



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Application 168 of 2008

KENYA TEA DEVELOPMENT AUTHORITY APPLICANT

AND

ROY TRANSMOTORS LIMITED RESPONDENT

(Application for extension of time to file and serve the notice, memorandum and record of appeal out of time in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Nambuye, J) dated 20th November, 2007

in

H. C. C. C. No. 2757 of 1996)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file an appeal from the ruling and order of the superior court (Nambuye, J) dated 20th November, 2007. The application is supported by an affidavit sworn by Rebeccah Mbithe, Head of Legal & Regulatory Affairs of the applicant.

The judgment in the case before the superior court was delivered on 20th November, 2007, and a notice of appeal was indeed filed within time on 3rd December, 2007. Then the applicant went to slumber until 26th March, 2008 when the respondent filed an application to strike out the Notice of Appeal. Now, faced with the aforesaid application, the applicant instructed new advocates to file this application for extension of time. Even then, it took the applicant's new advocates four months to file the application.

The reasons for the delay in filing the application are blamed on the applicant's previous advocates. In her supporting affidavit, Rebeccah Mbithe avers:

“That having filed the said Notice of Appeal, the previous advocates on record failed to take any steps to proceed with the intended appeal and particularly to apply for the proceedings within the time stipulated by relevant law despite clear instructions by the applicant herein and which inaction and or failures the said firm of advocates failed to communicate to the applicant.”

However, as the learned counsel for the respondent, Mr Rustun Hira, has pointed out the evidence before the Court is quite the contrary. Annexure RM4 to the supporting affidavit is a letter from the

applicant addressed to its previous advocate, which says, in part:

“Kindly file a notice of appeal and revert with certified copies of proceedings to prevent negative consequences.

Kindly also let us have your quotation for full legal fees if we were to instruct you to handle the appeal”.

There is no evidence that the applicant subsequently instructed its advocates to file the record of appeal. The fact is that it simply went to sleep. In the light of these facts, the submission by Mr James Okeyo, learned counsel for the applicant, that it was the applicant’s advocate who made the mistake, and that his mistake should not be visited upon the applicant, has no merit.

The delay here is inordinate, and the reason for delay completely lame and unacceptable. Rule 4 of the Rules of this Court gives me unfettered discretion whether to extend time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997* where this Court stated:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted”.

I have taken into account all the factors indicated above, including the fact that this is an old case that was filed in the superior court on 8th November, 1996. All litigation should come to an end at some point, and so should this, at this point. To do otherwise would send the wrong message to the litigants – that it is all right to sleep on your rights and we will welcome you anytime you wake up! Clearly, the Rules of this Court must be followed, and the applicant herein has not provided me with sufficient justification to grant it the indulgence sought.

Accordingly, and for reasons outlined, I am of the view that this application has no merit, and the same is disallowed. The respondent shall have the costs of the application.

Dated and delivered at Nairobi this 9th day of October, 2009.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR