



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPLICATION NO. 331 OF 2006

SAMUEL MWANGI APPLICANT

AND

JEREMIAH M’ITOBİ RESPONDENT

(Application for extension of time to file and serve record of appeal out of time in an intended appeal from a judgment and a decree of the High Court of Kenya at Meru (Etyang, J) dated 8th April, 1998 In H. C. C. APPEAL NO. 70 OF 1994)

RULING

I am asked to exercise my discretion under **rule 4** of the Court’s Rules in order to enable the applicant Samuel Mwangi to file and serve out of time a notice of appeal and a record of appeal upon the respondent Jeremiah M’Itobi. The applicant had previously filed Civil Appeal No. 180 of 2002. That appeal was struck out by the Court on 2nd November, 2006. I do not think I am required to concern myself with the reason(s) why the full Court struck out the appeal, but I need to point out that the question of whether the appeal being struck out stood any chance of succeeding was not and could not have been gone into. I mention this point at this stage because Mr. Kioga, learned counsel for the respondent, strenuously pressed upon me during the hearing of the motion that the intended appeal stood no chance at all of succeeding and that it would be an exercise in futility to extend time for the applicant. I am aware that a single Judge may be required to consider the possibility of the chances of success of the intended appeal, but for my part I would be very reluctant to refuse to extend time on that basis alone unless it was so obvious that there is some clear legal impediment to the proposed appeal, e.g. where it is shown that there is no right of appeal. It is not to be forgotten that the chances of success or otherwise of the intended appeal is merely a possible area for consideration. It ought not to be the province of a single Judge to conclusively determine that an intended appeal is bound to fail and, therefore, there is no reason for extending time.

As I have pointed out, the applicant’s previous appeal was stuck out on 2nd November, 2006. The present motion was lodged in the Court on 17th November, 2006, some fifteen days later. It is stated in paragraph 8 of Mr. Charles Kariuki’s affidavit in support of the motion that there was no delay in lodging the application, but I am not quite sure that some fifteen days is such a short period that it can be described as “no delay.” The legal position with regard to these matters is that whenever there is a delay of whatever period, there should be some explanation for it so as to enable a single Judge decide on how best to exercise the discretion conferred by **rule 4**. There is no explanation offered in the affidavit of Mr. Kariuki but in his submissions before me, Mr. Muchangi who urged the applicant’s motion before me told me that they had to write to the Land Adjudication Officer to seek his consent, which was one of the

reasons for striking out the previous appeal. Mr. Muchangi also told me that they had to look for the applicant to enable them file the motion. In the end Mr. Muchangi contended that a delay of some fifteen days is not inordinate.

While the point is not whether the delay is inordinate but whether there is an explanation for whatever delay that may be there, I take into account the oral submissions made before me and in all the circumstances of the case, I have come to the conclusion that the justice of the case requires that I exercise my discretion by allowing the prayer to extend time, rather than concluding that the delay of fifteen days is inordinate.

That being the view I take of the matter, I allow the notice of motion dated 16th November, 2006 and lodged in Court on 17th November, 2006 and I make the following orders:-

1. The applicant shall file and serve his notice of appeal within (7) seven days of the date of this order;
2. The applicant shall file and serve upon the respondent the record of appeal within fourteen (14) days from the date the notice of appeal is lodged in Court.
3. The applicant shall pay to the respondent the costs of this motion which I assess at Kshs.5000/- and that sum must be paid within twenty-one days from the date of this order. If payment is not made within that period, the respondent shall be at liberty to execute for it.
4. Should the applicant fail to comply with the orders or any of the orders stated in paragraphs (1) and (2) or should he fail to comply with them or any of them within the times prescribed therein, then in the event of such failure the motion for extension of time shall automatically stand dismissed without any further order of the Court.

Those shall be my orders.

Dated and delivered at Nyeri this 26th day of October, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.