



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 131 OF 2008

CHRISTOPHER MUGO KIMOTHO.....APPLICANT

AND

THE HON. THE ATTORNEY GENERAL.....RESPONDENT

(Application for leave to file the record of appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Osiero, J) dated 30th November, 2006

in

H.C.C.C. No. 287 of 1997)

RULING

In an application expressed to have been filed herein under **rule 4** of the Court of Appeal Rules on 20th June, 2008 the applicant sought an order to extend time within which to file the record of appeal and also for costs thereof. The application was based on 6 grounds which are set out on the face thereof. They are that:-

- “(i) The original Certificate of Delay was misplaced within counsel’s chambers.***
- (ii) The said Certificate of Delay has now been retrieved.***
- (iii) It is fit and just in the circumstances to so order.***
- (iv) That the interest of justice would be served by the granting of the orders sought.***
- (v) That the interest of justice would be served by the granting of the orders sought.***
- (vi) That no prejudice would be occasioned to the respondent if the sought orders are granted.”***

The supporting affidavit to the application is in similar terms as the grounds set out on the face thereof except for minor details as to the dates when the certificate of delay went missing or was retrieved. With the Court’s leave on 17th November, 2008, however, the applicant was allowed to file an amended

application which he did on 19th January, 2009. That application sought the following orders,

“(1) That the Honourable Court do extend time within which the record of appeal may be filed.

(2) The Honourable Court do extend time within which to lodge a fresh notice of appeal.

(3) In the alternative and without prejudice to prayer 2 above, this Honourable Court do validate the notice of appeal on record.

(4) Costs of this application be provided for.”

Grounds set out in support of the amended application are similar to those set out on the face of the original application save that sub-paragraph v. thereof provides that:-

“By virtue of lapse of time to file a Record of Appeal, the Notice of Appeal lodged by the Advocate for the applicant is deemed to have been withdrawn by the applicant.

The affidavit in support thereof deponed by one **Victor Nduhiu**, an advocate, in the firm of counsel for the applicant is in similar manner as the one in support of the original application except of course for minor details as to the dates the certificate of delay went missing or was retrieved and the reason for seeking leave for the amendment of the notice of motion. The application was heard *ex parte* on 7th October, 2007 when **Mr. Nduhiu**, learned counsel for the applicant appeared and submitted on it. The respondent did not appear though served with a hearing notice. **Mr. Nduhiu** repeated in his submissions the reasons set out on the face of the application as already set out in the preceding paragraphs of this ruling.

Factors the Court takes into account in extending time within which to file notice or record of appeal have already been set out in various authorities of this Court – see ***Fakir Mohamed vs Joseph Mugambi & 2 Others, Civil Application No. 332 of 2004 (unreported)***. These grounds are not applied as a matter of course, but depending on the circumstances of each case. The main reason for the delay herein is that the certificate of delay was misfiled in counsel’s chambers. It was discovered missing on 15th April, 2008 and retrieved on 6th June, 2008. If the judgment out of which the intended appeal arises was delivered on 30th November, 2006 and the application for certified copies of proceedings and judgment made on 14th December, 2006 the applicant had already lost 13 days. This delay is not explained. Then after receiving the letter notifying him that the proceedings were ready he paid for and collected them on 26th February, 2008. Even if I was to accept that these documents were misfiled on 15th April, 2008 and retrieved on 6th June, 2008 I would expect when they were retrieved the applicant would waste no more time in filing the record of appeal or this application in Court. Instead, however, he delayed for another 14 days to file the original application herein on 20th June, 2008. No explanation has been offered for this further delay. Given the date the applicant paid for and obtained copies of proceedings – 25th February, 2008 he would have been expected to file the record of appeal by latest 24th April, 2008 but he did not do so.

Apart from the certificate of delay, the record before me does not include the letter applying for the proceedings and/or judgment and I am not persuaded such request was ever made as alleged in the certificate of delay in the first place. Without such letter of request on the record it is not possible to compute the time of delay taken into account in order to comply with the proviso to **rules 81(1)** and/or **81(2)** of the Court of Appeal Rules. I am aware this Court has unfettered discretion to grant this type of application and that the same was heard *ex parte* but I am of the view that this notwithstanding, the letter applying for proceedings is one of such documents as are necessary for the proper determination of this application because without it is not easy to compute and exclude

“2 such time as may be certified by the Registrar of the superior court as having been required.”

as provided under the proviso to **rule 81(1)** of the Rules of this Court.

This is a serious hitch which stand in the way of the applicant such that he cannot clearly explain the delay in lodging the record of appeal in this Court within the prescribed period.

I dismiss this application with no order as to costs.

Delivered and dated at Nairobi this 23rd day of October, 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