



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI**

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

CIVIL APPLICATION NO. NAI 277 OF 2010

BETWEEN

GEORGE KIRIANKI LAICHENA APPLICANT

AND

MICHAEL MUTWIRI RESPONDENT

(An application for extension to file & serve record of appeal out of time from the judgment of the High Court of Kenya at Meru (Ouko, J) dated 12th March, 2009

in

HCCC NO. 14 OF 2001)

RULING

This is a **rule (4)** application which principally seeks two orders, namely:

- (1) *That the notice of appeal dated 18th March, 2009 and lodged in the superior court on the same date be deemed properly filed and served.*
- (2) *That the time for filing of the record of appeal be extended.*

The grounds relied upon by the applicant are set out in the body of the application namely that the delay occasioned in the circumstances is excusable; that the intended appeal raises important issues of law and finally that the extension will not occasion prejudice to the respondent.

The applicant has reinforced the above grounds in the affidavit in support of the application sworn on 23rd November, 2010, which gives further reasons for the delay as delay in issuing the certificate of delay; delay occasioned by the illness of the applicant's son and further delay due to an application for extension of time which was withdrawn on 18th November 2010; and that the appeal as per the draft memorandum of appeal does raise important issues for determination and which appeal has chances of success in that the applicant intends to contend *inter alia* that evidence of two important witnesses was excluded by the superior court and that the evidence could have made a difference in allocating responsibility for the accident and finally that the application for extension of time was not opposed.

On my part after taking into account the fact that although the respondents were duly served, they did not respond to the application, I have further taken into account the guidelines set out in the case of **MUTISO VS MWANGI [1997] KLR 630 CAK**, where it was held:

“It is now settled that the decision whether or not 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 of the delay, thirdly (possible) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if application is granted.”

With the above in view, I note that the notice of appeal was filed within the stipulated period. Similarly, the application for certified copies was filed within the stipulated period. As a result in determining the length of delay, the applicant is clearly entitled to benefit from the proviso to **rule 81 of this Court's rules**. The other element of delay was occasioned by the indisposition of the applicant's son as per the medical notes attached. Finally I note that the application was brought within a reasonable time after the release of the certificate of delay. However, this cannot be the end of the matter since in my view, **rule 4** must be applied and interpreted in a way that gives effect to the overriding objective as defined in **Section 3 A and 3 B of the Appellate Act**.

Since the Courts duty under the Appellate Jurisdiction Act, is to give effect to the overriding objective (O₂) both in the exercise of its powers and in the interpretation of its provisions, I think in every situation before the Court the overriding objective shall hence forth operate like the beetroot which when placed in a dish of different foods gives its powerful colour to all the foods in the dish. This is because in every situation before it the Court is exercising power. Like a wellspring the O₂ principle should be used to quench the thirst for both procedural and substantive justice. I think it has similar dimension under the Civil Procedure Act.

In my view, the applicant has in the circumstances described, endeavoured to honour important procedural timelines which were clearly intended to speed up the hearing of the intended appeal.

However in my view it is in the duty of the Court to ensure that whatever the situation or factual background, the end product of the exercise of power or interpretation must result in the rainbow effect of being just, expeditious, proportionate, affordable and efficient. These are in my view the principal aims which must be made to produce a **rainbow effect** for justice in each situation.

In the matter before me although fairly straight forward, I believe I have walked the talk in that with the factual background as outlined above, and after applying the rainbow effect, as defined above, it would be just to grant the application for extension of time.

In the result, I allow the application in terms of prayer 1 and further order that the record of appeal be filed and served within fourteen (14) days from the date hereof. It is further ordered that the costs of this application abide the outcome of the intended application.

It is so ordered.

Dated and delivered at Nyeri this 8th day of July, 2011.

J. G. NYAMU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

