IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 75 OF 2007

BETWEEN

ATTORNEY GENERAL ……..……. APPLICANT

AND

HON. PROF. GEORGE SAITOTI ……..……. RESPONDENT

(Application for extension of time to file a record of appeal in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Nyamu, Wendoh & Emukule, JJ.) dated 31st July, 2006

in

MISC. CIVIL APPLICATION NO. 102 OF 2006)

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R U L I N G

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file an appeal from the judgment and order of the superior court [Nyamu, J. (as he then was), Wendoh and Emukule, JJ.] dated 31st July, 2006. The application is supported by an affidavit sworn by Keriako Tobiko, Director of Public Prosecutions in Kenya, on 5th April, 2007.

The judgment in the case before the superior court was delivered on 31st July, 2006 and a notice of appeal was indeed filed within time on 10th August, 2006. It is not disputed that the applicant was provided with a copy of the typed record of proceedings on 9th February, 2007, and that the last day for filing the record of appeal was 10th April, 2007. However, on 5th April, 2007 the applicant filed this application for extension of time seeking the following order:

"1. The time for the Attorney General to lodge the Record of Appeal against the above-mentioned judgment and decision be extended by such period and upon such terms as this Hon. Court will deem appropriate".

The order sought by the applicant, given the manner in which it is drafted, and based on submissions made before me, appears to be for an indefinite period of time. I say so because of the history

of this case, and the events that unfolded after the judgment was delivered in the superior court on 31st July, 2006. Briefly, what was before the superior court was an application by Prof. George Saitoti, the respondent herein, for an order of certiorari to quash certain paragraphs of the **Report of the Judicial Commission of Inquiry into the Goldenberg Affairs** (the Report), and for an order of prohibition to prohibit the Attorney General from preferring any criminal charges against the respondent in connection with his role in the Goldenberg affair. After a full hearing before a bench of three judges, the superior court agreed with the respondent and duly quashed the offending portion of the Report. Aggrieved by that decision, the Attorney General, the applicant herein, filed a notice of appeal. In the meantime, on 21st March, 2006 the respondent's advocates extracted the order emanating from the said judgment, and forwarded the draft order to the Attorney General for approval. The Attorney General admits having received the draft order but did absolutely nothing about it within the stipulated time, or at all. In the deposition in support of the application, Mr. Tobiko, learned Director of Public Prosecutions, avers as follows, in part:

"19. Due to an oversight in the office, the said draft order was never brought to my attention, and the same was not therefore acted on by my office within the prescribed period. As a result, M/s Ngatia & Associates forwarded the draft Order to the Deputy Registrar for approval, sealing and signature.

20. On 9th February, 2007, my office was served with a sealed order by the M/s Ngatia & Associates. A copy of the Order is annexed hereto and marked as Exhibit KT-10.

21. Upon perusal of the sealed order, I noted some clerical errors and omissions there, namely; as regards Order 1 thereof;

a. Paragraphs 108 and 587 of the Report had been omitted.

b. The words "adversely" and "only" had been omitted".

Upon receipt of the sealed order from the respondent's learned counsel, Mr. Ngatia, the Attorney General wrote to the Deputy Registrar of the superior court requesting certain amendments of the order, and the Deputy Registrar promptly and unilaterally, without any reference to the respondent's counsel, amended the same and issued an amended order. That clearly triggered action on the part of the respondent who promptly filed an application before the superior court asking that the *"amended order"* be expunged, on the ground that the Deputy Registrar had no power to amend the original order. That application, dated and filed on 30th March, 2007, is yet to be heard. At the hearing before me on 15th July, 2010, Mr. Tobiko confirmed that the application had not been listed for hearing, and that he had absolutely no idea how long it would take to resolve the dispute regarding the terms of the extracted order. That is what makes the orders sought before me to be of an indefinite nature, and if indeed I was inclined to extend the time for filing the record of appeal, it would essentially be for an indefinite period of time. Neither counsel could say with any certainty when the issues arising from the disputed order would be resolved. In fact, Mr. Ngatia indicated that the superior court's decision on that application could also be the subject of appeal to the Court of Appeal, with the potential that the main appeal may not be heard for several years.

With that background in mind, I proceeded to hear the application for extension of time now before me. In his submissions before me, Mr. Tobiko, for the applicant, urged that the *"delay"* in filing the record of appeal arose out of his inability to include in the record of appeal the final order, which is a primary and necessary document. He admitted, however, that the delay in settling the terms of the draft order arose because of laxity in his office as the draft order requiring his input was never in fact brought to his notice. And that triggered a chain of events, leading to the current situation that I have alluded to earlier.

On his part, Mr. Ngatia, for the respondent, submitted that it would be unjust to grant the applicant an indefinite extension of time, that the delay herein is inordinate and inexcusable, and that the same is highly prejudicial of the respondent who had to step down as Minister in the Government of Kenya, and

who now faces similar prospect, should this matter be allowed to drag on indefinitely.

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".

This Court has also stated in **Grindlays Bank International (K) Ltd vs. George Barbuor**, *Civil Application No. Nai. 257 of 1995* following the House of Lords in **Ratman vs. Camarasamy** [1964] 3 ALL ER 933:

"The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some steps 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 an 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".

Now, has the applicant before me complied with those principles? Let us examine his conduct in relation to each of those principles. First the length of the delay. It is now almost exactly four years since the judgment was delivered by the superior court and the parties are nowhere near resolving even the issue of the terms of the order emanating from the judgment. And who is to blame for this grossly inordinate delay? In my view, the applicant. Because of the laxity at his office, the draft order was ignored, and by the time the applicant woke up from his long slumber, it was too late. The order had been sealed. Then, instead of including the sealed order in the record, and possibly including his own form of order in the record, the applicant took steps that precipitated further and indefinite delay, resulting in a situation where I am now being asked to grant an extension for an indefinite period of time. That would certainly go against the spirit of the Rules of this Court, and of the newly enacted **Sections 3A** and **3B** of the Appellate Jurisdictions Act, and of the principles outlined in the two cases that I have cited. If the applicant genuinely wanted to proceed expeditiously with this appeal, there was nothing to stop him from including in the record of appeal both the orders, the original and amended one, instead of using this as an excuse to extend time indefinitely. Therefore, with regard to both the length of delay, and the reason for delay, I am of the view that the delay herein is inordinate, and the reason lame and unacceptable. Thirdly, with regard to the merits of this appeal, I can only offer a prima facie view, as that is a matter for the full court to determine. I simply want to observe here that one of the grounds in support of the application, stipulated on the body of the application, is that the intended appeal raises *"serious constitutional and jurisprudential issues"* that ought to be heard on merit. This would have been a strong argument to canvass before me, but in the absence of any submissions made before me in that regard, I am unable to see what serious constitutional issues are at stake here. And finally, with regard to the prejudice likely to be suffered by the respondent, I am in agreement with the respondent's counsel that any further delay in this litigation is highly and unfairly prejudicial to the respondent who has once had to step down from his ministerial duties, and who continues to face the prospect of further embarrassment, inconvenience, loss and injury to his character and reputation, unless this matter comes to an end. He has waited four years from the date of judgment in the superior court and is now entitled to bring this matter to a closure.

Having taken into account all the factors indicated in the case of **Leo Sila Mutiso** (supra), I have come to the conclusion that the applicant has not placed sufficient material before me to enable me to exercise my discretion in his favour. I am unable to do so. Accordingly, and for reasons outlined, I am of the view that this application has no merit, and the same is disallowed with no order as to costs.

Dated and delivered at Nairobi this 29th day of July, 2010.

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR