



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 115 OF 2010 (UR. 86/2010)

BETWEEN

THE TOWN COUNCIL OF KARURI.....APPLICANT

AND

THE INDUSTRIAL COURT OF KENYA.....1ST RESPONDENT
KENYA LOCAL GOVERNMENT WORKERS UNION.....2ND RESPONDENT

(An application for extension of time within which to file and serve the Notice and the Record of Appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Dulu, J) dated 12th October, 2009

in

Misc. Civil Appl. No. 1037 of 2007)

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 superior court (Dulu, J) dated 12th October, 2009. The application is supported by an affidavit sworn by Patrick Wanyoike Mwaura, Town Clerk, Town Council of Karui.

The ruling in the case before the superior court was delivered on 12th October, 2009 and no notice of appeal was ever filed. According to the supporting affidavit, the applicant's reason for not filing the notice of appeal within time was that he was unaware of the date when the judgment was delivered by the superior court. He narrates in long-winded paragraphs in his supporting affidavit how the ruling was not delivered on the date originally set for delivery; how he made extensive inquiries of the registry and of the advocate for the respondent as to when the ruling would be delivered, and how eventually he found out on 29th October, 2009 that the ruling had indeed been delivered on 12th October, 2009 – in his absence.

Mrs. Judith Guserwa, learned counsel for the respondent says all this is untrue, as the respondent's counsel was actually present in court when the ruling was delivered on 12th October, 2009. The record before me clearly supports Mrs. Guserwa's position. Indeed, on the date of the delivery of the ruling, the

applicant was represented in court by Ms. Kamuyu who held brief for Mr. Gachoka. Even then, this application was filed on 31st May, 2010, some seven months after the applicant says that he actually found out about the delivery of the ruling. The excuses – that he was out of office briefly; that he had to summon several staff meetings; that his advocates had to study the ruling, and so forth – are lame and unacceptable. In the light of these facts, the submission by Mr. K. D. Mwaura, learned counsel for the applicant, that the delay here was occasioned by the applicant’s previous advocate, and that there was a breakdown in communication, has no merit.

The delay here is inordinate, and the reason for delay completely lame and unacceptable. 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, except the third – “the chances of the appeal succeeding”. The applicant has not annexed a draft memoranda of appeal, and I have no way of assessing the chances of the appeal succeeding.

Accordingly, and for reasons outlined, I am of the view that this application has no merit, and the same is disallowed. The respondent shall have the costs of the application.

Dated and delivered at Nairobi this 17th day of June, 2011.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR