



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ALNASHIR VISRAM, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 207 OF 2010

BETWEEN

**CYRUS MURIUKI MATHANGANI.....
.....APPLICANT**

AND

**ROSE WANJIKU
MBAI.....RESPONDENT**

(An application for extension of time to file notice and record of appeal out of time in an intended appeal against a Judgment of the High Court of Kenya at Nyeri (Kasango, J) dated 18th December, 2008

in

H. C. Succ. C. No. 489 of 2006)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file the Notice and Record of Appeal, from the judgment and decree of the High Court of Kenya at Nyeri (Kasango, J.) dated 18th December, 2008. The application is supported by the affidavit of Cyrus Muriuki Mathangani sworn the 9th August, 2010, and a further affidavit sworn by him on 20th May, 2011.

The judgment in the case before the High Court was delivered on 18th December, 2008, and the Notice of Appeal was filed on 5th January, 2009. Both counsel appearing before me agree that that was done within the time allowed, given the intervening Christmas vacation. However, the main issue here is the late filing of the record of appeal.

Mr. Maina Karigithi, learned counsel for the applicant seeks leave to file the record of appeal out of time, arguing that he received the certified proceedings only on 28th July, 2010, and filed this application within nine (9) days on 10th August, 2010.

Ms. Lucy Mwai, learned counsel for the respondent, opposes the application, arguing that the delay is actually twenty two (22) months, and not nine (9) days, as the record of appeal should have been filed within sixty (60) days of the delivery of judgment. The applicant, she argues, has not exhibited a

certificate of delay to show that the brief three (3) page proceedings were not availed until the 28th July, 2010, and urges me to disallow the application.

With respect, I must agree with the respondent's counsel that in the absence of a certificate of delay, time for filing the record started running from the date of the delivery of judgment – 18th December, 2008. The record of appeal should have been filed within sixty (60) days of the delivery of judgment – by the end of February, 2009. The delay herein is inordinately long, and unexplained. **Rule 4** of the Rules of this Court gives me unfettered discretion whether to extend time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. NAI. 251 of 1997** where this Court stated:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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.”

I have taken into account all the factors indicated above, and am of the view that this application has no merit, and the same is disallowed. Unfortunately, the applicant has not exhibited a draft memorandum of appeal, nor outlined the same in the application, and I have no way of ascertaining the chances of the intended appeal succeeding.

Accordingly, and for the reasons outlined, I disallow this application, with costs to the respondent.

Dated and delivered at Nyeri this 23rd day of May, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR