

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: OMOLO, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 334 OF 1998
BETWEEN

1. ISAIAH MWAI MATHENGE

2. MWAI LIMITED.....APPLICANTS

AND

VIRGINIA WANJIRU
MWANGIRESPONDENT

(Application for extension of time in an intended Appeal

from Judgment and Decree of High Court of Kenya at Nakuru

by the (Hon. Justice Rimita) dated 5th May, 1998

in

H.C.C.C. NO. 103 OF 1991)

R U L I N G

Isaiah Mwai Mathenge and *Mwai Limited* are the applicants in this notice on motion brought under Rule 4 of the Court's rules.

They seek from the Court orders that the Court be pleased to extend for them the time for filing the notice of appeal to 17th August, 1995 and for filing the record of appeal out of time.

Virginia Wanjiru Mwangi, the respondent, obtained judgment against the applicants on 15th May, 1995. If the applicants wanted to appeal against that judgment, then by the provisions of *rule 74(2)*, they had to file a notice of appeal within fourteen days from the date of the judgment, namely 15th May, 1995. The applicants told me, through the mouth of their present counsel *Miss Sijeny*, that they were not present when the judgment was delivered. *Mr. Mirugi Kariuki* for the respondent, however, told me that the Court record shows that the applicants were represented by counsel when judgment was delivered. Whatever may be the correct position, the applicants only filed their notice of appeal on 17th August, 1995. That at any rate, is what *Miss Sijeny* says. A copy of that notice has not been exhibited before me and *Mr. Kariuki* specifically says the respondent was never served with the notice of appeal. The applicants did not show me anything during the hearing of the motion to show that they had actually served the respondent with their alleged notice of appeal.

Next the applicants say they wrote a letter to the Deputy Registrar asking for copies of the proceedings and judgment. That letter was allegedly written on 17th August, 1995. Once again *Mr. Mirugi Kariuki* told me that the respondent did not receive a copy of that letter. Nor was a copy of the same annexed to the affidavit in support of the motion before me.

The applicants say they obtained the proceedings and judgment on 21st September, 1998. But they have not displayed before me any certificate of delay from the Deputy Registrar pursuant to the proviso to rule 81 of the Court's rules. This application for extension of time was not filed until 6th November, 1998.

Even assuming that the proceedings and judgment were obtained on 21st September 1998, as alleged it would mean that the applicants took over one month to file this simple motion for the extension of time. *Mr. Kariuki* told me on behalf of the respondent that the applicants are not serious in their desire to appeal. I entirely agree and their lack of seriousness is evident from the manner in which they are prosecuting this motion. They allege that they did file some notice of appeal, but as I have said a copy of that notice is absent from this record and the respondent specifically stated that she has not been served with that notice. No effort was ever made to show that the respondent was in fact served with the notice. Then a large portion of the delay is attributed to the Deputy Registrar who is said to have supplied the proceedings only on 21st September, 1998. But a copy of the letter asking the Deputy Registrar for the proceedings has not been displayed and despite the respondent's direct assertion that a copy of the letter was never sent to her, no effort was made to show that a copy of the letter was in fact sent to her.

Finally, if the delay between 17th August 1995 to 21st September, 1998 was wholly attributable to the deputy registrar, then the easiest thing to show that was to annex to the supporting affidavit, a certificate of delay to prove that fact. I think it would be an abuse of the process of the Court to extend time for the applicants in the circumstances of this case. I know my discretion is unfettered, but I have to exercise that discretion according to reason. There is absolutely no valid reason why I should exercise the discretion in favour of the applicants and that being my view of the matter, the notice of motion dated 5th November, 1998 and lodged in Court on 6th November, 1998 must fail. I order that it be and is hereby dismissed with costs thereof to the respondent.

Dated and delivered at Nakuru this 22nd day of September, 1999.

R. S. C. OMOLO

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR