



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Misc Appli 112 of 2005

ANN MUKAMI MUCHIRI APPLICANT

VERSUS

DAVID KARIUKI MUNDIA DEFENDANT

RULING

Ann Mukami Muchiri, the applicant herein seeks leave of this court to file her intended appeal out of time against a judgment delivered on 20th July 2005 in Nyeri CMCC 853 of 2003. The application was filed on 28th September 2005. The applicant explains that the delay in filing the appeal was caused by the delay in getting copies of typed proceedings and judgment. An affidavit from the applicants advocate annexes a Reissue of Certificate of Delay which shows that the proceedings and decree were not supplied until 3rd October 2005. Relying on the cases of (1) ***Leo Silla Mutiso v/s Rose Hellen Wangari Mwangi (Nbi) 255 of 1997 and (2) Joyce Wamuhu & 2 others v/s Ruth Kalekye & Another (Nbi) Civil Appeal No. 304 of 2004***, Mr. Ngugi urged the court to exercise its discretion in the applicant's favour since the delay has been adequately explained.

Mr. Mugambi who appeared for the Respondent opposes the application. Relying on the case of ***Kyuma v/s Kyiema (1988) KLR 185 and Wanjau Muraya (1983) KLR 276***, Mr. Mugambi submitted that the reasons given for the delay in filing the appeal could not exonerate the applicant because there was no requirement that the memorandum of appeal could only be filed together with the order or decree.

I have considered this application, the submissions of counsels and the authorities cited.

I find that the case of ***Kyuma v/s Kyiema (Supra)*** which was relied upon by Mr. Mugambi is distinguishable as the circumstances were different in that the appellant had filed an appeal and sought to apply the provisions of section 79G of the Civil Procedure Act which provides for the exclusion of time required for the preparation and delivery to the appellant a copy of the decree or order appealed from in computing the period of 30 days provided for filing an appeal. In the instant case the applicant has come to this court seeking leave to file his appeal out of time. In other words the applicant concedes that the period for filing appeal has already expired.

Although she has annexed a certificate of delay she is not invoking the provisions of section 79 G of Civil Procedure Act to have that period excluded but is merely using the certificate of delay to explain the reasons why she did not file her appeal within time. The reason was that her advocates required the proceedings and judgment to enable them prepare the memorandum of appeal. A request for the

documents was made two days after the judgment was delivered but same were not supplied until 21st September 2005. Thereafter this application was brought 7 days later.

Section 79G of the Civil Procedure Act and order XLIX rule 5 of the Civil Procedure Rules provides discretion to the High Court to extend time for filing an appeal.

The authority of *Leo Sila Mutiso v/s Rose Hellen Wangari Mwangi (supra)* which was cited by Mr. Ngugi provides how such a discretion is to be exercised.

“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 delay, secondly the reason for 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.”

The applicant has adequately explained the delay of about two months. A draft memo of appeal has been exhibited and it is evident that the appeal is arguable. I do not see any prejudice that the Respondent is likely to suffer.

Having considered all the relevant issues, I am satisfied that this is an appropriate case in which this court should exercise its discretion in the applicant’s favour.

I do therefore grant the application and order that the applicant shall file his appeal within 10 days from the date hereof.

Costs shall be in the cause. Orders accordingly.

Dated this 26th day of October 2006.

H. M. OKWENGU

JUDGE