



REPUBLIC OF KENYA
 IN THE COURT OF APPEAL
 AT NAIROBI
 (CORAM: GICHERU, AKIWUMI & SHAH, J.J.A.)
 CIVIL APPLICATION NO. NAI. 356 OF 1996
 BETWEEN

MUCHUGI KIRAGU APPLICANT

AND

1. JAMES MUCHUGI KIRAGU

2. HENRY THARIKI NG'ANG'ARESPONDENTS

(Application for extension of time to appeal out of time
 in an intended Appeal from a Judgment of the High
 Court of Kenya at Nairobi (Lady Justice Walekhwa)
 dated 13th May, 1992

in

H.C.C.C. NO. 632 OF 1980)

RULING OF THE COURT

The reference before us is in respect of the refusal of Kwach, J.A. sitting as a single judge of this court, to extend for the applicant, time within which to appeal against the judgment of Walekhwa, J. given on 13th May, 1992. The uncontroverted facts are that the applicant timeously filed his Notice of Appeal on 20th May, 1992, that is on the seventh day after the delivery of the judgment. But before then, his advocate had on 18th May, 1992, and within time, applied, to the Deputy Registrar of the High Court, and sending a copy of this application to the respondents' advocates, for copies of the proceedings and judgment in the matter before the superior court, for the purpose of lodging an appeal in this Court. The Certificate of Delay showed that the proceedings and judgment were delivered to the applicant on 5th August, 1996. From that day, the applicant had sixty days within which to lodge his appeal. This he failed to do because the Certificate of Delay itself, which would only be necessary to support an application for extension of time within which to lodge the appeal, was not ready for collection until 7th October, 1996, two days after the expiry of the sixty days. It was, however, not until 18th November, 1996, that the applicant filed his application for extension of time to lodge his appeal, some forty four days after the proceedings and judgment were delivered to the applicant, which constitute the period of delay involved. The real reason for this delay as deponed in the applicant's affidavit in support of his application is:

"That the application to appeal out of time could not be filed early as the applicant is a pauper and the delay has not yet been inordinate. He took a month to raise the court fees for filing the application and Advocates fees for it."

It is also noteworthy that his application was brought on the grounds that the intended appeal had

overwhelming chances of success and that the applicant would suffer greatly if his application was not granted. Annexed to the applicant's supporting affidavit were copies of the pleadings and judgment in the superior court together with the grounds of his intended appeal.

The application was opposed on the ground that the time taken from 7th October, 1996, when the Certificate of Delay was obtained, to 18th November, 1996, when the application was filed, was inordinately long. The applicant's averment in his affidavit that his poverty had been the cause of the delay in bringing the application was, however, not challenged.

As regards the poverty of the applicant, which the learned single judge properly identified as the applicant's only stated reason for the delay in filing his application, the learned single judge dealt with it rather peremptorily when he stated in his ruling that it was not good enough because the applicant could have sought refuge under the Rules of this Court with respect to poor litigants. The crucial averment of the applicant that he needed a month to raise the necessary funds for court and advocates fees, which was not denied, was not considered by the single judge of this Court.

Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it. If the learned single judge had considered this issue which was raised in the applicant's application, and in his supporting affidavit including the annexures thereto, we venture to say that he may probably have come to a different conclusion than the one he came to.

In the result we are constrained to come to the conclusion that the applicant's reference must succeed and hereby grant to him an extension of 30 days from today within which to lodge his record of appeal. The costs of the application and this reference shall be costs in the intended appeal.

Dated and delivered at Nairobi this 6th day of February, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.