeal Rules (the Rules) in which the applicant seeks extension of time in which to file a notice of appeal and record of appeal. The application is made on the following grounds:-

- "1. The time within which to file a notice of Appeal against the High Court orders delivered on 13th December, 2002 expired before the Notice of Appeal was filed.
2. That the Applicant moved High Court on 16th December, 2002 seeking to review the order of 13th December, 2002.
3. That the ruling in the applicant's application for review was delivered on 15th January, 2003 when the same was dismissed with costs.

4. That the time to file the notice of Appeal expired while the applicant was still waiting for the ruling on her application for review the which application she had hoped would be successful.

5. The delay to bring this application was caused by delay in the Ruling for the review and delay in receiving instructions from the applicant who at the time the ruling on her review application was delivered was in United Kingdom and it was not until the 24th of January that her advocates were able to inform her of the outcome.

6. That on 28th January 2003 she gave her advocates instructions to Appeal against the Ruling of 13th December, 2002.

7. This application has been brought without undue delay.

8. The applicant has an arguable Appeal with merit and overwhelming chances of success".

In his submissions before me, Mr. Mutua for the applicant contended that they made an application for review in the superior court and the ruling on that application delivered on 15th January, 2003. By then the time in which to appeal had expired. Mr. Mutua went on to state that his client lived in Britain and hence it took time before he could obtain instructions.

Mr. Mohamed for the respondent opposed the application on the ground that there was inordinate delay which had not been explained. He, however, conceded that the ruling on review was delayed but it was his view that the application for review was unnecessary, since orders for judicial review are not subject to review. In his view this application was frivolous and ought to be dismissed with costs.

Under rule 4 of this Court's Rules this Court is being called upon to exercise its discretion. In *Samken Limited and Another v. Mercedes Sanchez Rau Tussel and Another* - Civil Application No. NAI 21 of 1999 (unreported) this Court made the following observation:

"We said at the beginning of this ruling that rule 4 under which the applicants went before the single Judge gives unfettered discretion to the single Judge in deciding whether or not to grant the extension sought. Though the discretion is unfettered, like all judicial discretion it must be exercised on reason not caprice and the exercise must not be arbitrary or oppressive. Accordingly, the courts have over the years put down guidelines on how the exercise of a discretion ought to be done".

These guidelines may indeed be found in the decision of this Court in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* - Civil Application No. NAI 251 of 1997 (unreported) in which it was stated inter alia:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted".

I have to be guided by the above stated guidelines as I consider whether this application ought to be granted or not.

It is not in dispute that when the application for judicial review was dismissed by Githinji, J the applicant opted to file an application for review of that order of dismissal and that the ruling on that

application was delivered on 15th January, 2003. The applicant's application for review having been dismissed, her lawyer had to take instructions as to whether an appeal should be filed. The applicant lives in Britain and hence it took time before her lawyer could obtain instructions. That led to the delay. It is to be noted that this application under rule 4 of the Rules was filed on 4th March, 2003 so that there was a delay of about one and half months.

Having considered the material placed before me for consideration in respect of this application, I would say that taking the circumstances of the case into account, the delay has been adequately explained and I further find that since no prejudice would be caused to the respondent if the application is granted - at least Mr. Mohamed for the respondent did not address me on the issue of prejudice to his client - I am inclined to exercise my discretion in favour of the applicant.

For the foregoing reasons. this application is granted and the applicant is to file notice of appeal within 7 days of today's date and the record of appeal be lodged within 21 days from the date the notice of appeal is filed. The costs of this application shall abide the intended appeal.

**Dated and delivered at Nairobi this 9th day of May, 2003.**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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