



REPUBLIC OF KENYA

NICHOLAS MAHIHU MURIITHI..... APPLICANT

AND

NDIMA TEA FACTORY LIMITED..... 1ST RESPONDENT

FRANCIS NJOGU GATHU..... 2ND RESPONDENT

(An application to extend the time within which to serve a Notice of Appeal from the Ruling and Order of the High Court of Kenya at Nairobi, (Sitati J.) dated and delivered on 3rd April 2009

in

H.C.C.C. NO.446 OF 2008)

RULING

The applicant, Nicholas Mahihu Muriithi, sued Ndima Tea Factory Limited and Francis Njogu Gathu, the respondents, in the superior court seeking, among other reliefs, an injunction against both the respondents, their agents, servants, officers and employees restraining them from barring the applicant from “ *participating in all the business and proceedings of Ndima Tea Factory Limited or carrying out his duties in the office of Director representing the Kaguyu Electoral Area*”. Together with the plaint, the applicant filed an application under O.XXXIX rule 1 on the same terms, as above. The application was served on the respondents and later argued, inter partes, before Sitati J.

In a ruling delivered on 3rd April 2009, the learned judge dismissed that application on the ground that during his nomination to serve as a director for Kaguyu Electoral Area, there was a receiving order against him which he did not disclose, and that a receiving order had the same effect as a bankruptcy order. Consequently, she held, the applicant was not eligible for nomination as a director. Besides she said the applicant had no capacity to sue, and any suit on his behalf should have been filed by the Official Receiver.

The applicant’s nomination as a director of the Ndima Tea Factory Limited, was revoked on the ground that there was a receiving order against him, and Francis Njogu Gathu was nominated to take his place after the applicant had served as a director for about four months. As at the date of this application Francis Njogu Gathu had taken office.

The applicant intends to appeal against the order of the superior court declining to grant him an injunction. He filed a notice of appeal timeously, but did not serve it upon the respondents counsel on record within the time stipulated under rule 76(1) of the Court of Appeal Rules. The notice of appeal, which bears the date 6th April 2009, was filed on 7th April 2009, and should have been served by 14th April 2009. It was not however, served within that period and instead, it was served on 15th April 2009,

one day out of time.

In the application before me expressed to be brought under rule 4 of the Court of Appeal Rules, the applicant seeks an extension of time within which to serve the aforesaid notice of appeal, and a further order to deem the said notice to have been properly served. Two main reasons have been given by Mr. Nicholas Mahihu Muriithi, in his affidavit in support of the application, to explain delay in serving the notice of appeal. First, that there were intervening holidays, namely **Good Friday** and **Easter Monday**, and, second, that the considerable distance between Nairobi and Eldoret where the process was to be served hampered the process of service.

In his submissions before me, Mr. Gikandi, for the applicant added two more reasons. First, he stated from the bar that delay in service of the notice of appeal was as a result of an oversight, and second, that he was indisposed which fact made him not act timeously.

Francis Njogu Gathu, the 2nd respondent herein, filed a replying affidavit in which he, inter alia, deposes that the applicant was indolent in serving the notice of appeal and he did not bring this application promptly.

The power of the Court under rule 4, above is discretionally and wide. The discretion is judicial which then means that the Court must be guided by the law and evidence. Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil Application NO. NAI. 251 of 1997, lays down the matters to consider in application for an order under rule 4, aforesaid, namely, the length of the delay, the reason for delay, possibly the chances of the appeal succeeding if the extension sought is granted and the degree of prejudice to the respondent if the application is granted.

The main reason given for the delay herein is mistake on the part of the applicant's counsel. He did not take the essential step of serving a notice of appeal on time. The applicant's counsel did not file any affidavit to explain the cause of the delay. He sought to explain the delay orally from the bar. It is not the practice of this Court to act on oral explanations from the bar, in applications of this nature. There was no explanation given as to why the advocate concerned did not file an affidavit to explain his delay. Had he done so, the respondent would have had the opportunity of, possibly, responding to it. So as the matter stands I have no explanation from counsel for his delay in serving the notice of appeal.

The explanation given by the applicant is clearly not a reasonable explanation in the circumstances. The two holidays mentioned in his affidavit are not exempted days from computation of time under rule 3 of the Court of Appeal Rules. So, that explanation does not help the applicant. Besides after 13th April 2009, when Easter Monday holiday fell, there was 14th April 2009, which was a working day. Had some effort been made earlier to serve the respondents that would have been a good explanation.

The other reason given to explain the delay in serving the notice of appeal was distance. True, the distance between Nairobi and Eldoret is considerable. However, delay in serving was not strictly as a result of such distance. It is not shown how the distance was a factor. The applicant did not explain the mode of service so that it would be clear that distance delayed service.

The foregoing notwithstanding I am inclined to allow the application as the delay in service is for one day. In coming to that conclusion I have overlooked the issue of the merits of the intended appeal. That is a possible factor to consider. However I have decided against it because by the nature of the litigation any comment on the merits will certainly conclusively determine the matter in dispute and that is likely to embarrass the bench that will eventually hear the appeal.

In the circumstances I allow the motion as prayed and extend the time to serve a notice of appeal for such period as to deem the notice served on 15th April, 2009 as served within time. I award the costs of the motion to the respondent

Dated and delivered at Nairobi this 17th of July 2009

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR