



**IN THE COURT OF APPEAL
AT ELDORET
(CORAM: O'KUBASU, JA (IN CHAMBERS))
CIVIL APPLICATION NO. 138 OF 2011
BETWEEN**

JOSEPH OYULA.....APPLICANT

AND

RAMJI DEVJI VEKARIA.....RESPONDENT

(An application for leave to file and serve notice of appeal out of time from the ruling of the High Court of Kenya at Eldoret (Mwilu, J) dated 9th December, 2009 in H.C.C.C NO 92 OF 2007)

RULING

Before me is an application by way of Notice of Motion brought under **Rule 4** of the Court of Appeal Rules. The application seeks the extension of time in which to file and serve a notice of appeal and record of appeal. The application is brought on the following grounds:-

- “(a) The ruling giving rise to the appeal herein was delivered on 9th December 2009**
- (b) The applicant duly filed a notice of appeal against the said ruling on the 16th December 2009.**
- (c) The applicant duly wrote to the court on 11th December, 2009 requesting for certified copies of proceedings.**
- (d) The applicant duly filed a record of appeal and served the same within seven days.**
- (e) The applicant’s appeal was struck out by this Honourable Court on the 25th March, 2011 on the grounds that the record of appeal was filed out of time.**
- (f) The applicant has a good appeal with high chances of success and should not be locked out.**
- (g) The applicant has good reasons as to why the appeal was filed out of time.**
- (h)It is fair and in the interest of justice that this Honourable Court do exercise its discretion and allow the applicant to file and serve notice of appeal and record of appeal out of time.”**

Further to the foregoing grounds the application is supported by the sworn affidavits of Godfrey Nathan Kitiwa the advocate who has the conduct of this application and Joseph Oyula who is the applicant.

When the application came up for hearing Miss Sindani appeared for the applicant while Mr. P. Gicheru appeared for the respondent. In the submission before me, Miss Sindani gave a brief background to the application on how the applicant’s previous appeal was struck out on 25th March 2011 on the ground that it was incompetent. Miss Sindani then went on to explain why there was a delay in filing the struck out appeal. She relied on three decisions of this Court in support of the submissions in urging me to

exercise this Court's discretion in favour of the applicant.

In opposing this application, Mr. Gicheru pointed out that the ruling of this Court striking out the previous appeal was delivered on 25th March 2011 while this application was filed on 25th May 2011. Mr Gicheru submitted that as nothing has been said about that delay of two months this Court has no material on which to exercise its discretion. Mr Gicheru therefore asked me to dismiss this application as, in his view, the rules of this Court have not been complied with.

The background facts leading to the filing of this application are fairly simple and straightforward. The applicant filed a civil appeal in this Court which was struck out on 25th March 2011.

It was then upon the applicant and his legal advisers to start the appeal process afresh. In Njuguna v Magichu & 3 Others (2003) KLR 507 at p 509 Waki JA stated inter alia:

“There was no inordinate delay in applying for reinstatement of the appeal which is the right of the applicant as was stated in C APP NAI 337/96 Jedida Alumasa & 3 Others v SS Kositany (UR where Bosire Ag JA (as he then was) state:-

“ It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures provided he can be able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal.”

As regards the essential matters to be considered when dealing with an application under **Rule 4** of the Rules of this Court this Court had the following to say in Mwangi v Kenya Airways Ltd (2003) KLR 486 at p. 489:-

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well 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:”

In the present application since the applicant had to start the appeal process afresh, it was upon him to satisfy me that after his appeal was struck out on 25th March, 2011 he filed this application without undue delay. When did he file this application for extension of time? He filed it on 25th May 2011 – two months after his appeal had been struck out. What explanation has been given for the delay of the 60 days? None. The applicant's counsel took me through the earlier events that culminated into the earlier appeal being struck out. That was, with due respect to the learned counsel, not relevant for the purposes of this application. It was upon the applicant to give reasons for his delay in filing this application

In Waweru & Another v Kirori (2003) KLR 448 at p. 451 I stated inter alia:-

“ No valid reason has been given for this long delay. Pausing here for a moment it cannot be denied that there was inordinate delay which has not been adequately explained. The respondent is certainly prejudiced by this long delay since this has kept him away from the fruit of his judgment. The rules of the Court must, surely, be complied with.

In Ratman v Cumarasamy (1964) 3 ALL ER 933 Lord Guest delivering the opinion of the Privy Council at P 935 said:

“The rules of the Court must, prima facie, be obeyed and in order to justify a court in extending the

time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

The above passage has been quoted with approval by this Court in Grindlays Bank International (K) Limited v George Barbour – Civil Application Number NAI 257 of 1995 and Trade Bank Limited (in Liquidation) v L Z Engineering Construction Limited and Another – Civil Application No Nai 282 of 1998 (unreported).”

Having considered the submissions of Miss Sindani and the background facts to this application I am not satisfied that she has given any reason why there was a delay of two months in restarting the appeal process. It is not enough to say that it was the mistake of the advocate on record.

In view of the foregoing, I find no merit in this application and order that the same be and is hereby dismissed with costs to the respondent.

Dated and delivered at Eldoret this 23rd day of September, 2011.

E.O. O’KUBASU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR