



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CIVIL APPLICATION NO. 54 OF 2015 (UR 36/2015)**

**(CORAM: MUSINGA, JA. (IN CHAMBERS))**

**BETWEEN**

**SAMUEL NDURA KANYARA ..... APPLICANT**

**AND**

**MARY NJAMBI KARIUKI ..... RESPONDENT**

*(An Application for extension of time within which to file and serve a Notice of Appeal as well as the Record of Appeal out of time, arising from the ruling of the High Court of Kenya at Eldoret (Kimondo, J.) dated 7<sup>th</sup> October, 2014*

**in**

**H.C.C. SUIT NO. 144 OF 1993 & NO. 144B OF 1993)**

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**RULING**

1. The application before me is brought under **rule 4** of the **Court of Appeal Rules, 2010** and seeks one substantive order:

**“That the time limited for filing and serving the respondent by the applicant of the notice of appeal as well as serving the record of appeal be enlarged and the same be filed and served within such time the court shall deem fit.”**

2. The applicant, who is acting in person, stated in his short affidavit in support of the application that on 27<sup>th</sup> February, 2014 he filed an application in the High Court for extension of time. He was not aware that the application ought to have been filed in this Court. He therefore withdrew that application. That is all the applicant stated in explaining the delay, although he made brief but disjointed oral submissions in an effort to explain some annexures to his application.

3. In his brief submissions, the applicant stated that he is looking for a way to proceed with his **civil appeal No.144 of 1993**, which was struck out several years ago. That statement sharply contradicts the heading of his application which reads:

**“Being an application for extension of time within which to file and serve notice of appeal as well as the record of appeal out of time, arising from the ruling of honourable Justice G. K. Kimondo, delivered on 7<sup>th</sup> day of October, 2014.”**

4. The ruling of **Kimondo, J.** dated 7<sup>th</sup> October, 2014 shows that the applicant’s application in **Civil Appeal No. 152 of 1993** dated 27<sup>th</sup> February, 2014 was dismissed. In that application the applicant was seeking leave to appeal against the decision of Ibrahim, J.(as he then was) dated 16<sup>th</sup> December, 2008 in **Civil Appeal No. 152 of 1993**, striking out the applicant’s application for extension of time to file a notice of appeal before this Court. The learned judge held that the High court had no jurisdiction to deal with such an application.
5. Ibrahim, J. further noted that the applicant had continued to file one application after another, even after the High Court and the Court of Appeal had determined his previous appeals. Consequently, the judge directed the applicant not to file any other application without leave of the court.
6. In **Misc. Application No. 248 of 2013**, the applicant sought leave to appeal against the decision of **Kimondo, J.** made on 7<sup>th</sup> October, 2014. The learned judge granted leave, *“but only in relation to file an appeal out of time to Court of Appeal.*
7. A ruling by **Azangalala, J. (as he then was)** in **Civil Appeal No. 144”B” of 1993, Samwel Ndura Kanyara V Mary Njambi**, sets out a clear history of this matter. The background is that there was a case between the applicant and the respondent, **CMCC No.249 of 1989**, in which the applicant was seeking a quarter acre plot from the respondent, which he alleged to have bought from her.
8. The said suit was dismissed with costs vide a judgment delivered on 30<sup>th</sup> November, 1993. The applicant filed an appeal against that decision, *to wit., Civil Appeal No. 152 of 1993.* That appeal was summarily rejected by **Aganyanya, J. (as he then was)** on 3<sup>rd</sup> February, 1994. The appellant appealed against the summary rejection to the Court of Appeal vide **Civil Appeal No. 152 of 1995.** That appeal was struck out.
9. Undeterred, the applicant lodged another application in the Court of Appeal seeking leave to file a proper record of appeal, which application was allowed, following which the applicant lodged **Civil Appeal No. 215 of 1999.** That appeal was however struck out on 26<sup>th</sup> September, 2007.
10. In his oral submissions, the applicant stated that his appeal against the time court’s decision was No. 144 of 1993 and not No. 152 of 1993 that was struck out. There is a letter dated 14<sup>th</sup> April, 1994 addressed to the applicant by the High Court Deputy Registrar, Eldoret, informing the applicant that his appeal No. 144 of 1993 had been admitted to hearing on 3<sup>rd</sup> February, 1994 and advising him to prepare the record of appeal and serve it upon the respondent. Whereas it is true that one of the annexures to the applicant’s application is a copy of a memorandum of appeal headed: *“Civil Appeal No. 144 of 1993,”* together with an accompanying receipt No. 4UU506 bearing the above appeal number, it is not clear what became of that appeal. There is however a copy of the application by way of a notice of motion in **High Court Civil Appeal No. 152 of 1993** filed by the applicant as well as a supporting affidavit. That is the application that was dismissed by **Ibrahim, J.**
11. I have brought out all this information to demonstrate that the applicant’s application before me was quite mixed up. The applicant told this Court that he was too poor to engage an advocate to represent him.
12. The applicant’s application was opposed. The respondent filed a replying affidavit and stated,

*inter alia*, that the orders sought are superfluous as the applicant was on 22<sup>nd</sup> September, 2015 granted leave to file an appeal against the order made by **Kimondo, J.** on 7<sup>th</sup> October, 2015. That notwithstanding, Kimondo, J. did not have power to overrule earlier orders issued by other judges of similar jurisdiction, the respondent asserted. She cited all the earlier orders issued by **Aganyanya, Ibrahim** and **Azangalala, JJ.**

13. **Mr. Njuguna**, the respondent's learned counsel, urged the court to consider the history of this dispute and dismiss the application, saying that there must be an end to litigation.
14. This jumbled up application demonstrates the challenges lay people often undergo in their quest for justice in our courts. The applicant genuinely desired to appeal against the lower court's judgment in **RMCC No. 249 of 1989** but he encountered unsummountable legal challenges as highlighted by **Azangalala, J** in his ruling of 27<sup>th</sup> September, 2011, which I have already summarized. It seems there was also a mix up of documents at the court registry which I am unable to comprehend.
15. From his application, the applicant now seems to indicate that he desires leave to file and serve a notice of appeal and the record of appeal out of time in respect of the ruling of **Kimondo, J.** delivered on 7<sup>th</sup> October, 2014 but in his oral submissions he states that he want to be allowed to prosecute **Civil Appeal No. 144 of 1993.**
16. If what the applicant requires is leave to appeal, albeit out of time, the ruling of **Kimondo, J.** dismissing his application dated 27<sup>th</sup> February, 2014, the applicant did not sufficiently explain the delay between 7<sup>th</sup> October, 2014 when the application was dismissed and 15<sup>th</sup> October, 2015 when he filed this application.
17. In exercising its discretion under **rule 4** of the **Court of Appeal Rules**, the Court must take into consideration several factors, among them, the length of the delay, the reasons for the delay, the chances of success of the intended appeal, and the extent of prejudice that may be occasioned to the respondent. See **AFRICAN AIRLINES INTERNATIONAL LIMITED V SOUTHERN AFRICAN TRADE DEVELOPMENT BANK [2003] KLR 140.**
18. Even if the applicant wishes to obtain leave of the Court to pursue **Civil Appeal No. 144 of 1993**, he must still satisfy the aforesaid requirements. The applicant has not annexed a draft memorandum of appeal so that the Court can form a *prima facie* view of the chances of success of the proposed appeal.
19. It is now nearly 23 years since the impugned judgment was delivered and I think the respondent shall definitely be prejudiced if the orders sought are granted.
20. Much as I sympathise with the applicant, I think the odds are heavily weighed against him. I am therefore unable to exercise my discretion in favour of the applicant. Consequently, this application is dismissed. Each party shall bear its own costs.

**DATED and delivered at Eldoret this 10<sup>th</sup> day of March, 2016.**

**D. K. MUSINGA**

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**