



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAKHA, J.A. (IN CHAMBERS))
(CIVIL APPLICATION NO. NAI 28 OF 1993)

BETWEEN

EDWARD RIITHO

HEZRON KAMAU WAWERU

JOHN NDUNGU MBUGUAAPPLICANTS

AND

MUCHOHI GIKONYORESPONDENT

(Application for leave to file a Record of Appeal out of time from a Judgment of the High Court (Lady Justice Aluoch) dated 28th June, 1990

in

H.C.C.C. NO. 3480 OF 1985)

RULING

By their application dated and filed on February 26, 1993, the applicants by a motion on notice seek an order that the time for filing a record of appeal be extended.

The intended appeal is from the superior court in which judgment was entered on June 28, 1990 by Aluoch, J.. The notice of appeal was filed on July 4, 1990 within the prescribed time and although the affidavit in support (the affidavit) by Mr. Akhaabi, advocate for the applicants, that he applied for certified copies of the proceedings and judgment on October 22, 1991 he stated from Bar that he had in fact applied for them on July 3, 1990. These papers were ready in December, 1991 but he became aware of that fact in January, 1992 when the letter from the Registry dated November 1, 1991 was received by him. But Mr. Akhaabi collected the papers in December, 1992 (paragraph 6 of the affidavit) when he found out that the second applicant had died. He had informed the third applicant to liaise with the first and the second applicant with the view to giving him sufficient instructions (paragraph 7 of the affidavit). According to Mr. Akhaabi, time started to run for the purposes of filing an appeal from December 4, 1991 and the appeal became barred on February 19, 1992. It was not until February 26, 1993 that the present application for extension was filed.

In these circumstances, one comes to the fundamental issue for decision in this application whether the

Court should now exercise its discretion under rule 4 of the Rules of this Court and grant the enlargement of time sought.

The court has a wide discretion in this matter. There is no doubt that the terms of rule 4 are sufficiently wide to confer a discretion on the Court to extend the time, even where (as here) the time limited for filing the appeal has already expired. But this discretion, howsoever wide it may be, is a discretion to be exercised judicially having regard to the particular circumstances of each case. I consider that a passage of the opinion of the Privy Council in Ratman v. Cumarasamy, [1964] 3 A11 E.R. 933, at p.935, correctly sets out the principle involved:

"The rules of this court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

In the instant application, Mr. Akhaabi has conceded and, rightly in my view, that there has been inordinate delay.

There is, however, no satisfactory account of the time that has lapsed between January, 1992 up to December 1992 when copies of proceedings were collected. This is almost a whole year. Nor is there any explanation of the delay from February 19, 1992 when the appeal admittedly became barred up to February 26, 1993 when this application was filed. This is more than a year. The death of the second applicant of which Mr. Akhaabi was informed on December 24, 1992 still left the first and third applicants to pursue the appeal. On the material before me, I find that there has been inordinate delay which has not been sufficiently or satisfactorily accounted for. Indeed, there is no material before me on the basis of which I can consider this a fit and a proper case for exercising my discretion in favour of the applicants. There is no suggestions whatsoever that there has been any mistake or inadvertence or accident. It appears to me that less than proper diligence was exercised in pursuing the right of appeal.

Having given the most careful consideration to all the circumstances of this case, I am disinclined to grant the application. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 14th day of May, 1997.

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR