



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 77 of 2012

BETWEEN

MAVOLONI COMPANY LTD.....APPLICANT

AND

PETER GICHERU MUNGAI.....RESPONDENT

(Application for extension of time to file a Memorandum of Appeal and Record of

Appeal against the ruling and order of the High Court of Kenya at Milimani

(Mabeya J.) dated 10th November 2011 in

HCCC NO. 39 OF 2011)

RULING

By Notice of Motion dated 8th March, 2012 stated to be brought under **Rule 4** of the Court of Appeal Rules it is prayed that the time limited for filing and serving appeal and record of appeal be enlarged.

The application is supported by an Affidavit of Joseph Munyao Mutisya sworn on 8th March, 2012.

Mr. Mutisya, who describes himself as Chairman of the Applicant Company depones inter alia that his company was dissatisfied with the Ruling of the High Court made on 10th November 2011 and instructed its Advocate to appeal; the Applicant called for proceedings and Ruling from the High Court by a letter of 22nd November 2011 and reminder letter of 23rd January 2012; it was not until 9th February 2012 that a certified copy of proceedings and ruling were signed; the proceedings and Ruling were collected on 13th February 2012.

A Certificate of Delay was issued by the High Court dated 24th February 2012 and is attached to the Affidavit.

Mr. Kimathi, learned Counsel for the Applicant in urging the application submitted that the Applicant acted reasonably all along and was not to blame for delay in filing the appeal.

Mrs. Ngugi, learned Counsel for the Respondent relied on the Replying Affidavit of Elias Ngugi Ng'ang'a, an Advocate, sworn on 15th May 2012. Mr. Nga'ng'a concedes to having been served with Notice of Appeal but complains that the intended appeal has no chance of success. I have perused the various documents before me.

Ruling of the High Court intended to be appealed was given on 10th November 2011.

A Notice of Appeal was lodged on 22nd November 2011. Mr. Nga'ng'a, Advocate, confirms that Notice of Appeal was served upon him on 28th November 2011.

By letter of 22nd November 2011 the Applicant's Advocate called for Ruling of the High Court presumably for purposes of appeal. This was followed by a letter of 23rd January 2012 being a reminder. Neither of those letters were copied to the Respondent. Mrs. Ngugi has raised this as an issue for my consideration in this application.

A Certificate of Delay issued by the High Court dated 24th February 2012 certifies that Ruling was applied for on "22nd November 2012" (this is obviously an error, correct date being 22nd November 2011) and was certified on 9th February 2012.

Mrs. Ngugi, learned Counsel for the Respondent raised 2 issues:

- i) the intended appeal has no chance of success.
- ii) The letter to the High Court calling for Ruling for purposes of appeal was not copied to the Respondent.

On the first issue I must say, with respect, that it is premature for the Respondent to raise such an issue at this stage. I have neither the material nor the jurisdiction to entertain such an issue at this stage.

On the effect of not copying to the Respondent the letter requesting Ruling **Rule 82** of the Court of Appeal Rules provides for institution of appeals.

The provision relevant to the issue raised by Counsel is **Rule 82 (2)** which requires an Appellant to have made such a request or application in writing and serve the same upon the Respondent.

I note that the language in **Rule 82** is couched in mandatory terms.

It is common ground that the letter by the Applicant dated 22nd November 2011 was not copied or served on the Respondent.

As will be seen in this Ruling Notice of Appeal was lodged on 22nd November 2011, thus filed in time in accordance with the Court of Appeal Rules. The same was served on the Respondent on 28th November 2011, also on time in accordance with the Rules.

Certificate of Delay is dated 24th February 2012 and the application before me was filed on 19th March 2012.

I have carefully considered the objection taken by Counsel for the Respondent on the issue of non-service of the letter to the High Court calling for a copy of the Ruling.

The Applicant in this matter took all steps within time to appeal the Ruling of the High Court save service of a copy of the said letter stated above. I have taken the view that the Applicant is not an indolent litigant at all. It took all reasonable steps to initiate the appeal process. It is caught in the provision of **Rule 82** of the Court of Appeal Rules which is couched in mandatory terms.

Guided by the provisions of **Section 3A** and **3B** of the Appellate Jurisdiction Act and also **Article 159** of the Constitution of Kenya, I am minded to exercise my discretion in favour of the Applicant. The said provisions of law require me to exercise discretion guided by principles of justice to facilitate the just, expeditious, proportionate and affordable resolution of a matter such as the application before me. In the premises I grant the prayer for extension of time to file appeal out of time. The Applicant to file appeal within 14 days of today. Costs shall abide the appeal.

Dated at Nairobi this 22nd day of February 2013.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR