



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CIVIL APPLICATION 264 OF 2009

BETWEEN

BERNARD NJERU KINYUAAPPELLANT

AND

KENYA TEA DEVELOPMENT AGENCYRESPONDENT

(An application for leave to file and serve a notice of appeal out of time in an intended appeal arising from an order of the High Court of Kenya at Embu (Khaminwa, J.) dated 28th October, 2008

in

H.C.C.C. No. 33 of 2000)

RULING

This application made under **rules 4, 74(1) and (2) and 76(1)** of the Court of Appeal Rules is by Notice of Motion dated 29th July, 2009 and filed in this Court on 3rd August, 2009. It seeks the leave of this Court for the applicant to file and serve his Notice of intended appeal out of time with no order for costs. It is based on the grounds set out thereon, namely that:-

- “(a) The delay in filing and serving the Notice of Appeal was unintentional and inadvertent and due to inexperience and oversight on the part of the appellant who was acting in person.***
- (b) The delay in filing and serving the Notice of appeal will not prejudice the intended Respondent.***
- (c) The applicant has a good appeal with overwhelming chances of success and he stands to suffer irreparable loss and damage if this application is not allowed.***

In the supporting affidavit sworn by the applicant he deponed that the judgment was delivered on 28th October, 2008 and annexed a copy of such judgment to the application. He stated further that he did not know that he was required to file and serve a notice of appeal within 15 days from the date of judgment; and that he learned about this from a Court Clerk after he got certified copy of proceedings on 29th July, 2009.

Then in paragraph 9 of the affidavit he refers to the chances of success the intended appeal stands and that his failure to lodge and serve the notice of appeal within the requisite period arose from an excusable mistaken oversight. In a replying affidavit dated 27th April, 2010 and deponed to by **Joe Gathungu** an advocate of the High Court of Kenya having conduct of this matter on behalf of the respondent, the application was opposed on the grounds that there had been inordinate delay in filing the appeal since the judgment was delivered on 28th

October, 2008, and that if the applicant was serious about filing the appeal, he could have found out the procedure required in doing so from the Court Registry immediately after the delivery of the judgment. That the applicant had not shown that the appeal is meritorious because no draft memorandum of appeal had been annexed to the application.

The application was placed before me for hearing on 12th May, 2010 when the applicant appeared in person and addressed me on it. Mr. Kimani appeared for the respondent and also submitted on it. The applicant stated that he wishes to be allowed to file both the notice and record of appeal out of time and repeated nearly verbatim the grounds set out on the body of the application and the averments in the affidavit. He also stated that he was not supplied with proceedings by the Court in time and also that he went to Nairobi High Court to apply for these proceedings instead of applying to Embu High Court.

Mr. Kimani, for the respondent relied entirely on the averments in the replying affidavit. In his submissions he revealed that the applicant was represented by counsel in the superior court and should have sought advice on how to lodge the appeal. Much as I appreciate that the applicant is acting in person in this application, an application under rule 4 of the Rules of this Court requires that certain factors be considered before the Court can exercise its discretion either in favour of or against the applicant. The factors are:-

(a) The length of delay

(b) The reason for the delay

(c) Possibly the chances of the appeal succeeding if the application is granted, and

(d) The degree of prejudice to the respondent if the application is granted.

See Mutiso Leo sila v rose Hellen Wangari Mwangi – Civil Appeal Nai. 255 of 1997.

The judgment out of which this application arises was delivered on 28th October, 2008 and this application filed in Court on 3rd August, 2009. This is a period of approximately nine months' delay. The reason for this delay is given as inadvertence and inexperience. No wonder then that in paragraph 4 of the replying affidavit the advocate for the respondent states:-

“4 THAT ignorance of the law is no defence and therefore the applicant should not be allowed to file an appeal out of time since the reason given is not satisfactory.”

I agree. If the applicant was aggrieved by the ruling of the learned Judge and did not understand the appeal procedure, there was nothing to prevent him from getting the court or his counsel's advice on this at the earliest possible opportunity. He did not do this.

Even if I was to ignore this factor in order to exercise the Court's discretion in favour of the applicant I need to be convinced as to the possibility of the appeal succeeding. In paragraph (c) of the grounds on which the application is based, the applicant states:

“(c) The applicant has a good appeal with overwhelming chances of success and he stands to suffer irreparable loss and damage if this application is not allowed.”

This is also reflected in paragraph 9 of the supporting affidavit which avers:

“THAT I have a good appeal with high chances of success.”

But there is no demonstration of such “overwhelming” or “high chances of success” of the appeal as averred. This is made worse by failure by the applicant to annex a draft memorandum of appeal to the application in order to demonstrate this. In that event I have absolutely no basis for exercising the Court's discretion in favour of the applicant. Consequently I dismiss the application filed in this Court on 3rd August,

2009 but direct each party to bear his/its own costs thereof.

Dated and delivered at Nyeri this 24th day of June, 2010

D. K. S AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR