



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Application 295 of 2011

FEDENSIO M'MUGAMBI .....APPLICANT

AND

COUNTY COUNCIL OF MERU .....1<sup>st</sup> RESPONDENT

KIGARI FARMERS CO-OP SOCIETY LTD..... 2<sup>nd</sup> RESPONDENT

*(An application for extension of time to lodge Notice of Appeal and extension of time to file record of appeal out of time against the judgment of the High Court of Kenya at Meru (Kasango, J) dated 1<sup>st</sup> November 2010*

in

**H.C.C.A. No. 118 of 2009)**

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**RULING**

1. **Fedensio M'Mugambi** filed a Notice of Motion dated 16<sup>th</sup> November 2011 seeking three orders under Sections 3A, 3B and Rule 4 of the Court of Appeal Rules 2010 that:-

1. **the court does extend time for lodging notice and record of appeal.**
2. **the court does make any other order for ends of justice.**
3. **the costs do abide the outcome of the main appeal.**

2. The ground in support of the application is that the applicant an application before this Court on 8<sup>th</sup> February 2011 seeking leave to be allowed to lodge the appeal as a pauper. The application was dismissed by this Court (Anganyanya, JA) on 17<sup>th</sup> May 2011 on the ground that a draft memorandum of appeal was not attached thereto. No action was taken until 21<sup>st</sup> November 2011 when the present application was filed.

3. The background facts are that applicant filed suit against the respondents in the Chief Magistrates

Court at Meru in Civil Case No. 185 of 2008 seeking compensation of Ksh. 1,457,500/= in respect of damage caused to his land and crops when the Mutonga Water Furrow overflowed into his land. The lower court in its judgment dated 8<sup>th</sup> October 2009 dismissed the applicant's suit with costs. He appealed to the High Court which by judgment delivered on 11<sup>th</sup> November 2010, the appeal was dismissed. A notice of appeal was filed on 19<sup>th</sup> November 2010. No record of appeal has since been filed.

4. At the hearing of this application, learned Counsel **Mr. Alex Muthomi Gituma** appeared for the respondent while applicant was in person.

5. In support of the application for leave, the applicant deposed various reasons for the delay: that he was not able to pay court fees; he made an application before this Court to be allowed to lodge the appeal without payment of court fees; his application to lodge the appeal as a pauper was dismissed on 17<sup>th</sup> May 2011; he looked for friends and relatives to raise money to file the appeal; the delay is not inordinate and he has attached a draft memorandum of appeal and the appeal has high chances of success.

6. A replying affidavit deposed by Counsel for the respondent was filed. It is contended that the application for leave is an abuse of the court process, misconceived and actuated by malice and ill-will; the delay in filing the application is inordinate and has not been explained; the delay is for a period of 187 days from the date when this Court dismissed the application to lodge the appeal as a pauper on 17<sup>th</sup> May 2011; the applicant has not proved any of the factors necessary for the exercise of discretion under Rule 4 of this Court's rules; the appeal has no chance of success as the grounds in the memorandum of appeal were argued before the trial court and the High Court and were dismissed by the two courts below.

7. I have anxiously considered the application, the affidavits on record and submissions by the applicant and counsel for the respondent. I have considered the authorities submitted by the respondent. There is no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of "*sufficient reasons*". Nevertheless, it ought to be guided by consideration of the factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai 332 of 2004** (unreported).

8. There is also a duty now imposed on the Court under **Sections 3A and 3B** of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.

9. The applicant was not represented by Counsel both in the trial court and at the High Court. The applicant states that one of the reasons for delay in filing the notice of appeal is lack of funds. No evidence has been given in support of this statement. It is not enough to allege lack of funds; an applicant must demonstrate lack of funds either through production of a statement of financial means; lack of employment or absence of a source of income or such other means. In **Mutiso – Mwangi 1997 KLR 630**, the criteria that govern an application under Rule 4 were given as:

**“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 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 application is granted.**

10. The applicant has attached a draft memorandum of appeal to the application. I do not think it is advisable to comment on the merits of the appeal as this is the duty of the appellate court. It is not in dispute that the applicant filed the suit before the trial court as a pauper. After the High Court dismissed his appeal, the applicant duly filed a notice of appeal within time on 19<sup>th</sup> November 2010. It is the record of appeal that has not been filed. The explanation given is that the applicant had sought leave before this Court to lodge the appeal as a pauper which application was dismissed on 17<sup>th</sup> May 2011. The applicant explains that after this Court dismissed his application, he has been looking for funds from friends and

relatives and this explains the 187 days of delay.

11. I have taken into account that the suit before the trial court was filed by the applicant as a pauper; he made efforts to lodge the appeal in this Court as a pauper; the applicant has been prosecuting this case in person and this Court should promote just, proportionate, expeditious and affordable resolution of disputes. Both the trial court and the High Court did not make a positive order against the respondents. On balance and with great reluctance, I am inclined to exercise my discretion and grant conditional leave to file the record of appeal out of time. The applicant is to file the record of appeal within 14 days of this ruling failure to which the Notice of Motion dated 16<sup>th</sup> November 2011 shall stand dismissed with costs.

*Dated and delivered at Nyeri this 23<sup>rd</sup> day of May, 2013*

**OTIENO-ODEK**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**