



IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. 42 OF 2010

BETWEEN

1. NZELI MATIKU

2. MUTUA MATIKU.....APPLICANTS

AND

MWANGANGI MUTUA.....RESPONDENT

**(Application for extension of time to file a notice of appeal out of
time and lodge intended appeal from the ruling of the High Court
of Kenya at Machakos (Lenaola, J) dated 26th November 2009**

in

H.C. Misc. Application No 205 of 2008)

RULING

This application is brought under **rule 4** of the Court’s Rules. It seeks time to be extended within which the applicants (Nzeli, Matiku and Mutua Matiku) would file and serve a notice of appeal in respect of the ruling of the superior Court (Lenaola, J) delivered on 26th day of November 2009. The applicants also pray that costs of the application be provided for.

The application is grounded on the fact that the applicants’ other application for extension of time filed in the superior court on 28th September 2008 was on 26th November 2009 dismissed with costs. The application is also premised on the fact that the applicants’ advocates had requested another advocate to hold their brief on 26th November 2009, but the latter through inadvertence forgot to inform the former of the dismissal of their application and matter escaped attention until on 11th January 2010 when the respondent’s advocate called and later wrote on 12th January 2010 disclosing that the application was dismissed on 26th November 2009. The dismissal was conveyed to the applicants who instructed their advocates to appeal but the time for filing a notice of appeal had expired. It became necessary for the applicants to apply firstly to the superior court aforesaid and now to this Court.

The applicants submit that due to the fact that the mistake is that of their advocates, that ought not to jeopardize their right of appeal to this Court. The respondent (Mwangangi Mutua) opposes the application calling it, the funniest application he has ever seen. That is because the application dismissed by the superior court on 26th November 2009 was also an application to extend time within which the applicants may file a notice of appeal. The respondent's counsel, submitted that the applicants are surprisingly yet again attributing the delay to come this Court to another mistake on the part of their counsel.

The applicants blamed the failure of their counsel to remember that an adverse ruling had been delivered against them.

In Mr. Mutunga's view, the whole incident smack of negligence on the part of the applicant's counsel, who does not appear to learn that there are time deadlines within which a party is required to take steps in order that his appeal is not barred by avoidable delay. The respondent's counsel therefore submitted that this application is meant to delay the finalization of the matter the subject of the suit before the superior court.

The basic guidelines that I should take into consideration in dealing with this application under **rule 4** of the Rules, were discussed by the Court in the case of **MWANGI VS KENYA AIRWAYS LTD {2003} KLR 486 at pp 489-490** where the Court stated:-

“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 VS 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 a single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

It is clear in my mind that I have unfettered discretion to exercise in the consideration of the applicant's application for extension of time within which to file a notice of appeal, which is the first step in the process of appeals to this Court. The focus to me is the advocates counsel who started off by looking for an advocate to hold his brief before the learned Judge of the superior court. There is absolutely nothing untoward in one's brief being held by a colleague before the Court. What followed, is to my mind, what was wrong. The applicant's counsel never made any effort, for quite a long time to find out the outcome of the ruling from the advocate who held his brief before he learned Judge of the superior court. The reason for this inaction is blamed on inadvertence on his part. However, the respondent's counsel has indicated in argument, that this conduct on the part of the applicants' counsel has persisted before the learned Judge of the superior court when the applicant's applied for extension of time therein and has continued to this Court.

I see that this application was not filed in this Court until on 9th March, 2010. It has taken the applicants some 56 days from 11th January 2010, to come to this Court after their counsel learnt of the dismissal of their application. This delay is inordinate and cannot in my view be excused. There is also the prior delay

from 26th November 2009 to when the counsel learnt of the dismissal on 11th January 2010. The cumulative effect of these periods of delay is to make the same totally inordinate and I cannot in these circumstances exercise my discretion in the applicant's favour in which event, I dismiss the application with costs.

Dated and delivered at Nairobi this 24th day of September 2010

M. OLE KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR