



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 269 of 2012

TELKOM KENYA LIMITED.....APPLICANT

AND

NYAMODI OCHIENG-NYAMOGO.....RESPONDENT

(An Application for extension of time for applying in the Superior Court for copies of proceedings and Judgment pending the lodging, hearing and determination of an intended Appeal form the Judgment of the High Court of Kenya at Nairobi (Nambuye, J. as he then was) dated 8th May, 2012

in

HCCC NO. 1736 OF 1993)

RULING

The applicant herein has moved this Court “under Rule 4, 82 and 83 of the Court of Appeal Rules, and all enabling provisions of law and procedure” for an order inter alia that:

“This Honourable Court be pleased to extend time within which the applicant can make its application for typed copies of proceedings and judgment.”

The application is premised on five principal grounds on its face and supported by the affidavit of **Donald B. Kipkorir** sworn on 31st October, 2012. The gist of the grounds raised is that the appellant has an arguable appeal which it should be allowed to ventilate before this Court and that it was late in applying for the proceedings before the High Court to enable it pursue the intended appeal.

The explanation given for the said lateness is that learned counsel acting for the applicant inadvertently failed to write the letter bespeaking the High Court proceedings when hefiled the notice of appeal. He did not therefore, apply for the said proceedings within 30 days and since he wishes to rely on the proviso to **Rule 82(1)** of this **Court’s Rules**, he is asking this Court to invoke its powers under **Rule 4** of this **Court’s Rules** to extend the time within which he can write the letter asking for the proceedings of the High Court.

In his oral submission in Court, *Mr. Kipkorir*, learned counsel for the applicant, stated and correctly so, that Rule 4 gives this Court unfettered jurisdiction to extend time. He therefore, entreats this Court to enlarge time in order for him to write the letter in question.

The application is strongly opposed by the respondent through his learned counsel, **Mr. Tiego**. According to Mr. Tiego, the application is an abuse of the Court process. He submitted that this Court lacks jurisdiction to grant the extension sought under Rule 4. He contended that under Rule 4 of the Court of Appeal Rules the Court's power to extend time is not unlimited. He urged that this Court can only extend time where such time is limited by the court of Appeal Rules; and where the Superior Court has fixed the time within which to do an act. He further submitted that in this case, there was no time limit set by the High Court within which the said proceedings must be applied for. He emphatically argued that there is no provision anywhere in the Court of Appeal Rules setting the time limit within which the said letter should be written.

In his reply, *Mr. Kipkorir* maintained that **Rule 82** of this **Court's Rules** sets the limit within which such a letter must be written.

I have considered the notice of motion in question, the grounds on its face, the rival affidavits and the oral submissions of both counsel. In my considered view, there is only one issue for my determination which is posed by this application. Does this Court have jurisdiction under Rule 4 of the Court of Appeal Rules to extend time within which a party intending to appeal to this Court from a decision of the High Court should request for the written proceedings and judgment of that court? Is there a time frame or structure that is set by this Court's Rules or under the Civil Procedure Rules which requires a party to write the letter bespeaking the trial courts proceedings within a particular time?

I must state from the outset that this is a novel application and I have not been able to get any spot on relevant authorities on the issue. I was not served with any such authorities either.

My view of this matter however, is that **Rule 4** cannot be invoked *in vacuo*. It is not a carte blanche which can cover any situation where a party feels extension of time is required.

I agree that the said Rule restricts this Court's discretion to certain pronounced parameters. This Court can only extend time that is limited by the Court of Appeal Rules. This to my understating means that there must be a specific Rule that limits time within which a party must perform a particular act. For instance, the time limits set out under **Rules 75, 77, 79, 82** and other such Rules.

Does **Rule 82** on which this application is pegged impose such a limit on the parties? In my view, it does not. Nowhere does that Rule impose a duty on a party to apply for the proceedings before the High Court within 30 days.

All it says – by way of proviso is that:-

“provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the Superior Court as having been required for the preparation and delivery to the appellant of such copy.”

This proviso does not place any obligation on a party to ask for the proceedings within 30 days of the delivery of the judgment. To my understanding, it was a proviso which was only meant to aid or otherwise reward a diligent applicant, and also cover any delay occasioned by the court in preparing the proceedings which delay is beyond the control of the parties. If a party fails that test, then it cannot invoke **Rule 4** of the **Court of Appeal Rules** to apply for extension of time within which to file an intended appeal as limited under Rule 82 of the Court of Appeal Rules.

There is no Rule in our statutes that says that a party **MUST** apply for the proceedings within 30 days of the delivery of the Judgment or Ruling by the Court. Rule 4 is clearly inapplicable in the present circumstances.

I also note that there was no time limit here that was set by either this Court or by the High Court

which I can possibly extend under Rule 4.

Whichever way, I look at the application; the same is clearly outside the ambit of Rule 4 of the Court of Appeal Rules. I am inclined to agree with learned counsel for the respondent, that this Court has no jurisdiction to grant prayer 2 of the applicant's notice of motion dated 31st October, 2012.

The applicant may have an arguable appeal; it may have good reasons for the delay in applying for the said proceedings, but this Court has no jurisdiction to enlarge the time sought by the applicant. Having so found, then it will not be necessary for me to consider those issues.

For the foregoing reasons, my finding is that the motion before me lacks merit and the same is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 10th day of May, 2013.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR