



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 44 OF 2010**

**BETWEEN**

**TITUS KOCEYO ..... APPLICANT**

**AND**

**MATHEW O. OSEKO T/A**

**OSEKO & COMPANY ADVOCATES..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

*(Application under Rule 4 of the Court of Appeal Rules for extension of time within which to serve the Notice of Appeal upon the 2<sup>nd</sup> Respondent pursuant to the Orders under Ruling of 30<sup>th</sup> September, 2009 (Onyancha, J.) pending the filing, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi*

**in**

***H.C.MISC. APPLICATION NOS. 901 of 2007 (os) consolidated with misc. 933, 934, 935, 936, 937 & 938 of 2007(os)***

\*\*\*\*\*

**RULING**

This is an application by way of notice of motion stated as having been brought **“Under Rule (4) and 42 of the Appellate Jurisdiction Act Cap. 9 Subsidiary Legislation of the Laws of Kenya”**, in which the applicant, **TITUS KOCEYO** seeks the following orders:-

**“1. THAT there be an extension of time within which to serve a Notice of Appeal on the 2<sup>nd</sup> Respondent arising out of the Ruling and Orders made by Justice D.A. Onyancha on 30<sup>th</sup> September, 2009 in H.C.MISC. APPLICATION NO. 901 of 2007. (OS) Consolidated with MSC.APPL. NO. 933, 934, 935, 936, 937 AND 938 of 2007 (OS).**

**2. THAT the costs of this application be in the intended appeal.”**

The application which is supported by the affidavit of **TITUS OTIENO KOCEYO** is brought on the following grounds:-

- “(a) The Applicant have (sic) an arguable appeal.**
- (b) The intended appeal is not frivolous and raises substantive matters of law.**
- (c) Whereas a Notice of Appeal was duly filed and served upon all the parties in the superior court, the 2<sup>nd</sup> Respondent, though not a party in the superior court, could be affected by the outcome of the Appeal and therefore ought to have been served with the Notice of Appeal, but was through inadvertence not served.**
- (d) The Application has been made without delay.**
- (e) It is in the interest of justice that time be extended to enable the applicant serve the 2<sup>nd</sup> Respondent with the Notice of Appeal.**
- (f) That it was an innocent mistake that the 2<sup>nd</sup> Respondent was not served.**
- (g) That no prejudice will be occasioned to the 2<sup>nd</sup> Respondent if time is extended.”**

When the application came up for hearing before me, Mr. Gilbert Josiah Mungu appeared for the applicant, while Mr. Patrick Lumumba Otieno appeared for the respondent. Mr. Kuyo appeared for the interested party. In his submissions, Mr. Mungu more or less repeated what was in Mr. Koceyo’s supporting affidavit and went on to argue that the applicant had given sufficient reasons for the delay and that what happened was excusable. Mr. Mungu further submitted that by granting the orders sought the respondent would not be prejudiced.

In reply to the foregoing, Mr. Otieno submitted that there was no explanation offered by the applicant who as an advocate of the High Court ought to have known the steps to be taken in such matters. It was Mr. Otieno’s contention that this was not a case of an innocent mistake. While accepting that this Court has unfettered discretion in matters of this nature, Mr. Otieno submitted that such discretion can only be exercised upon well understood principles. Finally, Mr. Otieno submitted that the applicant had failed to show that this Court’s discretion should be exercised in his favour. Accordingly, Mr. Otieno asked me to dismiss this application with costs.

On his part Mr. Kuyo chose to leave the matter in the hands of the Court.

It is now well settled that an application under **Rule 4** of this Court’s Rules, the Court is being asked to exercise its unfettered discretion which discretion has to be exercised judicially.

In **MWANGI V. KENYA AIRWAYS LTD. [2003] KLR 486 at pp. 489-490** this Court said:-

**“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed itself thus:-**

**“It is now well 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.”**

**These, in general, are the things a judge exercising the discretion under rule 4 will take into**

***account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”***

In the present application, I have considered the grounds upon which the application was brought, the supporting affidavit of the applicant and the submissions by counsel appearing for the parties, and it would appear that there is no dispute that the applicant failed to serve the notice of appeal on the 2<sup>nd</sup> respondent. There was what appears to be panic on the part of the applicant in view of the nature of the proceedings before Onyancha, J. The applicant has explained the reasons that led to non-compliance with the rules. There was a delay of about four months. This delay has been sufficiently explained as far as I am concerned. This Court in a ruling delivered on 13<sup>th</sup> November, 2009 was of the view that the intended appeal was not frivolous. Lastly, it has not been shown that the respondent would be prejudiced in any way if this application was granted.

In view of the foregoing, I am satisfied that the applicant has demonstrated that he deserves this Court’s discretion being exercised in his favour. Consequently, the application is allowed and the applicant is ordered to serve the notice of appeal to the 2<sup>nd</sup> respondent within ***seven (7) days*** from the date of this ruling. The costs of the application shall abide the outcome of the intended appeal.

***Dated and delivered at NAIROBI this 16<sup>th</sup> day of July, 2010.***

***E.O. O’KUBASU***

.....

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***