REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Application 184 of 2009

SAMUEL NJIRANI NGABIA.....APPLICANT

AND

MICHAEL THUNGU WANYOIKE
JOSEPH GICHUHI THUNGU
MBUGUA GICHU (Suing as personal representatives
of the estate of ARTHUR WANYOIKE THUNGU.....RESPONDENT

(Application for extension of time to file Notice and record of Appeal out of time in the intended appeal for the ruling of the High Court of Kenya at Nairobi (Khaminwa, J) dated 8th May, 2009

in

H. C. Succession Cause No.792 of 2003)

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RULING

The application before me is an application dated 24th June 2009 brought under Rule 4 of this Court's rules. The applicant seeks leave to file a Notice of Appeal and Record of Appeal out of time and that time be fixed for the filing of the intended Notice of Appeal and the Record of Appeal.

The applicant relies on an affidavit of his advocate Mr George Korongo sworn on 24th June 2009 and the respondents rely on the 1st respondent's affidavit sworn on 3rd November 2009 by Mr Michael Thungu Wanyoike.

During the hearing on 10th November, 2009 Mr Korongo the learned counsel for the applicant put forward submissions to the effect that when the ruling in H.C.C.C. 792 of 2003 the subject matter of the intended appeal was delivered on 8th May 2009 he applied for copies of the formal order on 19th June 2009 without delay; and further that he filed this application on 24th June 2009 and therefore the delay could not be said to be inordinate.

The learned counsel for the 1st respondent Mr Charles Ngugi in his submissions stated that firstly there is no ruling given by Khaminwa J as stated in the heading of the application and in the affidavit in support and therefore the application is incompetent since the ruling intended to be challenged was given by (Khamoni J) secondly, the applicant had not shown that he had at any time applied for the alleged missing file to be reconstructed and therefore the alleged delay has not been explained, thirdly the issuance of a Notice of Appeal is not dependent on the availability of a ruling or order; and finally that no memorandum of appeal has been exhibited to demonstrate that the applicant has an arguable appeal.

Before the court can exercise its unfettered discretion to extend time in favour of the applicant, the applicant has to show, among other things

that the appeal or the intended appeal is not frivolous, that the application has been brought without inordinate delay and that the respondent would not suffer undue prejudice if the application is not allowed (see ***WASIKE v SWALA [1984***] KLR 591.

From the above background facts the applicant has not demonstrated that the intended appeal is not frivolous having neither set out the intended grounds in the application itself nor annexed a draft memorandum of appeal and a copy of the ruling delivered by the superior court. He has also not given any good reasons for not having filed a Notice of Appeal or the Record itself. Surely the applicant's counsel did not need copies of the ruling to file and serve a notice of appeal within stipulated time. The challenged decision was given six months ago and this delay has not been explained. On the requirement of whether the respondent will suffer prejudice the applicant did not address this requirement at all but it is evident from the record that judgment which gives rise to the subject matter of the intended appeal was given in 2003 nearly 6 years ago. There cannot in my opinion be greater prejudice to a respondent than the frustration of keeping him away from the fruits of a judgment in his favour given nearly 6 years ago.

Finally the application itself refers to a non existent ruling in the heading and is therefore patently incompetent. The application does not satisfy any of the known requirements of rule 4 at all and with respect, the learned counsel for the applicant is clearly not aware of those requirements!

In my view the application also subverts the aims of the overriding objective as expressed in sections 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act in that it will give rise to further delay and costs and I would dismiss the application on this ground as well.

All in all, I decline to exercise my unfettered discretion in favour of the applicant and I hereby dismiss the application with costs to the 1 st respondent.

It is so ordered.

DATED and delivered at Nairobi this **13th**day of **November**, 2009.

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR