



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: ONYANGO OTIENO, NYAMU & MARAGA, J.J.A.**

**CIVIL APPEAL (APPLICATION) NO. 180 OF 2009**

**MBURUGU M. KIOGA ..... APPELLANT/APPLICANT**

**AND**

**KENYATTA NATIONAL HOSPITAL**

**DR KINOTI MUGAMBI**

**DR MACHOKI M'IMUNYA ..... RESPONDENTS**

**(An appeal from the ruling of the High Court of Kenya at Nairobi (Khamoni, J) delivered on 26<sup>th</sup> June, 2008**

**in**

**H.C.C.S. NO. 1070 OF 2002)**

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**RULING OF THE COURT**

1. On 26<sup>th</sup> June, 2008, Khamoni, J dismissed the appellant's suit for want of prosecution. On 3<sup>rd</sup> July, 2008, the appellant evinced his intention to appeal against that decision by filing a notice of appeal and applied for copies of the proceedings. As required by **Rule 82(2)** of the **Court of Appeal Rules** (the Rules), he copied that application to the respondent's advocates and there is no issue raised in respect of that application or notice of appeal. He filed his record of appeal on 11<sup>th</sup> August, 2009. The respondent, however, claims that the record of appeal was filed out of time and on that ground, they have applied under **Rules 42 (1), 52 (2), 80 and 85 (1) (f) and 2A** of the Rules to have the appellant's appeal be struck out. The application is supported by the other two respondents. This ruling is on that application.
2. Relying on his affidavit in support of the application, Mr Gachuhi the learned counsel for the third respondent, urged us to strike out this appeal on two grounds. One, that in the High Court the appellant was represented by M/s Musalia Mwenesi & Company Advocates who filed the notice of appeal on his behalf. The appellant without filing a notice to act in person, filed the record of appeal herein. In his view, that made this appeal incompetent and it should, therefore, be struck

out.

3. Secondly, that the appellant's replying affidavit does not explain the delay. The court having on 23<sup>rd</sup> April, 2009, advised the appellant that the proceedings were ready for collection, in the absence of an affidavit from M/s Musalia Mwenesi & Company Advocates who filed the notice of appeal and applied for copies of the proceedings to explain that delay, there is no reason why it took the appellant upto 11<sup>th</sup> June, 2009, to collect the proceedings. He relied on the cases of **D.T. DOBIE & CO (K) LTD VS. ALFRED MUCHAYO (2005) ECLR** and **RAMJI DEVJI VEKARIA VS JOSEPH OYULA (2011) ECLR** and submitted that there having been more than two months' delay, which he described as inordinate, this Court cannot exercise any discretion in favour of the appellant. In the circumstances, he urged us to allow this application and strike out this appeal with costs to the 3<sup>rd</sup> respondent/applicant.
4. Mr Odhiambo the learned counsel for the first respondent associated himself with the submissions of Mr Gachuhi and also urged us to strike out this appeal. He argued that extension of time having not been sought, dismissing this application will amount to extending the time for lodging the appeal without hearing the parties on that and that would be in breach of **Article 50** of the **Constitution**. As his suit had been dismissed for want of prosecution, he said the appellant should have been more vigilant.
5. The application was strongly opposed. Mr Naragwi the learned counsel for the appellant dismissed it as unmeritorious. On ground one, he argued that the appellant has never appointed an advocate to represent him in this appeal. In the circumstances, he said there was no need of filing a notice to act in person under **Rule 23** of the Rules.
6. On ground two, Mr Naragwi submitted that the appellant did not receive the Deputy Registrar's letter dated 23<sup>rd</sup> April, 2009, advising that the proceedings were ready for collection. It is when he went to court on 11<sup>th</sup> June, 2009 to check on them that he found they were ready and he immediately paid for them. Although it took a few days for them to be availed, he filed this appeal on 11<sup>th</sup> August, 2009, which is within sixty days from 11<sup>th</sup> June, 2009.
7. We have considered the matter. As we have pointed out, the appellant's suit was dismissed for want of prosecution and he blamed his erstwhile lawyers for that. There is nothing on record to show that he thereafter instructed them to file an appeal against the dismissal order. Although the same lawyers filed a notice of appeal and applied for proceedings, the Deputy Registrar's letter about the proceedings being ready for collection was addressed to them and the appellants may very well have not seen or known about it. In the circumstances, we believe the appellant that he did not engage a lawyer to handle this appeal on his behalf.
8. That being our view of the matter, we find that the appellant filed this appeal within the required period of sixty (60) days from 11<sup>th</sup> June, 2009, when he paid for the proceedings. Consequently, we dismiss this application but given the confusion on representation of the appellant, we order that each party bears its own costs.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of April, 2012.**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**