



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, J.A.) (IN CHAMBERS)

CIVIL APPLICATION NO. NYR 4 OF 2014 (UR 2/14)

BETWEEN

GEORGE MWENDA MUTHURI.....APPLICANT

VERSUS

MAMA DAY NURSERY AND PRIMARY SCHOOL LIMITED.....RESPONDENT

(Being an application for extension of time to file a Notice of Appeal and record of appeal out of time for an intended appeal from the Ruling and orders of the High Court of Kenya at Meru (Makau, J.) dated 28th June, 2012,

in

HCCC No. 180 of 2011)

RULING

[1] The application as drawn, seeks to rely on the provisions of **Sections 3A (1) and (2)**, (*supposedly of the Appellate Jurisdiction Act*) and **Rules 2, 4, 5, 42 and 47** of the **Court of Appeal Rules**. George Mwenda Muthuri the applicant seeks leave to file notice of appeal and the record of appeal against the ruling of the High Court delivered on 28th June, 2012, in **Meru HCCC No. 180 of 2011**, out of time. The applicant also sought for an order of stay of proceeding in the aforesaid case, which prayer was abandoned by counsel for the appellant for the simple reason that it cannot be granted by a single Judge. (See **Rule 53 (1)** of *the Court of Appeal Rules*):

[2] The motion is supported by the following grounds:

- a. ***Ruling was delivered on 28th June, 2012, by Hon Justice J. A Makau in Meru HCCC No. 180 of 2011 and the applicant was aggrieved by the said Ruling.***

- b. ***The applicant has an arguable appeal which has high chances of success. The Hon. Judge, amongst erred in law and fact when he struck out the Applicant's replying affidavit thus proceeding with the matter in a manner like the application in question was not opposed. This***

was (sic) prejudiced to the applicant.

- c. *The applicant failed to file the appeal within time as he did not have the means to pay legal fees to his advocates on record or engage a new one. He is not employed and had to dispose of some piece of land to afford legal fees.*

- d. *Meru HCCC No. 180 of 2011 may be fixed for hearing any time and if the proceedings are not stayed, the appeal herein will be rendered nugatory.*

- e. *It is in the interest of justice that the orders sought are granted.*

[3] The motion was also supported by the applicant's sworn deposition that elaborated on the above grounds. At the hearing Mr. Thuku, learned counsel for the applicant submitted that the applicant although aggrieved by the ruling of 28th June, 2012, could not file the appeal within 14 days as required. This is because he did not have money to pay the advocates fees. He was represented by the Law Firm of E.K Ogot Advocates who requested the applicant to make a deposit to enable them file an appeal. The applicant also approached the firm of Ndungu Njoroge and Kwach Advocates who are on record for him, but they too needed their legal fees settled before they could file the requisite appeal. This prompted the applicant to sell a property to raise money, finally in March, 2014, he managed to pay the legal fees, but this application was at first filed in Court of Appeal Nairobi Registry before it was finally transferred to Nyeri. He made reference to among other decisions, the case of MUCHUNGI VS JAMES MUCHUNGI KIRAGU & ANOTHER, [1998] eKLR where this Court stated:

“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.”.

[4] On the same issue of the appeal being arguable, Mr. Thuku emphasized that the applicant's replying affidavit which contained 45 paragraphs in response to the application for injunction was struck out on the grounds that it was not dated; which was merely a technicality. As a result the matter proceeded without the applicant being heard. The applicant was prejudiced because an injunction was issued restraining him from dealing with a family business where he is a Director and shareholder, and thus depriving him a means of livelihood. The applicant contends that he is unemployed and his sisters in law who are in control of the company have excluded him from the running of the business. The order of injunction would continue to hurt him as it would perpetuate the status quo. Mr. Thuku urged me to grant the leave which would not in any way prejudice the respondents.

[5] This application was opposed; Mr. Ngunjiri, learned counsel for the respondent relied on a detailed replying affidavit by Beatrice K. Murithi who discounted every contention by the applicant. He submitted that the delay of 20 months since the ruling was delivered was inordinate. Moreover, the explanation offered by the applicant was not cogent, as the replying affidavit has demonstrated that the applicant makes an income. Even if he did not have the money to instruct an advocate, he is a learned man with several degrees who could have had access to the Court and filed the requisite notice of appeal even without the assistance of a lawyer. He distinguished the authorities cited by counsel for the applicant. For

example in the case of ***MUTISO V MWANGI***, [1999] 2 EA 231, the delay that was excused was for three and half months. Also in the case of ***Muchungi*** (*supra*) the delay that impeded the applicant from filing the appeal that was not considered by the Judge was for 1 month in which the applicant needed to organize his finances to file the appeal.

[6] Regarding the prejudice that the applicant will face if leave is not granted, Mr. Ngunjiri submitted there will be none as what the applicant intends to appeal against was an interlocutory order of injunction that was made pending the hearing of the suit. The subject matter of the suit is a dispute only of the management of a school with students and teachers and there is no dispute over the ownership, thus the applicant will not suffer any prejudice by waiting for the outcome of the suit.

[7] I have considered the rival submissions by both counsel, it is well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal is essentially discretionally. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; inter alia, the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. (***MUTISO V MWANGI***), (*supra*). **Rule 4** of the ***Court of Appeal Rules*** donates unfettered discretion and as long as the discretion is exercised judiciously a single Judge would be entitled to consider any other relevant material.

[8] The delay in this case was attributed to the applicant's inability to raise legal fees. Failure to raise legal fees *per se* is not a justifiable reason especially when the delay is so inordinate. In the case of ***Muchungi***, (*supra*) this Court allowed the extension of time for filing the appeal simply because the applicant needed 1 month to organize his finances, and that fact was not given due consideration by the Judge who had declined the application for extension of time. This has to be contrasted with this case where the applicant took a whopping 20 months to organize his finances. Although the applicant states in his affidavit that he has no means of livelihood, this was seriously contested by the respondent's replying affidavit especially the averment that the applicant is a man of great learning who could have accessed the Court to file the requisite notice of appeal which lends credence to the allegation by the respondent that this whole application was an afterthought.

[9] The other matter I have considered is the prejudice to be suffered by the applicant if the time to file an appeal is not extended. In this case the intended appeal is against an interlocutory order of injunction pending the hearing and determination of the main suit. All is not lost for the applicant because during the hearing of the main suit, he will have an opportunity to bring out all his evidence and to be heard on the same and if still aggrieved by the outcome of the main case, he will have an opportunity to bring to this Court a comprehensive appeal. Hearing an appeal arising from the entire suit would obviously save the Court judicial time. As it was held by this Court in the case of Municipal Council of;- ***Mombasa & Another vs Kenya Transport Association***, CA No Nai. 26 of 2011:

“This would not only be beneficial to the parties but also in furtherance of the overriding objective, as stipulated in Sections 3A and 3 B of the Act and the Rules inter alia of achieving a just timely and less costly determination of dispute as well as ensuring effective use of judicial resources”.

I find that the inconvenience the applicant will encounter by waiting for the trial to complete is a prize he will have to pay for failing to observe the timelines of filing the appeal within the time provided.

[10] For the foregoing reasons, I find no need to inquire into the merit of the appeal as the reasons for the delay and the prejudice to be suffered are not satisfactorily explained. In the result the application is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 30th day of June, 2014.

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR