



COURT OF APPEAL OF KENYA AT NAKURU

CIVIL APPLICATION 69 OF 2009

NATION NEWSPAPERS LIMITED APPLICANT

AND

PETER BARASA RABANDO RESPONDENT

Being an application for extension of time within which to lodge the Record of Appeal against the judgment and decree of the High Court of Kenya at Nakuru (Kimaru, J) dated 15th November, 2006

In

H.C. C. C. No. 505 of 1998)

RULING

This is an application by way of notice of motion brought under **Rule 4** of the Court of Appeal Rules in which the applicant, NATION NEWSPAPERS LIMITED ,seeks the following orders:-

“1. THAT this Honourable Court be pleased to extend the time limited for the lodging of the Record of Appeal in an appeal against the Judgment and Decree of Hon. Justice L. Kimaru dated 15th November, 2006.

2. THAT costs of this application be provided for.”

The application is brought on the following grounds:-

“(a) There was delay in the certification of the decree.

(b)The delay in certification was occasioned by a disagreement between the parties’ advocates as to the proper contents of the decree.

(c)The duly signed sealed and certified Decree and Orders of Hon. Justice L. Kimaru were issued on 20th day of February, 2009. The last day of lodging the Record of Appeal was the 5th day of February, 2009.

In addition to the foregoing there is a long and detailed affidavit sworn by Geoffrey Imende, an advocate acting on behalf of the applicant in which Mr. Imende gives the background to this matter.

This application came up for hearing before me on 22nd February, 2010 when Mr. Emmanuel Wetangula appeared for the applicant and Mr. Chuma Mburu appeared for the respondent, Peter Barasa Rabando. In his submissions, Mr. Wetangula more or less reiterated what was stated in the grounds upon which the application was brought and what was in Mr. Imende’s affidavit. He submitted that the delay was from 5th February, 2009 to the date this application was filed (2nd March, 2009). In his view, the delay was not inordinate and that the same has been explained. He reminded me that the Court has to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent. Finally, Mr. Wetangula submitted that the Court had to consider the overriding objectives of litigation.

In opposing the application, Mr. Mburu pointed out that there have been several applications in this matter and that the delay has not been clearly explained. He submitted that the respondent will suffer prejudice as he has not benefited from the fruit of the judgment delivered in his favour. It was his contention that the intended appeal has no chances of success.

It must be pointed out that the affidavit of Mr. Imende has not been disputed in any material way. It has also not been disputed that there was a problem with certification of the decree of the High Court. The parties were not in agreement as to the contents of the decree. This led to some delay as the parties sought to reach an agreement on the final decree. From the material placed before me the record of appeal ought to have been lodged by 5th February, 2009. That, however, did not happen. The final decree was availed to the applicant (or its advocates) on 23rd February, 2009. The applicant was therefore out of time in filing the intended appeal. It is for that reason that this application was filed. What the Court has to consider in such circumstances is the length of the delay, the explanation given for that delay, the chances of the appeal succeeding (possibly) and the prejudice to the respondent in the event that the application is granted .

It has been stated time and again that in an application under **rule 4** of this Court's Rules, a single judge of the Court is called upon to exercise his discretion which discretion although unfettered must be exercised judicially. In **MONGIRA & ANOTHER V. MAKORI & ANOTHER [2005] 2 KLR 103** at pp 106 – 107 this Court said:-

*“On numerous occasions this Court has had time to comment and elaborate on the issue of judicial discretion and the nature of that discretion exercised by a single judge under **rule 4** of the Rules. In **Mwangi v. Kenya Airways Ltd [2003] KLR 486** at p 487 – 488 this Court stated:-*

*“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 vs. Rose Hellen Wangari Mwangi**, (Civil Application No. NAL. 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.”

*These, in general, are the things a judge exercising the discretion under **Rule 4** will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. **Rule 4** gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above, so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”*

Applying the foregoing to the circumstances of this application it is to be noted that the length of the delay has been stated and in view of what has been stated in the affidavit of Mr. Imende it cannot be said that the delay was inordinate. Secondly, there was explanation for the said delay. Although Mr. Mburu submitted that the delay had not been clearly explained, I think there was proper explanation for that delay. I would not comment on the chances of success of the intended appeal. As for the prejudice to the respondent, I have noted that the decretal amount has been deposited in an interest earning account hence in event that the appeal fails the respondent will reap the fruit of his judgment.

In view of the foregoing I am satisfied that this application should be allowed. Accordingly, the application is allowed and the applicant is to lodge the record of appeal within thirty (30) days from the date hereof. The costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nakuru this 26th day of February, 2010.

E. O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.