



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 187 OF 2009 (UR 128/2009)

STANLEY MAINA MWANGI.....APPLICANT

AND

SABINA WANJIRU MWANGI.....RESPONDENT

(An application for extension of time to file and serve record of appeal in an appeal

from the High Court of Kenya at Nairobi from the ruling of the (Dulu, J.) dated 16th April, 2008

in

SUCCESSION CAUSE NO. 1723 OF 2004)

RULING

This application brought pursuant to **rule 4** of the Court of Appeal Rules and dated 23rd June 2009 is seeking three orders which are:-

“1. That this Honourable Court do extend time to the applicant for filing of an appeal against the decision, ruling and order of the Honourable Mr. Justice Dulu dated 16th April 2008.

2. That the appeal and the record of appeal having been filed and served out of time be deemed to have been filed and served within the prescribed period.

3. That the costs of this application be proved (sic) for.”

As I have stated above, the application is brought under **rule 4** of this Court’s Rules. The law as regards the principles guiding the Court when considering such an application is now well settled. The court in deciding such an application exercises unfettered discretionary jurisdiction which, like all such discretions, must be exercised judicially and not on the whims of the court nor capriciously. In exercising the same discretion certain principles have taken root as the guiding principles. These are that for an applicant to benefit from the provisions of the rule, he has to demonstrate the period of the delay, the explanation or reasons for that delay, whether or not the appeal or the intended appeal, if no appeal has been filed, is arguable, but without going into the merits of the appeal or the intended appeal, and lastly, he needs to show that the respondent will not suffer prejudice if the appeal is allowed. These guiding

principles are in no way exhaustive. Since the Court exercises unfettered discretionary jurisdiction, it goes without saying that the Court is bound to consider all factors that need to ensure justice to the matter before it even if some of those factors do not fall into the bracket stated above. In the case of Joseph Mweteri Igweta vs. Mukira M'Ethare & Another, Civil Application No. Nai. 8 of 2000, Lakha J.A. (as he then was) set out the principles admirably. He stated:-

“The subject matter of this litigation relates to twelve acres of land situated in Meru District. The application made under rule 4 of the Rules is to be viewed by reference to the underlying principles of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini appeal), the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them.”

Several other decisions have amplified the above decision – see the cases of Pan African Paper Mills (EA) Ltd vs. Olaka, [2001] KLR 8, and Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi, Civil Application No. Nai. 255 of 1997.

In this notice of motion, the undisputed facts are that the ruling sought to be challenged was delivered by the superior court (Dulu, J) on 16th April 2008. The applicant conducted his case in the superior court in person. The case was in High Court at Nairobi Succession Cause No. 1723 of 2004. On 17th April 2008, i.e. one day later, the applicant, hired advocates and through his advocates, he applied for copies of proceedings and ruling. He also filed notice of appeal on the same date. He sent a reminder to the Court dated 7th November, 2008. Vide a letter dated 12th March 2009, he was informed in person that the copies of proceedings and ruling applied for were ready and would be collected on payment of Ksh.2,560/= . He paid that amount on 13th March 2009 and collected the same. A certificate of delay was issued to him dated 18th March 2009 and that certificate exonerated the applicant from blame in respect of delay between 17th March 2008 and 12th March 2009. Applicant's advocates then embarked on preparation of the record of appeal. In the course of doing so, they stated at paragraph 10 and other parts of the supporting affidavit sworn by Stanley Maina Mwangi, that they realized that the ruling appealed against was not certified and so they had to go back to the Court to seek its certification. That caused some delay in preparing and filing the appeal. Other documents such as pleadings were not availed to them and they had to access them from court. Eventually the appeal was filed on 5th June 2009. The delay period was sixteen days. Mr. Kimani, the learned counsel for the applicant, on the main, reiterated what was already covered in the affidavits sworn by himself and the appellant. He however added further that as the applicant conducted his case in the superior court in person, he came to realize that copies of certain documents including some exhibits were not handed over to him by the applicant who also did not have them and so he had to go back to the court for not only certification of the subject ruling, but also to get copies of those other documents. That was the main reason for the delay of 16 days.

Ms. Mutisya, the learned counsel for the respondent opposed the application. Relying on the replying affidavit sworn by Sabina Wanjiru Mwangi, she maintained that the appellant had failed to give an acceptable explanation for the delay period which she readily conceded was sixteen days. In her view, the advocates for the applicant cannot seek to have the applicant benefit from the fact that the applicant conducted his case in person and so they could not access certain documents in time as the same advocates were instructed in good time as is witnessed by the letter seeking copies of proceedings and ruling which was dated 17th April 2008. They thus had enough time to know what documents were required in good time and so the delay needed not occur. She asked me to disregard that explanation as it was not a valid explanation. The replying affidavit she relied upon stated further that intended appeal has no chances of success as the respondent, who is applicant's father has diligently administered the estate of John Mwangi Njoroge who was the respondent's husband and applicant's father.

I have considered the notice of motion against the background of the facts before me and the law which I have cited above. It is not in dispute that the delay period was sixteen (16) days. The applicant said that was the time taken in preparing the record of appeal and it took such length of time because certain documents were not available and had to be obtained from Court later after the copies of proceedings and ruling were obtained as it was then that the applicant's advocate became aware of them. The respondent's counsel would hear none of that as to her there was enough time for the appellant's counsel to put their house in order and the reason they advanced for delay is not valid. In my mind, the explanation required under **rule 4**, need only be a reasonable explanation i.e. an explanation that would be acceptable to a reasonable court directing its mind to the issue and even if a particular Judge is not convinced that it is indeed a good explanation, so long as it is a reasonable explanation, it should suffice. In the matter before me, I do not see anything unreasonable in the statement that as the applicant conducted his case in person before the superior court, when his advocates received the proceedings, which was about 12th March 2009, and realized for the first time that the ruling which was to be challenged on appeal was not certified and that other documents which should have been part of the proceedings were not there, they had to go back to the court to get the ruling certified and get copies of those documents and that caused delay. In my understanding, what the applicant is saying is that as the applicant conducted his case on his own, he did not keep copies of certain vital documents which would only be accessed from the court and that delayed the process of preparation of the record of appeal. Indeed at paragraph 10 of Mwangi's affidavit to which I have referred hereinabove, he stated that after his advocates had paid for certified copies of the ruling, and proceedings, they realized that the ruling was not certified and had to go back to the court for certification of the same, and that caused some delay. At paragraph 9 he said:-

“9. That my advocates on record informed me which information I believe is true that due to the fact that I had no proper records of the pleadings as explained in paragraph 3 herein, my advocates had to get the pleadings from the court file to compile the record of appeal and the exercise took more time than they expected.”

At paragraph 3, he stated that he was unable to keep proper records of the pleadings. All these allegations have not been challenged in the replying affidavit filed by the respondent. In my mind, searching for the pleadings not supplied by the applicant to his advocates due to ignorance, seeking certification of the ruling being challenged are matters that could and probably did slow down the pace of preparing the records. I accept the explanation as reasonable.

I was not addressed on the merits of the appeal already filed. The respondent said at paragraph 8 of his replying affidavit that it has no chance of success. The applicant did not annex a copy of the memorandum of appeal already filed which is Civil Appeal No. 111 of 2009, nor did he cause the Registry to avail it. I cannot therefore give an informed opinion as to its merit but clearly, from the record, it is an appeal involving mother and son in the succession of the deceased's estate. The deceased as I have stated, was the husband of the respondent and the father of the applicant. Whereas I would on my own frown at such a situation where a son takes a mother to court over the property of her husband, nonetheless, this is a family feud which needs to be given a full hearing to enable the family turn towards peace for posterity. I think this Court should hear the appeal already filed. Further and in any event, I was not told of any prejudice that the respondent would suffer if the appeal already filed is heard and finalized and on my part, I see none.

Lastly, the conduct of the applicant shows a person interested in pursuing the matter. He applied for copies of proceedings one day after the ruling. He caused his advocates to send a reminder when delay was apparent. Immediately he was told the proceedings were ready on 12th March 2009, he paid for them on 13th March 2009. That is a person who has not slept on his rights. He is a person interested in pursuing the matter. He needs to be given opportunity to realize his dream of having his appeal heard.

In short, the application succeeds. The time to file the appeal is extended by such period as to have the Civil Appeal No. 111 of 2009 deemed as having been filed in time. The record of appeal in respect of Civil Appeal No. 111 of 2009 is hereby deemed to have been filed and served within the prescribed period. Costs of the notice of motion to be in the appeal. Orders accordingly.

Dated and delivered at Nairobi this 20th day of November, 2009.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a truecopy of the original.

DEPUTY REGISTRAR