



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 299 OF 2010

PETER G.N. NGANGA & ANOTHER..... APPELLANTS

AND

THE PROVINCIAL REGISTRAR OF TITLES & 9 OTHERS.....RESPONDENTS

(Appeal from the order of the High Court of Kenya at Nairobi (Wendo,J) dated 27th March,2009.

in

H.C.MISC.APPL.NO.666 OF 2006)

RULING OF NAMBUYE JA

Before this court is an application presented to this court by way of a notice of motion filed on the 25th day of November, 2010. It is brought under the inherent jurisdiction of the court, rule 1(3) and Rule 4 of the Court of Appeal rules. Three reliefs are sought namely:-

- (1) That the time limited by the court of Appeal Rules for filing of the Record of Appeal be extended to the 19th day of November, 2010.**
- (2) That the Honourable Court be pleased to make any other orders within its inherent jurisdiction.**
- (3) That costs of and incidental to the Application abide the result of the Appeal.**

The application is anchored on the grounds in the body of the application the content of both the supporting and supplementary affidavits annexures there to and oral submissions in court.

When the application was called out for hearing, learned counsel for the 1st, 2nd and 3rd respondents were absent and the court being satisfied that they had notice of the hearing date, allowed the learned counsels present to proceed with the hearing.

Learned counsel for the applicants **Mr. F.N. Wamwala** has urged this court to grant the reliefs sought on the ground that the applicants were aggrieved with the orders issued by the High Court on the 27th day of March, 2009; they desired to appeal against the said grieving orders and duly lodged the notice of appeal in time and applied for copies of typed proceedings to enable the applicants file the record of appeal. The copy of the proceedings were supplied to the applicants on the 15th day of July,2010 and a certificate of

delay issued to that effect on the 16th day of July,2010; that by reason of the issuance of the certificate of delay on the 16th day of July,2010, the record of appeal is supposed to have been filed on the 1st day of September,2010; that the said appeal was not presented in time on account of the indisposition of the first applicant; that the 2nd applicant is a family concern with the first applicant and his wife as the sole Directors of the 2nd applicant; and in the premises the 2nd applicant could do nothing about facilitation of the filing of the appeal in the absence of the 1st applicant.

MR. F.N. Wamalwa went on further to submit that the appeal was lodged only 18 days late; that no prejudice will be suffered by the respondents if leave to extend time for the lodging of the appeal which has already been lodged out of time is granted; that at stake are serious issues of law flouted by the High Court which need to be interrogated and refined by the court of appeal; that the applicants also needs to have their grievances vindicated considering that the grieving orders struck out the applicants petition at an interlocutory stage before parties were given an opportunity to be heard on the serious issues raised in the petition; and lastly that it is in the best interests of justice to both sides that the appeal be allowed to be regularized and then proceed to be heard and disposed off on its merits.

In opposition, learned counsel for the 4th, 5th, 6th and 9th respondents **Mr. M.N. Ndeti** relied on the content of the replying affidavit deponed by **Mbage Njuguna Ng'ang'a** on the 10th day of December, 2010 and filed on the same date. He urged this court to decline the exercise of its discretion in favour of the applicants because the applicants have not been truthful with regard to the reasons they have given for their delay in presenting the appeal in time; the period of delay is 65 days and not 18 days as submitted by the applicants counsel; the reasons given for the delay of the 1st applicants indisposition does not hold because the directors of the 2nd applicant which is a legal entity distinct from the first applicant could have moved diligently to file the appeal in time; funds for the filing of the appeal could have been paid by other Directors considering that there has been no demonstration as to who eventually financed the costs for the filing of the appeal. Further that there is nothing to show that it is the first applicant who financed the filing of the appeal; and lastly that the medical evidence exhibited by the first applicant itself defeats his allegation of indisposition.

Learned counsel **Mr. Kuyo** holding brief for **Mr. Ochieng Oduol** for the 7th and 10th respondents urged the court not to allow the application sought on the grounds that there is no merit in the intended appeal because it is not true that the High Court made orders without hearing the parties as it is evident from the record that issues raised by the preliminary objection were combined with those raised by the chamber summons, parties heard and a merit decision given.

On case law learned counsel for the 4th, 5th, 6th and 9th respondents referred the court to the case of **Kiragu versus Kiragu (1990) KLR 323** where in it was held inter alia that:-

“An application for an extention of time for lodging of an appeal may be made even after the prescribed time has expired. However failure of an applicant to explain the delay in prosecuting his appeal may lead to the extention being refused”.

In addition to the above cited authority the court wishes to draw inspiration from the decisions in the case of **Leo Sila Mutiso versus Rose Helen Wangari Mwangi (1999) 2 EA23** where it was held that: **factors to be taken into account when considering whether to extend or not to extend time are: firstly the length of the delay; secondly the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted**”; the case of **Mwangi versus Kenya Airways Limited (2007) KLR 4&6** wherein Waki JA ruled that:-

“There is room for the Judge in the exercise of his/her discretion under rule 4 of the Court of Appeal rules to consider any other factor outside those listed so long as the factors are relevant to the issues being considered and the success of the intended appeal being a possible consideration as well”

The case of **Bi-mach Engineers Limited versus James K. Mwangi CA application No. Nai.115 of 2011 (UR)** decided by Waki JA on the 3rd day of June, 2010 wherein the learned law lord ruled that:-

“The exercise of the courts discretion under rule 4 of the Court of Appeal rules is subject to the now overriding objective principle introduced in civil litigation by the introduction of section 3A and 3B of the appellate jurisdiction Act cap 9 laws of Kenya which principle impose a legal duty on the court to facilitate the just and expeditious proportionate and affordable resolution of disputes”

The case of **Peter Kinyori Kithimba versus Gladys Wanjiru Mugwi and another Nyeri Civil Application No.121/2005 (UR)** wherein Waki JA with held the exercise of his discretion in favour of the applicant because there was inordinate delay which had not been explained satisfactorily; the case of **B1-Mach Enginners limited versus James K. Mwangi C.A. (Supra)** wherein Waki JA with held the exercise of the courts’ discretion in favour of the applicant because the application presented fell short of candidness and betrayed lack of expedition; the case of **John Koki Waluke versus Moses Masika Wetangula and 2 others Nairobi CA (App307/2009)** wherein a full bench of the CA declined to exercise its discretion to extend time because the application had been anchored on an incorrect affidavit, and lastly the case of **John Bundi Magiri versus Co-operative Bank of Kenya Limited Nairobi CA App.19 of 2010 (UR)** wherein Nyamu JA declined to exercise his discretion in favour of an applicant because there had been no demonstration as to why the advocate for the applicant had not even obtained instructions on phone to file a notice of appeal, no demonstration by production of medical evidence to show in ability on the part of the applicant to move with speed; the delay of four (4) months had not been explained adequately and lastly that the granting of the orders sought was not in any way going to further the overriding objective principle.

This court has given due consideration to the afore set out rival deponements, rival oral high lights by counsels present at the hearing of the application and applied principles of law as well as case law applicable to the exercise of the courts discretion in deciding whether to with hold or grant extention of time as set out above and the court is satisfied that in the circumstances of this case the court is inclined to grant the relief sought of an extention of time to validate the appeal filed for the following reasons:-

- (i) The appeal has already been filed and all that the applicant is seeking from the court is the courts’ indulgence in the exercise of its discretion in extending the time within which to file the appeal for a period of 18 days upto the date the appeal was filed. The period of 18 days has been calculated based on the certificate of delay granted to the applicant showing the length of time taken to prepare the record of proceedings. The respondents took issue with the 18 days because according to them the delay is 65 days and not 18 days as asserted by the applicants. Their computation of time as being 65 days has not been backed up by any documentary proof. Neither have they sought to controvert the certificate of delay relied upon by the applicant and for this reason the respondents assertion that the delay was for 65 days stands ousted.
- (ii) The applicants have fronted sickness as the course of the delay and exhibited medical documents to that effect. The respondents took issue with the medical records not on account of lack of genuiness but on the basis of qualification that though these could incapacitate the first applicant, they could not operate to incapacitate the ability of the second applicant which is a party with distinct legal capacity and whose Directors could have moved with speed to authorize the filing of the appeal independently of the first applicant. The first applicant has explained in the further affidavit that the 2nd applicant is a family concern whose directors are the first applicant and his wife who could do nothing in the first applicant’s absence. There being no evidence to fault the first applicants medical evidence and there being no evidence to controvert the first applicants’ deponements that the only directors of the 2nd applicant are the first applicant and his wife and that the first appellants’ in capacitation operated to incapacitated the only other director of the second applicant namely his wife and prevented her from filing the appeal in time the court finds nothing in the respondents deponements and submissions to oust the applicants explanatory reason for the delay. The court therefore accepts the explanation as being sound.
- (iii) With holding of the relief sought will not be in furtherance of the overriding objective principle in that it will not amount to a facilitation of quick dispensation of justice as it will open further litigation on

the same application before a full bench since relevant rules of the CA allow a party aggrieved by an order of a single Judge denying a relief under this provision to seek audience before a bench of three Judges to revisit the denial with a view to either confirming or overturning it.

(iv) The court is alive to the provisions in Article 159(3) (d) and Article 22(3) (d) of the current constitution 2010 which enjoins courts of law not to deny the rendering of justice to litigants on account of technicality. Any move by this court to with hold the relief sought in the circumstances where the period of delay is only 18 days which delay this court has found to have been satisfactorily explained would amount to a denial of justice on a point of technicality.

(v) The issue of the learned Judge moving on own volition to dispose off the entire petition at an interlocutory stage is an arguable point irrespective of whether it succeeds ultimately or not. It is now trite that even if there is only one arguable point, the right to be heard on any appeal should not be with held.

(vi) No prejudice has been shown to be likely suffered by the respondents if an appeal which is already filed can be allowed to proceed to merit disposal.

(vii) It is also now trite that a right of appeal is a fundamental right and can only be with held if there are exceptional circumstances shown for with holding the same. Herein no exceptional circumstances which this court can use to curtail the applicants crystallized right of appeal have been shown to exist.

In the premises prayer 1 of the notice of motion application filed on the 29th November, 2010 is allowed. The time limited by the Court of Appeal rules for filing of the record of appeal be and is hereby extended to the 19th day of November, 2011.

Costs of the application will be in the appeal.

Dated and delivered at Nairobi this 9th day of November, 2012.

R.N. NAMBUYE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR