



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NAI. 303 OF 2010

BETWEEN

JOHN MUGO NGUNGA.....APPLICANT

AND

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

AND

**MARGARET M.
MURANGU.....INTERESTED
PARTY**

(An application for extension of time to serve notice of appeal out of time against orders of the High Court of Kenya at Embu (Karanja, J)

dated 27th April, 2010

in

H. C. Misc. Appl. J. R. No. 15 of 2008)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file an appeal from the ruling and order of the High Court of Kenya at Nyeri (Karanja, J.) dated 27th April, 2010. The application is supported by an affidavit sworn by Morris Guchura Njage on 12th October, 2010.

The decision in the case before the High Court was delivered on 27th April, 2010, and a notice of appeal was indeed filed within time on 5th May, 2010. However, it was not served on the respondent within the time stipulated in the Rules, but was served on 28th September, 2010, some four months outside the permitted time. The reason given for the delay is that the applicants advocates' law clerk, responsible for serving the court process, simply did not know the time limited in the Rules within which service was to be effected. This is simply a case of ignorance of the law, which certainly is not a good

excuse for late service. While I do not condone such ineptitude, I believe it would be too harsh to punish the applicant for the mistake made by a clerk in the advocates' office.

Mr. Morris Njage, learned counsel for the applicant apologized for the error and urged that I apply the oxygen principle in allowing this application. Ms. Muthike Rose, opposed the application, arguing that the record of appeal had also not been filed. And that the time limit for doing so had expired.

The application before me is to extend the time for serving the notice of appeal – not the record of appeal, and I will simply address myself to what is before me.

Having considered the application, heard counsel, I am of the view, as I said before, that it would be too harsh to punish the applicant for the careless mistake of a clerk. Also I am unable to discern what prejudice, if any, was suffered by the respondent arising from the delayed service. **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 merit, and I allow the same.

The notice of appeal, filed on 5th May, 2010, and served on 28th September, 2010 shall be deemed to have been properly served, on time. The costs of this application shall be in the appeal.

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

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR