



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 112 OF 2009

BETWEEN

DICKSON NDEGWA MBUGUA .....APPLICANT

AND

CITY COUNCIL OF NAIROBI .....1<sup>ST</sup> RESPONDENT

HENRY ANDANDE .....2<sup>ND</sup> RESPONDENT

DENNIS K. CHEBITWEY .....3<sup>RD</sup> RESPONDENT

JOHN KIPSANG BUNDOTICH .....4<sup>TH</sup> RESPONDENT

*(An application for extension of time to file notice of appeal and record of appeal out of time from the judgment of the High Court of Kenya at Nairobi (Rawal, J.) dated 21<sup>st</sup> July, 2008*

in

H.C..C.C. NO. 304 OF 2004)

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RULING

The notice of motion dated 15<sup>th</sup> April 2009 and filed on 22<sup>nd</sup> April, 2009, seeks three orders, which are:-

- “1. That the applicant herein be granted leave to file the notice of appeal and record of appeal out of time.*
- 2. That costs of this application be provided for.*
- 3. That such other and/or further relief be granted as this Honourable Court might deem necessary in the unique circumstances of this matter.”*

The grounds upon which the applicant Dickson Ndegwa Mbugua, seeks the same orders are that the judgment he seeks to appeal from was delivered on 21<sup>st</sup> July, 2008 in his and his advocate’s absence as

they were not aware that the judgment would be delivered on that date because the learned Judge of the superior court, had, after hearing the suit, fixed the judgment to be delivered on 18<sup>th</sup> July 2010 but on 18<sup>th</sup> July 2008, the learned Judge was not on duty and a Court Clerk informed the applicant's advocates that the judgment would be delivered on notice. It was on 20<sup>th</sup> March, 2009, close to eight months later that the applicant knew that judgment had been delivered on 21<sup>st</sup> July 2008 and without any notice to the applicant's advocate. Even after that knowledge, when the applicant's advocate sent his clerk to get full and true state of the situation from the Court Registry, the clerk went to the court Registry and returned with information that the court file was not available at the Registry. All that culminated into delay in the applicant's advocate taking early action to file notice of appeal and record of appeal in time and hence this application. That is according to the affidavit and supplementary affidavit, both sworn by the applicant's counsel, John Patrick Machira. The first respondent, City Council of Nairobi, through its learned counsel Mr. Odede, does not object to the application. The 2<sup>nd</sup> respondent had not taken any part in the proceedings in the superior court whereas the third and fourth respondents though served with hearing notice through their advocates Njeru Nyaga & Company, did not appear.

In his address to me, Mr. Machira submitted that the delay period, which he admitted was long, was caused first by the fact that both his client and his office were not aware that judgment which was to be delivered on 18<sup>th</sup> July 2008 and was not so delivered because the learned Judge was not on duty and was thereafter to be delivered on notice, was actually delivered on 21<sup>st</sup> July 2008 without any notice having been served upon them and secondly that when they eventually knew that the judgment was delivered on 21<sup>st</sup> July, 2008, on 20<sup>th</sup> March 2009, they contacted the court Registry but the file was not available. The clerk sent to peruse the file was told that the file was probably with the learned Judge and had not been released back to the Registry. That delay persisted until 6<sup>th</sup> April 2009, when the court file became available and action to procure copies of judgment commenced. On 22<sup>nd</sup> April, 2009 this application was filed.

I have considered all the above. I have also considered the law. I have unfettered discretion in deciding the matter, but like all judicial discretions, it must be exercised upon reason and not on my own whims or capriciously. The applicant needed, in law to explain the period of delay, which in this case is from 4<sup>th</sup> August 2008, being the last day on which notice of appeal should have been filed (being the 14<sup>th</sup> day after judgment delivered on 21<sup>st</sup> July 2008) to 22<sup>nd</sup> April 2009, being the date when this notice of motion was filed. He also needed to satisfy me that prima facie, the intended appeal is arguable, but without going into the full merits of the appeal, and that the respondents would not suffer prejudice by my extending the time within which to file notice of appeal and record of appeal. These sentiments were clearly spelt out by this Court in the case of ***Fakir Mohamed vs. Joseph Mugambi and two others, Civil Application 332 of 2004***. It stated:-

***“The exercise of this Court’s discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors – See Mutiso vs. Mwangi Civil Application No. Nai. 255 of 1997, (ur), Mwangi vs. Kenya Airways Ltd (2003) KLR 486, Major Joseph Mwereri Igwete vs. Murika M’Ethare & Attorney General Civil Application No. Nai. 8 of 2000 (ur) and Murai vs. Wainaina (No.4) (1982) KLR 38”.***

I have considered the application with all the above in mind. In my view, the delay period has been explained. I have seen draft memorandum of appeal in the record. I cannot say the intended appeal is frivolous. The first respondent did not object to the application and the 3<sup>rd</sup> and 4<sup>th</sup> respondents never filed any replying affidavit and did not appear before me to oppose application. Thus none has alleged any prejudice should I allow the application. All in all, this is an application that warrants exercise of my discretion in favour of the applicant and I so do.

The notice of motion succeeds. The applicant is granted ten days (10) from the date hereof to file notice of appeal and sixty (60) days thereafter to file record of appeal. Costs in the intended appeal.

*Dated and delivered at Nairobi this 29<sup>th</sup> day of July, 2010.*

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**