



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OMOLO, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 76 OF 1994**

**BETWEEN**

**DAVID KONGO .....APPLICANT**

**AND**

**NJOROGI NJUGUNA .....RESPONDENT**

**(Application of extension of time to file appeal**

**from a judgment of the High Court of Kenya at**

**Nairobi (Justice Nyarangi) dated 18th October, 1979**

**in**

**H.C.C.C. NO. 575 OF 1968)**

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**RULING**

David Kongo, the applicant herein, asks me under rule 4 of this court's Rules to exercise my discretion in his favour and grant to him an extension of time within which he can lodge his appeal. The judgment against which he proposes to file his intended appeal was delivered by the late Mr. Justice Nyarangi on 18th October, 1979. That is some fifteen years ago. However, the applicant did actually file an appeal against the judgment. That was this Court's Civil Appeal No. 79 of 1985. That appeal came up for hearing on 25th October, 1989. It was then discovered that the appeal was incompetent as the applicant's then counsel had failed to comply with the then mandatory requirements of rule 85 (1) (g) of the court's rules. The appeal was then ordered struck out with costs.

The applicant, however, did not give up. He next filed Civil Application No. NAI 10 of 1990 and it would appear that by that application, he sought an extension of time to file a fresh record of appeal, containing the certified copy of the order which copy he had omitted to include in the appeal struck on

25th October, 1989. The date on which Civil Application No. NAI 10 of 1990 was filed is not given to me so I do not know if it was filed without undue delay. I suppose I have to take it in favour of the applicant that that application was filed without undue delay. The application came up for hearing on 18th March, 1992. By the consent of all concerned the application was ordered withdrawn with a further order that the applicant was at liberty to file a fresh application with enough copies for the files of each Judge of Appeal. It was also ordered, among other things, that:-

"The previous proceedings of the Court of Appeal whereby C/A 79 of 1985 was struck out"

be also included in the new application to be filed.

The application before me is the fresh application filed pursuant to the order 18th March, 1992. It was filed on 20th April, 1994, some two years after the order authorising its filing was made. The application does not contain:-

"The previous proceedings of the Court of Appeal whereby C/A No. 79 of 1985 was struck out"

and Mr. Kimani's explanation for that failure to comply with the order of the court appears to be that when he asked the registry of the court to supply him with those proceedings he was told such proceedings are never given out to parties. But Miss Mburu for the respondent Njoroge Njuguna countered this by asserting what the order required the applicant to do was to attach to his present application, the record of appeal in C/A 79 of 1985.

With respect, I agree with Miss Mburu. If the applicant had attached the record of appeal which had been struck out, I would have been able to understand at a glance the nature of the dispute between the parties, how the trial judge had resolved the dispute and the reason or reasons which led him to resolve it, in the way that he did. Mr. Kimani for the applicant tells me that their proposed grounds of appeal are substantial and because of that I should exercise my discretion in their favour. My answer to that contention must be that I am unable to tell, one way or the other, whether the grounds are substantial because I do not have before me the High Court proceedings. That is the kind of handicap which this court's order of 18th March, 1992 was obviously intended to cure. So that right from the beginning the applicant has not complied with the terms of the order which gave him right to file this application. Miss Mburu contended that the failure to comply with the court's order made the application before me incompetent. I agree.

But even if I were wrong on this point I would have nevertheless refused to exercise my discretion in favour of the applicant. He was given leave to file the application way back on 18th March, 1992. He did not file the application until after two years and in his supporting affidavit, the applicant does not in any way attempt to contain this delay of two years. Before me, Mr. Kimani said that they were trying to get various documents from the court's registry, one such document being the proceedings to which I have already referred. There is, however, absolutely no evidence before me of my letters to the deputy registrar requesting for such documents or anything of that kind. It was clearly the duty of the applicant to satisfy me on these points before I can be expected to exercise my discretion in his favour.

There should be an end to litigation. As I had at the beginning the ruling sought to be appealed against was delivered some fifteen years ago. It is true that the applicant has at various stages, been let down by counsel. But the respondent is equally entitled to justice and I do not think it is right to keep him in suspense for that length of time merely because his opponent's advocates are not doing a good job of it. For these reasons, I would have refused to exercise my discretion in favour of the applicant. But as it is, I agree with Miss Mburu that this application is incompetent because of its failure to comply with the court's order authorising its filing. I accordingly order it to be struck out with the costs thereof to the respondent. That shall be my order.

Dated and delivered at Nairobi this 16th day of September, 1994.

R. S. C. OMOLO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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