



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPLI 246 OF 2008 (UR 157/2008)

MONICA MALEL

HERON KOSGEIAPPLICANTS

AND

REPUBLIC1ST RESPONDENT

THE CHAIRMAN LAND DISPUTES TRIBUNAL

UASIN GISHU DIVISION.....2ND RESPONDENT

JOHN KEAH CHERWON3RD RESPONDENT

(Being an application seeking orders to extend time within which to lodge a Notice of Appeal from the judgment and Decree in the High Court of Eldoret (Ibrahim, J) dated 12th March, 2007

in

H. C. Misc. C. Appl. No. 48‘A’ of 2003)

RULING

The application dated 15th August, 2008 and filed in Court on 20th August, 2008 is brought under **rule 4** of this Court’s Rules. It seeks an order of this Court to extend the time within which the applicant should lodge a Notice and Record of Appeal. It is based on the grounds set out on the face of the application and the supporting affidavit. The grounds set out are that the applicant is aggrieved by the decision of the superior court (*Ibrahim, J.*) dated 12th March, 2007 but from which no Notice or Record of Appeal were lodged within the prescribed period. The reasons given for the delay were that:

- “i. The applicants were financially disadvantaged and could not give their lawyers instructions on appeal within 30 days after delivery of judgment.***
- ii. Counsel for the applicant did also prepare a Record of Appeal but the same remains un-lodged.***
- iii. Counsels considered the prudence of not going on with a defective Notice of Appeal and upon advising appellant on its correspondences concurred that we do file the application.”***

That the application has been made in good faith, that the applicant's intended appeal raises grounds of appeal that ought to be heard on merit. No prejudice would visit the respondent if the Court grants this application as costs would be an adequate remedy and that the applicants stand to suffer irreparable loss and damage unless the orders sought are granted.

The supporting affidavit deponed to by **Linah Chepkosgei Kigen**, counsel for the applicant re-states the grounds set out on the face of the application and that it was on 14th May, 2007 when the applicants instructed counsel to file the Notice of appeal. The supporting affidavit also discloses that it was on 22nd May, 2007 when a request for typed copies of proceedings was made.

James M. Kithili, an advocate for the 3rd respondent swore a replying affidavit to oppose the application and said the supporting affidavit to the application was not in accordance with the provisions of **Order xviii Rule 3(1)** of the Civil Procedure Rules and that the applicant had not demonstrated that the intended appeal has any merits to warrant the grant of leave to initiate the process out of time. There was no replying affidavit from the 1st and 2nd respondents.

I heard the application on 23rd September, 2009 when counsel for the parties submitted on it. **Mr. Kaira**, learned counsel for the applicant stated that the Court had unfettered discretion to grant the order sought. In his submissions, **Mr. Kaira** stated that the applicant was not aware of the date of delivery of the judgment until sometime in May, 2007 when he then drafted the Notice of Appeal on 14th May, 2007. According to him the applicant was looking for security and after he got it he entered into a consent order with the applicant as shown by consent letter dated 20th August, 2007. He also talked about delay in getting typed copies of proceedings which he applied for on 22nd May, 2007 and received on 10th August, 2007. He stated that the appeal has chances of success and referred the Court to the draft memorandum of appeal on which he has listed three grounds of appeal. He also questioned the jurisdiction of the tribunal on matters relating to trusts and that the matter raised was of public interest and that the delay was not inordinate.

Mr. Kathili, learned counsel for the 3rd respondent opposed the application and stated that reasons for the delay must be contained in the affidavit which was not done herein. The only reason given for the delay was that of financial constraint which should have been deponed to by the applicant and not his advocate. According to his submissions a delay of seventeen (17) months was inordinate and that it was not necessary for the applicant to wait for copies of proceedings before filing a Notice of Appeal. He stated that the matter before the tribunal touched on division of land and rules of natural justice were upheld. That it had not been demonstrated that the Judge of the superior court misapprehended the law.

Matters which the Court takes into account when considering whether or not to extend time are, generally:

(a) The length of the delay

(b) The reason for the delay

(c) Possibly the chances of the appeal succeeding if the application is granted and

(d) The degree of prejudice to the respondent if the application is granted.

The list of these factors as given above is not exhaustive. **Rule 4** of the Court of Appeal Rules gives the single Judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered; ***Mwangi v. Kenya Airways Ltd [2003] KLR 486***. At this stage the Judge is dealing with the process and not the substance of the application.

The judgment of the superior court from which the appeal is intended was delivered on 12th March, 2007;

and this application was lodged in this Court on 20th August, 2008; though the original notice of appeal was lodged on 14th May, 2007. Either way the applicant was out of the time prescribed for the filing of such notice and/or record of appeal. The reason given for the delay as shown in ground (e) on the face of the application and paragraph 4 of the supporting affidavit was financial constraint on the part of the applicants. However, during the submissions their learned counsel, **Mr. Kaira** introduced other reasons for the delay including being unaware of the date of the delivery of the judgment which he became aware of sometime in May, 2007. He also talked of the delay being occasioned when he was looking for security which the record reveals was ordered in the sum of *Kshs.65,000/=* on 6th July, 2007 by the late Honourable Judge of the High Court (*Kaburu Bauni, J.*) as a condition for stay of execution. This order arose from an application by notice of motion dated 31st May, 2007 which was also outside the time prescribed for filing notice of appeal. If the money being sought was for security for stay of execution then I do not see how it was connected to the filing of the notice or record of appeal.

When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show. Also the averment in the affidavit about financial constraint should have come from the applicants and counsel's deponement on it amounts to hearsay.

I have carefully considered this application and I am of the view that the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred which amounts to saying that no valid reason has been offered for such delay. Even then I find a delay of over one year from the date of judgment to the filing of this application extremely inordinate and no reasonable tribunal would exercise its discretion in favour of a party who has been so late.

For the forgoing reasons, I dismiss this application with costs.

Dated and delivered at ELDORET 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