REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli. 239 of 2008 (UR 152/2008

RAFIKI ENTERPRISES LIMITED …..…… APPLICANT

AND

AFRISON EXPORT IMPORT LIMITED….. 1ST RESPONDENT

NAIROBI CITY COUNCIL ……..……. 2ND RESPONDENT

(An application for leave to serve the Notice of Appeal dated 24th July, 2008 out of time in

an appeal from the ruling of the High Court of Kenya at Nairobi (Ang'awa, J) dated 23rd July, 2008

in

H.C.C.C. No. 1536 of 2008)

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RULING

I have before me an application by way of a Notice of Motion dated 22nd August, 2008, and brought under Rule 4 of the Court of Appeal Rules in which the applicant *Messrs Rafiki Enterprises Ltd* is seeking the following orders:-

"1 (a) Time for service of the Notice of Appeal dated 24th July, 2008 and filed on 28th July 2008 be extended to include up-to and until 7th August, 2008 and the Notice be deemed to have been properly served.

(b) In the alternative the applicant be granted leave to serve the Notice of Appeal out of time.

2. (a) The Record of Appeal in *Civil Appeal No 174 of 2008, Rafiki Enterprises Ltd –vs- Afrison Export Import Limited & Nairobi City Council* be deemed to have been properly filed.

(b) In the alternative, the applicant be granted leave to serve the Record of Appeal in *Civil Appeal No.1740 of 2008, Rafiki Enterprises –vs- Afrison Export Import Limited & Nairobi City Council* out of

time.

3. The costs of and incidental to the application abide the result of the Appeal."

The grounds relied on are set out in the body of the application and also in an affidavit sworn on 22nd August, 2008 by the applicant's Counsel, *Mr Nelson Havi* and filed on the same date.

The salient points are that the applicant has appealed against the decision of the superior court (*Ang'awa, J*) given on 23rd July, 2008 dismissing the applicant's Chamber summons dated 15th November, 2007. In addition, the applicant states that it has a meritorious appeal because a pre litigation statutory notice had not been given by the respondent pursuant to the Government Lands Act before the suit was commenced, and that the Notice of Appeal had been filed timeously on 28th July, 2008 but the only omission was the applicant's failure to serve the notice within the 7 days stipulated in Rule 76 of this Court's rules. The delay in effecting service was for only 2 days and was caused by an inadvertent oversight on the part of the process server engaged by the applicant's advocates to effect service on or before 4th August 2008 which was the last day of service. The applicant counsel further contends that he was not aware of the mistake and only came to know about it after he had filed a record of Appeal in *Civil Appeal No. 174 of 2008 Rafiki Enterprises Ltd vs Afrison Export Import Ltd & Nairobi City Council*. As regards any possible prejudice to the respondents, the learned counsel for the applicant has submitted that there is no noticeable prejudice which cannot be compensated by way of costs.

The first respondent's counsel *Mr Mwanza Mulwa* had as at the time of the hearing of the application, not filed any affidavit and he was content to rely on what he called points of law. The first point he raised, is that the 1st respondent was likely to be prejudiced in that on 20th August 2008, the 1st respondent had filed an application to strike out the Notice of Appeal, which according to him is defective and that the application before the Court was aimed at pre-ementing the final disposal of the application to strike out the notice, which was first in time. He concluded his submissions by urging the Court to find that the application was prompted by the respondent's application to strike out and therefore dismiss it on that ground. Finally, he invited the Court to hold that the delay of 2 days was not explained at all.

On his part, the learned counsel for the second respondent *Mr Mubea* conceded the application and fully accepted the applicant counsel's submissions.

The Court has fully reflected on the matter, including the submissions of counsel as outlined above, and is of the view that, all in all, it would be just to allow the extension. Firstly, because under rule 4 this Court has unfettered judicial discretion which in my view, must be exercised to advance the cause of justice which in this case includes the need to have any valid issues ventilated on merit other than being buried in the grave of technicalities. Secondly, in my view the discretion must also be exercised in order to give the fullest recognition of the right of access to the highest court in the land. In this regard, the Court is aware that, so far, individual judges of this court have exercised their discretion after taking into account very well known factors namely, the length of delay, the explanation for the delay, the prejudice the delay might cause to the other party, and the merits of the appeal (without holding a mini appeal).

Guided by the above principles, I am of the view that the delay of 2 days although unfortunate, cannot be said to be inordinate. The delay has been satisfactorily explained and it is clear to the Court that the learned counsel for the applicant had clearly instructed the process server to honour the deadline as per Rule 76 of this Court's Rules. Although it has been argued by the 1st respondent's counsel that the outcome of this application might prejudice the outcome of the application to strike out the notice of appeal, the court has taken into account the fact that, this application though not first in time was, nevertheless filed under a certificate of urgency and it has also been intimated to the Court by counsel that the real challenge in the pending application to strike out, will be the competence of the Notice of Appeal itself which is a mandate of the full Court and for this reason the Court is not immediately aware of any possible usurpation of the full Court's mandate. It follows therefore that there is no immediate prejudice to the 1st respondent which cannot be compensated by way of costs. Finally as regards the merit of appeal it is clear to the Court the issue concerning the application of the Government Lands Act might be

arguable.

To conclude, the Court is fortified in its view of the matter by the holdings in the case of *JOSEPH MWEERI IGWETA v MUKIRA M'ETHARE & ANOR C.A. NO. NAI 8 OF 2000 – see Lakha J.A.'s* observations concerning the Court's discretion under Rule 4. Similarly the same holdings appear in the now well cited case of *LEO SILA MUTISO v ROSE HELLEN WANGARI MWANGI C.A. NAI 251 OF 1997 (unreported).*

For those reasons the application must succeed. I hereby allow the Notice of Motion dated 22nd August 2008 and order that the Notice of Appeal dated 24th July 2008 and filed on 28th July 2008 be and is hereby extended to include up to and until 7th August 2008 and that the Notice be deemed to have been properly served. I further order that the record of *Appeal in Civil Appeal No. 174 of 2008 Rafiki Enterprises Ltd v Afrison Export Import Ltd.* and *Nairobi City Council* be deemed to have been properly filed and served.

I further order that the costs of and incidental to this application do abide the outcome of the appeal.

It is so ordered.

DATED and delivered at Nairobi this 3rd day of July, 2008.

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR