



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 229 OF 2011

BETWEEN

JAMES MIGWI.....1ST APPLICANT

JANE WANGECHI.....2ND APPLICANT

AND

SUSAN WANJIKU MWANGI.....RESPONDENT

(An application for leave to file and serve Notice and Record of Appeal out of time in an intended appeal against the whole Ruling of the High Court of Kenya at Embu (Muchelule, J.) dated 28th June, 2011

in

H. C. C. A. No. 26 of 2008)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file and serve a notice of appeal, and record of appeal, from the ruling and order of the High Court of Kenya (Muchelule, J.) dated 28th June, 2011.

The ruling in the case before the High Court was delivered on 28th June, 2011. However, the applicants say in their deposition that the delay of more than two months in filing this application was occasioned by the following reasons:

1. *That we are the applicants herein and hence competent to swear this affidavit.*
2. *That the judgment against which we intend to appeal was delivered on 28th June, 2011 by Honourable Mr. Justice Muchelule, sitting in the High Court of Kenya at Embu Civil Appeal No. 26 of 2008. (Annexed is a copy of the judgment marked JM '1')*
3. *That on 6th July, 2011, we requested that the lower court file from Wang'uru Court be transferred to the Embu High Court to enable the appeal to be heard. (Attached is a copy of the letter requesting for the transfer of the lower court file marked JM '2')*

4. However, due to factors beyond our control the file was transferred when the Ruling was being delivered.”

In his submissions before this Court, Mr. Karithi, learned counsel for the applicant, stated that the delay was occasioned because he was awaiting the record of proceedings. However, he has not exhibited a certificate of delay, nor has he explained why he needed the proceedings to file the Notice of Appeal.

Mr. Kinyua, learned counsel for the respondent, argued, on the other hand, that the delay herein was inordinate and unexplained, and urged me to disallow the application.

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.”

Having considered the application and the deposition in support of the same, and having heard counsel, I am of the view that the delay in bringing this application is inordinate, and is not well explained. I discern no good reason for the delay. The explanation provided in paragraphs 3 and 4 of the supporting affidavit (reproduced above) shed absolutely no light as to the reason for delay nor does it explain what was the relevance regarding the transfer of the file from the lower court to the High Court, and what were those factors “beyond the control” of the applicant that caused the delay herein.

I have taken into account all the factors indicated in the *Leo Sila Mutiso case (supra)* and am of the view that this application has no merit, and the same is disallowed with costs to the respondent.

Dated and delivered at Nyeri this 20th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR