



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CIVIL APPLICATION 117 OF 2009

MARGARET MUTHONI MUCHIGAAPPLICANT

AND

ESTHER KAMORI GICHOHIRESPONDENT

(Application for extension of time to file appeal from the judgment of the High Court of Kenya at Embu (Khaminwa, J.) dated 2nd October, 2007)

in

H.C. Succession Case No. 6 of 2004)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules from the judgment and order of the superior court (*Khaminwa, J.*) dated 2nd October, 2007. The application is supported by an affidavit sworn by **Morris Guchura Njage**, learned counsel for the applicant.

The judgment in the case before the superior court was delivered on 2nd October, 2007, and a notice of appeal was indeed filed within time on 12th October, 2007. Then the applicant went to slumber until 9th January, 2008, a period of almost three months. There is absolutely no explanation of the reasons for delay by the applicant during that period. She has sworn no affidavit to explain what, if anything, she did to have her previous advocate file the appeal in time. Instead, her new advocate, *Mr. Njage*, has sworn the supporting affidavit, in which he depones, in part, that

“...on perusing the court file, I noticed that M/s R.M. Mugo & Co. had neither applied for nor obtained a copy of the proceedings or judgment in order for the appeal to be filed. By this time the applicant was already out of time.”

In addition to blaming the applicant’s previous advocate for not filing the appeal on time, *Mr. Njage* then depones that he applied for proceedings on 9th January, 2008, and eventually obtained the same on 17th February, 2009, after a period of thirteen months. However, he has not exhibited a certificate of delay from the Deputy Registrar. Indeed, as he informed the Court at the hearing of this application, he had not even applied for one. Hence, there is no way of telling whether the second delay of thirteen months was indeed attributable to the court registry in not furnishing the proceedings on time.

I find that both the delays here, the first one of three months, and the second comprising thirteen months, are inordinate, and either unexplained, or the explanation is 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, including the fact that this is an old case that was filed in the superior court in 2004. All litigation should come to an end at some point, and so should this, at this point. To do otherwise would send the wrong message to the litigants – that it is all right to sleep on your rights and we will welcome you anytime you wake up! Clearly, the Rules of this Court must be followed, and the applicant herein has not provided me with sufficient justification to grant her the indulgence sought. 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 Nyeri this 13th day of May, 2010.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR