



Donald O. Raballa v Judicial Service Commission & Attorney General (Civil Application 10 of 2015) [2015] KECA 796 (KLR) (17 April 2015) (Ruling)

Donald O. Raballa v Judicial Service Commission & another [2015] eKLR

Neutral citation: [2015] KECA 796 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 10 OF 2015
DK MUSINGA, JA
APRIL 17, 2015**

BETWEEN

DONALD O. RABALLA APPLICANT

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

(Application for extension of time to file and serve Notice of Appeal out of time in an intended appeal from a Judgment of the High Court of Kenya at Nairobi (Odunga, J.) delivered on 13th May, 2013 in HC. MISC No. 648 of 2009)

RULING

1. This application dated 22nd December, 2014 seeks one substantive order, that is; leave to file and serve a notice of appeal and the record of appeal out of time. The judgment sought to be appealed against was delivered by Odunga, J. on 13th May, 2013. The application is brought under Article 159 (2) (d) of the Constitution, sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 4 and 87 of the [Court of Appeal Rules](#).
2. The application is supported by an affidavit sworn by Donald O.Raballa, the applicant, who was in the employ of the Judicial Service Commission as a Resident Magistrate from 23rd June, 2005 until 13th May, 2009 when his services were terminated.
3. The applicant moved to the High Court on 27th November, 2009 and unsuccessfully challenged the termination of his services, which he contended was unprocedural.



4. Following dismissal of his suit, the applicant instructed M/S Ashfords & Company Advocates to file a notice of appeal, which they did, on 20th May, 2013. The said advocates requested for typed proceedings and the judgment to enable them prepare the record of appeal and the same were availed on 19th February, 2014. A certificate of delay issued by the Deputy Registrar which indicated that the time taken by the court to prepare and supply the certified copies of the proceedings was from 15th May, 2013 to 19th February, 2014, that is 217 days. However, the certificate of delay was ready for collection on 4th June, 2014.
5. M/S Ashfords & Company Advocates did not file the record of appeal upon receipt of the certified copies of the proceedings and judgment, despite the applicant's considerable effort to have them do so. As a result on 31st October, 2014 the applicant decided to instruct M/S Maingi Musyimi & Associates Advocates filed a notice of change of advocates on 3rd November, 2014. That notwithstanding, the said advocates did not file the application now under consideration until 22nd December, 2014.
6. The applicant believes that the intended appeal is arguable and urges the court not to punish him for the mistake of his former advocates.
7. Mr. Musyimi, learned counsel for the applicant, submitted that the delay is not inordinate and referred the court to the draft memorandum of appeal as evidence that the intended appeal is not frivolous.
8. Mr. Kaumba, learned counsel for the respondent, opposed the application. He submitted that the delay in filing the application had not been sufficiently explained in that the certificate of delay was issued on 19th February, 2014 yet the application was not filed until 15th January, 2015; a period of about 11 months. Even after instructing the current advocates on 31st October, 2014, there was also an unexplained delay of upto 75 days.
9. Mr. Kaumba added that the applicant, who was a judicial officer, ought to have known the timelines applicable and thus do his best to ensure that the record of appeal is filed in time; for example, by personally checking with the court registry, instead of writing letters to his advocates.
10. I have considered the arguments advanced by counsel as summarized hereinabove. Under rule 4 of this Court's Rules, a single judge is empowered to exercise his discretion to allow or disallow an application for extension of time. The discretion must however be exercised judiciously and not capriciously. The principles that the Court has to consider in such an application are well settled. In *LEO Sila Mutiso V Rose Hellen Wangari Mwangi*, Civil Application No. NAI 251 of 1997, this Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”
11. It is against the aforesaid principles that I shall consider this application. As regards the length of the delay, the judgment sought to be appealed against was delivered on 13th May, 2013. A letter bespeaking certified copies of the proceedings and judgment was sent to the deputy registrar on 15th May, 2013. The Certificate of Delay shows that from 15th May, 2013 to 19th February, 2014 when the document sought were eventually collected is a period of 217 days.
12. Apart from the single letter dated 14th May, 2013, there is no evidence that counsel for the applicant or the applicant himself ever made any follow up by sending reminders or visiting the registry to enquire



about the progress made in typing the proceedings. That notwithstanding, in view of the fact that there is on record a Certificate of Delay that has not been challenged, I shall restrain myself from making a finding that the delay was inordinate.

13. Turning to the reasons for the delay, the applicant blames his erstwhile advocates and to some extent, though indirectly, the Court. He does not attribute any delay to himself at all. I have already stated that the applicant was a Resident Magistrate and therefore well acquainted with the legal requirements and procedure for filing appeals from the High Court to the Court of Appeal. He was well aware of the statutory timelines that must be met, failing which any delay must be sufficiently explained.
14. The applicant was by a letter dated 6th December, 2013 notified that the proceedings were ready for collection upon payment of the requisite fees. He did not pay that fees until 4th February, 2014, a delay of 60 days. The applicant further delayed in collecting the certified copies of the proceedings and only did so on 19th February, 2014, a further delay of 15 days. All that delay has not been sufficiently explained.
15. M/S Maingi Musyimi and Associates advocates were retained by the applicant in place of Ashfords & Company Advocates on 31st October, 2014. They drafted the application now before this Court as well as its supporting affidavit sometimes in December, 2014. Both documents are dated 22nd December, 2014. What were they doing the whole of November 2014 and almost the whole of December 2014, a period of 52 days? And that is not all, they did not file the application until 15th January, 2015, a further period of 23 days.
16. Taking all the above into consideration, I find and hold that the delay in filing this application for extension of time has not been sufficiently explained. In such circumstances as stated above, an applicant cannot call into aid the provisions of Article 159 (2) (d) of the *Constitution* of Kenya, 2010 to argue that the Court should not reject his application on procedural technicalities. Statutory timeliness are set for good reasons and in instances where the Court is permitted to exercise its discretion to extend the time for such compliance, the law requires that the reasons for failure to meet the timelines be sufficiently set out. That has not been done in this instance.
17. As regards the chances of success of the intended appeal, all I wish to state is that from the draft memorandum of appeal the intended appeal is not frivolous, it is arguable. An arguable appeal is not one that must succeed, it is one that raises reasonable arguments that warrant consideration by the Court.
18. All in all, I am not inclined to exercise my discretion to extend the time for filing the intended appeal as sought by the applicant and hereby dismiss the application dated 22nd December, 2014. The applicant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF APRIL, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

