



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 114 OF 2008

THE HON. ATTORNEY GENERAL.....APPLICANT

AND

JAMES ALFRED KOROSORESPONDENT

(An application for extension of time to serve the notice of appeal in the intended appeal against the judgment and decree of the High Court of Kenya at Nairobi (Ojwang, J.) dated 22nd February, 2008

in

H.C.C.C. NO. 2996 of 1996)

RULING

This is an application under **rule 4** of the Court of Appeal Rules seeking an order extending the time within which to serve a notice of appeal out of time. The applicant is the **Hon. Attorney General**, with **James Alfred Koroso** as the respondent.

The applicant was adjudged by the superior court to be liable in damages, general and exemplary, in a claim for general damages for false imprisonment, malicious prosecution, and for alleged violation of constitutional rights of the respondent. He was dissatisfied with the decision and timeously filed a notice of appeal declaring his intention of appealing against the whole of that decision. The applicant concedes that the said notice of appeal was served on the respondent about three days outside the time stipulated in this Court’s Rules for doing so, and hence the application before me.

It is well settled that in applications of this nature the court exercises judicial discretion. Such discretion must be exercised on the basis of the evidence and the law. In considering the application the court is obliged to consider the length of the delay, the reason for the delay, possibly the chances of the intended appeal succeeding if the application is allowed and the likely prejudice to the opposite side if the application is granted (see **Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. NAI. 255 of 1997**). That is not an exhaustive list as each case has to be looked at on the basis of its peculiar facts and circumstances. In coming to that conclusion I recognize that there may arise situations which do not fall within those I have set out above, but which on an objective view of the matter might lead a court to lean in favour of granting an extension of time. Such situations are however rare.

The delay in effecting service was only for three days. **David Mungai**, a Senior Clerical Officer at the Attorney General’s Office effected service. He has sworn an affidavit to say that delay in effecting

service arose because he was sent on official duties to the Mount Kenya region, and by the time he returned the time for effecting service had lapsed. He attached copies of a letter requesting for authority to travel and a copy of safari imprest form requesting for funds for the trip, dated 7th April, 2008 respectively. Authority to travel was given the same day and payment of imprest was authorized on 8th April, 2008. In a replying affidavit filed on 7th November, 2008, the respondent pointed out that the reason given for seeking an extension of time is not believable as the documents David Mungai annexed to his affidavit related to a period after the date of service.

When the applicant was served with that affidavit, he caused David Mungai to swear a further affidavit on 18th November, 2008 to which he attached what he considered to be the correct documents. The copy of a memo seeking authority is dated 3rd March, 2008. Authority to travel was granted on 4th March, 2008. However, although the safari imprest form is shown to have been filled on 5th March, 2008, the recommendation for its payment and the approval of payment are pre-dated 4th March, 2008. These anomalies were pointed out by the respondent in a supplementary affidavit he filed on 21st November, 2008. The respondent deposed that the applicant was trying to concoct evidence to justify the application before me, and in his view there is no proper basis for exercising my unfettered discretion in his favour.

This application came for hearing before me on 24th September, 2009. Ten days earlier David Mungai had filed a further supplementary affidavit. In that affidavit he maintained that he travelled on 10th march, 2008 and returned on 13th March, 2008. He annexed to his affidavit fresh copies of the letter of authority to travel and a copy of an imprest warrant dated 5th March, 2008. He has not explained the discrepancy in the dates of the safari imprest warrant and the apparent predating of the approval to pay an imprest of Kshs.6800/=.

There is another affidavit in support of the motion before me, sworn by one **Charles Mwanzia Mutinda**, a Litigation Counsel in the applicant's office. He has deposed mainly on what Mr. Mungai has stated in his first affidavit and in addition he deposes that the intended appeal is meritorious and has very high chances of success. Mr. Mutinda filed a supplementary and further supplementary affidavits. In the supplementary affidavit he annexed a copy of the judgment of the superior court against which an appeal is intended. The further supplementary affidavit was filed on 15th September, 2009. To that affidavit, he annexed a copy of the plaint, the memorandum of appearance, the written statement of defence which had been filed in the superior court by him, a copy of decree, a notice of appeal and the draft memorandum of appeal.

The length of the delay in serving the notice of appeal is clearly short. The respondent did not however, consider it to be short, but that is because he started computing the period from the date the notice of appeal was filed. In computing the length of delay it will be prejudicial to compute the period the way the respondent has done. Delay is recognizable after the last date of the period within which service was to be effected. The reason the applicant has proffered for the three days delay is on the face of it plausible. The applicant has not however fully explained the discrepancy in the dates on the documents exhibited in support of the explanation given. I do not want to speculate on the issue of the authenticity of those documents. It can however, be safely stated that the applicant has not satisfactorily explained the delay.

As regards the merits of the intended appeal the decree is for what appears to me to be high sums on the heads of false imprisonment and malicious prosecution, as also on the head of violation of constitutional rights. The sums awarded are Kshs.10 million on each of those two heads. No decisions were cited to show comparable awards. The applicant's intended appeal is, *prima facie*, arguable.

Should I exercise my unfettered discretion in favour of the applicant? Notwithstanding the fact that the delay in serving the notice of appeal has not been satisfactorily explained, this case is unique. It is the first one to my knowledge in which damages have been awarded on the head of violation of constitutional rights of a citizen. It is an issue which needs to be decided by this Court to provide guidance to the courts below. That is more so because a separate award has been made on the head of malicious prosecution and false imprisonment which aspect are also the basis for the award of damages for violation of the

constitutional rights of the respondent.

Mr. Gichovi for the respondent in his submissions stated, *inter alia*, that this is not a fit case for the exercise of my judicial discretion in favour of the applicant, and in his view if the court, for whatever reasons, is minded to grant it, it should be on terms. I have considered that submission. I have also considered what Mr. Bitta for the applicant stated regarding the merits namely, that the applicant has a meritorious appeal. I have already expressed my views on it and need not repeat myself here.

Considering the facts and circumstances of this matter, and what I have stated above, I am inclined to exercise my judicial discretion in favour of the applicant. Accordingly I extend the time within which the applicant is to serve his notice of appeal for such period as to include the date the notice of appeal was served upon the respondent. I have agonised on the submission by Mr. Gichovi on the imposition of terms, but I am disinclined to do so. I however consider that the applicant should be condemned to pay the costs of this motion, which I accordingly do.

Dated and delivered at Nairobi this 16th day of October, 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