



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 19 OF 1997
BETWEEN

GEOFFREY NJOROGE KINYANJUIAPPLICANT
AND
NYAUTHA GICHUNGURESPONDENT

(Application for extension of time to file a Notice of Appeal in an intended appeal
from the Judgment of the High Court of
Kenya at Nairobi (Mr. Justice Dugdale) dated 7th July, 1994
in
H.C.C.C. NO. 370 OF 1992)

RULING

I have before me a motion on notice expressed to be brought under **rule 4** of the Court of Appeal Rules (the Rules) by Mr. Meenye for orders that the time for filing the notice of appeal and record of appeal be extended.

The intended appeal is by the unsuccessful defendant in the **Senior Resident Magistrate's Court at Kiambu** in which judgment was entered on 9 November, 1992. The appeal from that judgment being CIVIL APPEAL NO. 120 OF 1995 was on 16 January, 1997 struck out as incompetent as the record of appeal did not include an application to the Land Control Board for consent to sub-divide in breach of **rule 85(1)(f)** of the Rules. On 6 February, 1997, within less than a month, the present application was filed. It is supported by Mr. Meenye's affidavit and is based on the ground that such omission was due to an oversight and a mistake on the part of counsel for the applicant in failing to comply with the said Rule.

On behalf of the respondent, Mr. Kairaria in making his rival arguments submitted that there was no genuine reason why the document was not included in the record. Secondly, he argued that no purpose would be served by granting an extension of time as the question of jurisdiction proposed to be raised in the intended appeal had not been argued in the first instance nor on the first appeal. Finally, it was urged that this was an old matter which had started ten years ago and all litigation, in the interest of justice, must come to an end.

In my judgment, the starting point is **rule 4** of the Rules itself, which explicitly confers the widest measure of discretion in applications for extension of time and draws no distinction whatsoever between various classes of cases. For present purposes, it is extremely important to note that the rule expressly stipulates that applications for extension are subject only to one overriding consideration and that is, the order proposed to be made should be just. For my part, I find this statement important. Having given most anxious consideration, I find no hesitation whatsoever in finding, as I do, that the failure to comply with **Rule 85(1)(f)** was clearly a mistake. As was said by Madan, J.A. (as he then was) in **BELINDA MURAI AND NINE OTHERS VS. AMOS WAINAINA** in Civil Application No. NAI 9 of 1978 (unreported):-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.

It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice."

That being the view of the matter that commends itself to me, I have come to the clear conclusion that this case falls under the heading of those in which counsel's error is not necessarily a bar to his obtaining an extension of time.

I am not persuaded that no purpose would be served by extension of time because the question of jurisdiction can always be raised even on a second appeal for the first time.

Waiver or consent do not confer jurisdiction.

Finally, I readily concede that this is an old matter.

But I do not think that it has been shown to me that the lapse of time that has occurred was through any fault on the part of the applicant. As was said by Omolo, J.A. in GICHUHI KIMIRA V. SAMUEL NGUNU KIMOTHO AND ANOTHER Civil Application No. NAI 243 of 1995 (unreported):-

"Mr. Gautama for the respondent does not, indeed he cannot, challenge the court's power to grant an extension of time under these circumstances. The court clearly has jurisdiction to do so. I am aware that litigation ought to come to an end and that it is unfair that one case should hang over the heads of parties indefinitely. But that consideration must be weighed against the wider interests of justice, namely that where possible cases should be brought to a close after a hearing on the merits.

The decision sought to be appealed against was made in 1989 but there was no suggestion that between that date and 1991 when the appeal was filed, there was any undue and unaccounted for delay. As I have said the court gave an extension of time to enable the appeal to be filed. The appeal was struck out sometime this year but once again there is no suggestion that the applicant had in any way delayed the hearing of the appeal. This application has been prosecuted with proper dispatch and in the circumstances, I think I ought to exercise my discretion in favour of the applicant."

It is true that litigation must come to an end but as in all such cases, basic principles are in conflict. While it is an important principle in the administration of justice that all litigation must come to an end, sooner than later, the administration of justice also normally requires that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not unnecessarily debar a litigant from the pursuit of his rights.

Balancing one against the other, I have come to the clear conclusion that, in the circumstances of this case, this is one which deserves the exercise of the court's discretion. I have material before me on the basis of which I think this is a fit and proper case for exercising my discretion in favour of the applicant. As I said earlier this is a case of a mistake: the applicant has not been shown to be guilty of any delay.

Accordingly and, for the reasons above stated, I allow the application and order that the applicant shall

file his notice of appeal within seven days from the date hereof and the record of appeal within fifteen days thereafter. The applicant shall pay to the respondent the costs of this application in any event.

Dated and delivered at Nairobi this 12th day of March, 1999.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR