



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT ELDORET
Civil Application 247 of 2008

BOOKER ONYANGO

MESHACK OMONDI AGENG'O

JOHN KWAMBAI ROTICH.....APPLICANTS

AND

ELDORET WATER SANITATION CO. LTD.....RESPONDENT

(Application for the extension of time within which to appeal out of time in an intended appeal from the order made by the High Court of Kenya at Eldoret (Mohamed Ibrahim, J) dated 17th April, 2008

in

H.C. Misc. C. APPL. NO. 97 OF 2003)

RULING

By a Notice of Motion application brought under *rules 4, 76 & 81* of the Court of Appeal Rules seeking extension of time within which to file a Notice of Appeal against the ruling of the superior court (*Mohammed Ibrahim, J*) dated 17th April, 2008.

Before the Court can exercise its unfettered discretion in favour of the applicants herein, the applicants must show, as was held in *WASIKE V SWALA (1984) KLR 591*, that:

- a.) There is merit in the intended appeal.
- b.) Extending the time to file the Notice of Appeal will not cause undue prejudice to the respondent.
- c.) The delay is not inordinate.

As stated above, the applicants intend to appeal against the ruling of *Mohamed Ibrahim, J* dated 17th April, 2008, whereby the learned Judge said as follows:-

“I find that the applicants are not entitled to orders of certiorari, prohibition and mandamus as applied for. As a result the application must fail. It is hereby dismissed.”

The ruling of the learned Judge annexed to the application shows that there was an Agency Agreement between Eldoret Municipal Council and Eldoret Water and Sanitation Co. Ltd. for the supply of water to the residents of Eldoret. The company was discharging statutory duties on behalf of the council, and through the agency agreement the applicants were absorbed by the company as its employees. They were offered letters of appointments and they took up their employment. They also joined a Trade Union to represent them.

The applicants accepted the appointment by appending their signatures on the letters of appointment on 22nd August, 2000, and served their employer until their services were terminated on 23rd January, 2003.

The applicants were suspended and thereafter appeared before a Disciplinary Committee on 3rd & 4th October, 2002, to answer various charges or accusations of misconduct, namely, dishonesty and fraud. The company terminated their services after allegedly finding them guilty of the accusations or charges.

The applicants have neither annexed a draft Memorandum of Appeal, nor enumerated in the supporting affidavit the grounds on which they will be appealing against the ruling. In these circumstances I am not satisfied that the applicants have shown that the intended appeals are arguable and not frivolous. I do not actually know the grounds of the intended appeal.

On the issue of the delay, it was submitted by learned counsel for the applicants that the learned Judge's ruling was delivered on 17th April, 2008 and the applicants subsequently filed a Notice of Appeal without seeking leave of the superior court. This was dated 29th April, 2008. The defect was pointed out to the applicants and they withdrew the application, and rectified their position by entering into a consent to act in person vide a Notice dated 29/4/2008. By that date, the appeals were out of time, as the 7 days allowed by the rules had expired. Here the delay of 4 days was excusable and not inordinate. It was the subsequent delay that was vehemently opposed by learned counsel for the respondent who submitted that after the applicants had filed the consent to act in person dated 29th April, 2008 (but filed in court on 30th April, 2008), they did not file the present application for extension of time to file notice of appeal out of time, till 30th July, 2008. The delay was not explained in the affidavit, and was termed "inordinate" by learned counsel for the respondent; who also complained of the lack of a Memo of the intended appeal, and further still, that his client stands to suffer prejudice because of the prolonged litigation in this matter.

Learned counsel for the applicants was not able to explain this second delay from 29th or 30th April, 2008, to 30th July, 2008, a total of 112 days either orally in court, or in any affidavit. This could amount to prejudice. In the circumstances I find this delay to have been inordinate, and I am unable to exercise my discretion in their favour, with the result that the Notice of motion dated 30th July, 2008, is dismissed with costs.

DATED and DELIVERED at ELDORET this 26th day of February, 2009.

JOYCE ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR