



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appli 46 of 2009

FRANCES GACHOKI MURAGEAPPLICANT

AND

JULIA WAINOI KINYUA

JUDITH NYAGUTHI.....RESPONDENT

(An application for extension of time to file record of appeal out of time from the judgment of the High Court of Kenya at Embu (Khaminwa, J.) dated 16th January, 2008

In

H.C.C.A. NO 46 OF 2005)

RULING

Before me is an application by way of Notice of Motion brought under **Rule 4 of** the Court of Appeal Rules in which the applicant **Francis Gackoki Murage** seeks the following orders;

1. *THAT this Honorable Court be pleased to extend the time to the applicant within which to file his intended appeal from the decision of the Hon. Khaminwa J. delivered at Embu on the 16th January, 2008.*
2. *THAT this Honourable Court be pleased to extend the notice of appeal dated the 29th January, 2008.*
3. *The costs of this application be costs in the appeal”.*

The application is brought on the following grounds:-

(a) The applicant has already filed his Notice of appeal on the 30th January, 2008 and is desirous of filing and prosecuting his appeal. The notice of appeal has already expired.

(b) The applicant made his application for proceedings well inside the time allowed for the filing of appeal.

(c) The applicant could not file his appeal on time. The delay was caused by the High Court in providing copies of the proceedings outside the time limited for the mounting of the appeal”.

Further to the foregoing there was the supporting affidavit of the applicant in which he explains in great details the circumstances that led to the delay in lodging the record of appeal.

When this application came up for hearing in chambers before me on 11th May, 2009 Mr. Morris Njagi appeared for the applicant while the respondents were represented by Mr. Munene Muriuki. In his submissions Mr. Njagi relied on the affidavit of his client and went on to urge me to give the applicant an opportunity to ventilate his grievances in the highest court in the land. Mr. Njagi pointed out that the subject matter was family land on which all the parties were still living.

In opposing the application Mr. Muriuki relied on the replying affidavit in which it was contended that the delay remained unexplained.

The law as regards the principles to be applied by this court when dealing with applications under **rule 4** of the Court's Rules is now well settled. The starting point is that the court has unfettered discretion in dealing with such an application. However, like all judicial discretions, the court has to exercise its discretion upon reasons and not upon the whims of the court. To guide the court on what to consider when exercising this discretion, the case law has established certain matters that must be taken into account. These are first, the period of delay must be considered. Second, the court has to consider carefully the reasons given for such a delay. Thirdly, the court would consider whether the appeal or the intended appeal (as is the case here) for which extension is sought is arguable, that is it is not frivolous appeal – and it must be pointed out that an arguable does not mean an appeal that will be successful. Fourthly, the court is required to consider if the respondent (or respondents as is the case here) will be prejudiced if the application is granted. These are the main principles to be considered but the list is not meant to be exhaustive and can never be exhaustive, as the exercise of discretion by itself demands that the court should not be restricted in its operations. Other matters such as problems relating to finances for mounting the appeal, ages of the parties, conduct of advocates, delay by courts, the motive and issues may in certain circumstances be relevant.

In **PATEL v WAWERRU AND 2 OTHERS [2003] KLR 361** at pp 362 – 3 this Court had following to say in respect of **Rule 4** of this Court's Rules:

“This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In Leo Sila Mutiso v Rose Hellen Wangare Mwangi Civil Application No. NAI. 251 of 1997 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 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”.

In the application before me the applicant explains in his affidavit the efforts made in pursuing the intended appeal. The main reason for the delay was that the High Court delayed in preparing and supplying judgment. The clerks at the High Court kept on saying that the proceedings were not ready.

Having considered what has been urged before me and bearing in mind the guiding principles in matters of this nature and especially in view of the fact that this is family land, I am of the view that sufficient material has been placed before me to warrant the granting of the prayers sought. I must however point out that since a notice of appeal was filed in time there can be no justification in granting an extension to file another notice of appeal. What the applicant really requires is extension of time in which to lodge and serve the record of appeal.

In view of the foregoing, I allow this application and leave is hereby granted to lodge the record of appeal out of time. The record of appeal is to be lodged and served within thirty (30) days from the date hereof.

Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nyeri this 15th day of May, 2009.

E.O O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR