



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 245 of 2008

PROTEIN & FRUITS PROCESSORSAPPLICANT

AND

ENKASITI FLOWER GROWERS LTDRESPONDENT

(An application for extension of time to file record of appeal in the intended appeal from

the ruling of the High Court of Kenya at Nairobi (Ang'awa, J) dated 10th May, 2009

in

H.C.C.C. No. 1207 of 2005)

RULING

The application dated 28th August 2008 and filed in Court on 1st September, 2009 is brought under **rule 4** of this Court's Rules. It seeks an extension of time to enable the applicant to file an appeal out of time. It is based on the grounds set out on the face thereof and on the averments in the supporting affidavit. The application was argued before me on 13th July 2009, when *Mr. Mwaura*, a director of the applicant submitted the superior court case ended on 10th May, 2007 and he applied for proceedings and filed notice of appeal on 18th May, 2007. The proceedings were not ready until 9th June, 2008. Given that scenario, the appeal ought to have been filed by 8th August, 2008 but that when the decree was extracted it had an error which necessitated that it be returned and a proper one was extracted on 8th August, 2008. Then this application was filed on 1st September, 2008, for leave to file the record of appeal out of time. *Mr. Mwaura* referred me to the replying affidavit and stated that objections raised therein particularly in paragraphs 7 and 8 cannot feature in this application. He submitted that he had the applicant's authority to act for it. He said that the appeal was arguable and the reason why it was struck out was not valid. The respondent still occupies the suit property, hence no prejudice will be caused to it if this application is granted.

Mr. Amoko, learned counsel for the respondent opposed the application and said that no material had been placed before the Court to enable it to exercise its discretion in favour of the applicant. According to the counsel the period of delay had not been given yet this was the crux of the application and that the applicant had not been candid with the Court as he was misusing the Court process. Counsel referred the

Court to page 188 of the record when **Mr. Mwaaura** is recorded to have appeared before the superior court on 7th October, 2005 when the matter was stood over generally by *Visram J.* because the said **Mwaaura** did not show the Court the authority authorizing him to act for the applicant but that on the same day the matter was placed before another Judge (*Ojwang, J*) who proceeded to hear the chamber application dated 5th October, 2005 without being shown the authority requested by *Visram, J.* just to illustrate how the applicant was abusing the process of the court. He stated that although **Mr. Mwaaura** annexed to the record of appeal authority to act dated 21st January, 2006, this document was not produced before the superior court or was drawn after the case had already been filed there and after the matter had already been placed before *Judges Visram and Ojwang* on 7th October, 2005.

Counsel stated that in any case the authority given to **Mr. Mwaaura** to act dealt with a completely different property than the one in dispute in this appeal. In that case, counsel argued, the applicant has no arguable appeal. And on the issue of the decree, counsel stated that the applicant decided to extract one without involving the respondent on 27th May, 2005 until 11th July, 2008 when he forwarded it to counsel for the respondent for approval when the same had already been signed and sealed. He submitted that this is not a party who deserves the exercise of the Court's discretion in his favour as the applicant was the authors of their own misfortunes. Counsel stated that all the authorities cited by the applicant were not in his favour.

The dispute between the parties involved a sale/purchase agreement which the appellant and the respondents entered into on 11th June, 1996 wherein the applicant intended to sell to the respondent **L.R. No. 1087/1**. Later the applicants backed out of the transaction for various reasons amongst them the failure to comply with **section 6** of the Land Control Act – Cap. 302 Laws of Kenya; or for breach of contract on the part of the respondent. This then gave rise to the suit the subject of the present appeal.

It is now settled law that the Court's decision whether or not to grant extension of time under **rule 4** of the Court's Rules is essentially discretion. It is also settled law that the Court will take into account certain set principles before deciding to or not to grant extension of time. These principles include the length of the delay, possibly the chances of the appeal succeeding if the application is granted and the degree of prejudice to be suffered by the respondent if the application is granted. These principles were outlined in the case of ***Leo Sila Mutiso v. Rose Hellen Wangari Mwangi (Civil Application No. 251 of 1997)*** (unreported). In ***Kenya Ports Authority v. Silas Obengele (Civil Application No. 297 of 2004)*** (unreported) a three Judge bench was more succinct on this point when it stated that:-

“Mr. O'rao-Obure next attacked a single Judge's decision on the ground that there were inordinate delay which remained unexplained, the learned Judge was not entitled to exercise his discretion in the manner he did. We agree that it is now settled wherever there is a delay, even for one day, there must be some explanation for it otherwise and (sic) extension may not be granted.” See also *Reliance Bank Limited (In Liquidation) v Grandway Ventures Limited & 2 Others, (Civil Application No. Nai. 118 of 2007)* (unreported).”

The present application was necessitated when the applicant received proceedings of the superior court and realized there was an error on that order and/or decree. That he returned this decree to the court for correction before he compiled the record of appeal for filing in court on 1st September, 2008. But the ruling the subject of this appeal was made on 10th May, 2007 and the applicant made an application for certified copies of proceedings on 18th May, 2007. In paragraph 2 of this application the copies of the proceedings were supplied to the applicant on 9th June, 2008. Thus the dates between the applying for proceedings and of the filing of the notice of appeal on 18th May, 2007 and the supply of the proceedings is adequately explained. There the applicant lost 8 days. However after the applicant received the proceedings it does not explain in the application, its supporting affidavit or in **Mr. Mwaaura's** submissions to this Court when he discovered the error in the order or decree, when he returned it to the court for correction and when he received it back to enable him to file the record of appeal in the Court on 1st September, 2008. Thus the delay between 9th June, 2008 to 1st September, 2008 – a period of about 83 days, has not been explained sufficiently. When one adds 8 days delay after the delivery of ruling, this

makes a total of 91 days out of which 60 days allowed by the law to lodge the appeal should be subtracted leaving a balance of 31 days delay for which the applicant has not given any explanation. Though paragraph 14 of the supporting affidavit stated that the applicant received copies of the decree on 8th August, 2008, this is not supported by the certificate of delay.

Apart from the forgoing, there is the issue of the authority granted to **Patrick K. Mwaura** to prosecute this matter on behalf of applicant. The authority he relies on is found on page 181 of the record which related to sale of plot **No. 8827/11** Thika District by public auction; but in the dispute which gave rise to the superior court case which gave rise to the appeal herein related to land reference **No. 10871/1**. I have not been given any connection or relationship between these two parcels of land or whether the power given was of a general nature. As regards the said resolution on page 182 of the record I am of the view that it related to change from being represented by counsel to acting in person. Given this background information the arguability of the appeal is in doubt. In the circumstances cannot go into the nugatory aspect of the appeal and I am not inclined to exercise my discretion in favour of the applicant. Consequently I dismiss this application with costs.

Dated and delivered at Nairobi this 24th day of July, 2009

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR