



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 158 OF 2009

BETWEEN

DR. C.O. OKERE APPLICANT

AND

ESTHER NDUTA KIIYUKIA 1ST RESPONDENT

ESTHER MUTHONI. 2ND RESPONDENT

CITY COUNCIL OF NAIROBI 3RD RESPONDENT

(An application for leave to extend time to file and serve the Memorandum and Record of Appeal against the judgment of the High Court of Kenya at Nairobi (Rawal, J) dated 4th May, 2007

In

H.C.C.C. No. 2 of 2004)

RULING

The motion the subject of this ruling is one under **Rule 4** of the Court of Appeal Rules. It seeks two prayers, namely:-

“(a) THAT the time within which the applicant should file and serve upon the Respondents the Memorandum and Record of Appeal be extended for such period as the Court may deem fit; and

(b) THAT the costs of and incidental to this application do abide the result of the intended Appeal.”

Rawal, J. gave judgment against Dr. C.O. Okere, the applicant herein, on 4th May, 2007. On 9th May, 2007, the applicant filed a notice of appeal through his advocate, Mr. Julius Opini. On the same day, the applicant wrote a letter to the Deputy Registrar of the superior court asking for a certified copy of the proceedings and judgment. Both the notice of appeal and the letter bespeaking the proceedings and judgment were duly served on the respective advocates for all the respondents, Esther Nduta Kiiyukia, Esther Muthoni and the City Council of Nairobi. By a letter dated **30th January, 2009** the Deputy Registrar of the superior court informed the advocates for the applicant that copies of the proceedings and judgment were ready for collection. Mr. Opini swears that he received this letter on **20th February, 2009**

and on **24th February, 2009** they paid the requisite fee for the proceedings and judgment but he was only given the proceedings on **3rd March, 2009**. That must have been because of the fact that Mr. Opini had asked for a certified copy of the proceedings which is really not necessary for lodging an appeal. The only document which **Rule 85 (1)** requires to be certified is a copy of the decree or order – see **Rule 85 (1) (h)**. The other documents necessary for compiling a record of appeal need not be certified. The applicant obtained from the Deputy Registrar a certificate of delay dated **13th May, 2009**. Apparently Mr. Opini was of the view that the sixty days allowed for lodging the record of appeal had expired so on **9th June, 2009**, he lodged in this Court the present motion for extension of time. I asked Mr. Opini what he was waiting for between **13th May, 2009** when he received the certificate of delay and the **9th June, 2009** when he lodged the motion. His answer was that he was preparing the motion itself. Miss Kamau, learned counsel for the 1st respondent did not contend before me that this delay of some twenty-six (26) days was inordinate and I shall not base my decision on that aspect of the matter.

But Miss Kamau appeared to contend that by the time the applicant was filing his motion for extension of time, the time for lodging the record of appeal had not lapsed and that the motion was consequently not necessary and constituted an abuse of the process of the Court. Miss Kamau, therefore, asked me to declare the motion incompetent and on that basis strike it out.

It may be that at the time the motion was being filed, the time for lodging the record of appeal had not expired as Miss Kamau contended. But I do not think that would, by itself, render the application incompetent. In any case, the time for lodging the record of appeal must have expired by now and in accordance with **Rule 4** itself the Court may extend such time:-

“--- -----whether before or after the doing of the act -----.”

The two authorities which Miss Kamau relied on are really not relevant to this issue and furthermore the decisions were made at the time when an applicant was required to show sufficient reason for the delay. Again, even if I were to be minded to declare the application as incompetent and strike it out as Miss Kamau asked me to do, all that would follow is that the applicant would be entitled to make another application and that would result not only in lengthening the period of litigation but also increasing the costs; **section 3A** of the Appellate Jurisdiction Act was intended to cover that kind of situation.

Having considered all the surrounding circumstances, I have come to the conclusion that I should extend time as requested by the applicant. I accordingly order that the applicant shall file his memorandum of appeal and the record of appeal within ten days (10) of the date hereof. Thereafter the applicant shall serve that record upon the respondents within seven (7) days of its being lodged in the Court. I award the costs of the motion to the 1st respondent in any event. Though Mr. Murugu asked for costs on behalf of the 3rd respondent, the third respondent filed no papers at all, such as a replying affidavit, and Mr. Murugu did not argue either in support of or in opposition to the motion. I accordingly refuse to award any costs to either the 2nd or the 3rd respondents. Those shall be my orders in the motion.

Dated and delivered at Nairobi this 30th day of July, 2010.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.