



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 227 of 2009 (NYR 25/09)

EDWARD KAMAU NDUNGUAPPLICANT

AND

PETER NJOGU GITAURESPONDENT

(An application for extension of time to file notice and record of appeal out of time from a ruling and order of the High Court of Kenya at Nyeri (Kasango, J.) dated 17th October, 2008

in

H.C.C.A. NO. 86 OF 2000)

RULING

This is an application by way of notice of motion brought under **Rule 4** of the Court of Appeal Rules in which the applicant **EDWARD KAMAU NDUNGU** seeks the following orders: -

“1. That the Honourable Court may be pleased to grant the Applicant extension of time to file notice of appeal and record of appeal out of time from the ruling and order of the Honourable Lady Justice Mary Kasango dated 17th October, 2008 in Nyeri High Court Civil Appeal No. 86 of 2000.

2. That the costs of this application do abide the results of the intended appeal.”

The application is supported by the affidavit of the applicant. The grounds upon which the application is brought are as follows:

“(i) The Applicant had no notice that he was supposed to show cause why his appeal should not be dismissed on the day it was dismissed.

(ii) The Applicant has been ailing for a long time and was not aware that his appeal had been dismissed until the month of June, 2009.

(iii) The Applicant is desirous of pursuing the intended appeal and hence this application.”

When the application came up for hearing before me on 5th November, 2009 Miss L. Mwai appeared for

the applicant while Mr. J.N. Mbutia appeared for the respondent. In her submission Miss Mwai repeated the contents of the applicant's affidavit and went on to say that the respondent would not be prejudiced in any way if the court granted this application. She further pointed out that the appeal in the superior court was dismissed on a technicality, and that the applicant's intended appeal had high chances of success.

To counter the foregoing Mr. Mbutia pointed out that the appeal in the superior court was filed in October, 2001 and dismissed eight years later. Mr. Mbutia submitted that the applicant was not candid since there was no proof that he had been sick. In the end Mr. Mbutia concluded that this application was an afterthought and urged me to dismiss it with costs.

The background facts to this application may be found from the affidavit of the applicant. In that affidavit the applicant depones *inter alia*:-

"3. That on 17th October, 2008, Honourable Lady Justice Mary Kasango dismissed my appeal for want of prosecution. (Annexed hereto is a copy of the order marked 'EKN.1').

4. That I had no notice from the court or from my advocates on record that my appeal was listed for dismissal for want of prosecution on 17th October, 2008.

5. That my advocates on record in Nyeri H.C.C.A No. 86 of 2000 may have been served with the hearing notice for 17th October, 2008, but they failed to attend court on my behalf. (Annexed hereto is a copy of the notice issued marked 'EKN.2').

6. That the failure to attend court by my advocates should not be visited upon me as I am a layman.

7. That in the year 2008 and part of 2009, I did not visit my advocate's chambers as I was ailing and was in and out of hospital. (Annexed hereto are copies of the medical record marked 'ENK.3').

8. That therefore I did not know that my appeal had been dismissed for want of prosecution until the month of June, 2009, when the Respondent started boasting in the village that he had succeeded in the case against me.

9. That upon visiting the Nyeri High Court civil appeals registry, I discovered that my appeal was dismissed on 17th October, 2008, for want of prosecution under Order XLI Rule 31 (2).

10. That I immediately instructed my advocates on record to apply for extension of time to file notice of appeal and record of appeal out of time and I visited my advocates in the superior court for an appraisal. The said advocates wrote to me a letter dated 10/6/09 which I attach hereto and mark 'ENK.4'.

11. That I am truly aggrieved by the dismissal order as my appeal in the superior court was meritorious. (Annexed hereto is a copy of the memorandum of appeal and the proceedings of the trial court marked 'EKN.5' and 'EKN.6').

12. That my intended appeal has high chances of success as I had no notice of the hearing date when my appeal was dismissed and there was no evidence that my advocates had been served with the memorandum of appeal.

13. That the Respondent shall suffer no prejudice if this application is allowed.

14. That I am still desirous of pursuing the appeal and hence the need to file the application to regularize the position."

The foregoing has not been seriously disputed by the replying affidavit of the respondent. Indeed, the respondent was of the view that since the appellant's appeal in the superior court was dismissed on 17th

October, 2008 he (the applicant) has taken no steps to have the appeal heard. But it is to be observed that the applicant came to know about the dismissal of his appeal in June, 2009 when the respondent started boasting in the village that he had succeeded in the case against him. What did the applicant do after learning that his appeal in the superior court had been dismissed? He instructed his lawyer to file this application in this Court. This application was filed in this Court on 8th July, 2009.

It has been stated time and again that in an application under **rule 4** of the Rules of this Court, a single judge of this Court is called upon to exercise his discretion which discretion although unfettered must be exercised judicially. In **MONGIRA & ANOTHER v. MAKORI & ANOTHER** [2005] 2 KLR this Court said:

“On numerous occasions this Court has had time to comment and elaborate on the issue of judicial discretion and the nature of that discretion exercised by a single judge under rule 4 of the rules. In Mwangi v Kenya Airways Ltd [2003] KLR 486 at p 487-488 this Court stated: -

“Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. NAI. 255 of 1997) (unreported), the Court expressed itself thus: -

“It is now well 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 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”.

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an 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 in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

Applying the foregoing to the facts of this application it is to be noted that once the applicant came to know of the dismissal of his appeal in the superior court he instructed Miss Mwai who promptly filed this application on 8th July, 2009. I have considered the length of delay and the explanation given for that delay. In my view this application should be granted since the respondent will suffer no prejudice if the relief sought is granted.

For the foregoing reasons this application is allowed and the applicant is ordered to file and serve a notice of appeal within seven (7) days from the date hereof. The record of appeal is to be lodged and served within thirty (30) days from the date the notice of appeal is filed. The costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at NYERI this 6th day of November, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR