



IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI NO. 191 OF 2007

ROYAL MEDIA SERVICES LTD. APPLICANT

AND

- 1. TELKOM KENYA LTD.**
- 2. COMMUNICATIONS COMMISSION OF KENYA**
- 3. KENYA BROADCASTING CORPORATION**
- 4. ATTORNEY GENERAL**
- 5. NICHOLAS ETYANG**
- 6. DANIEL MUSAU**
- 7. FRANCIS WANGUSI**
- 8. DANIEL WATURU**
- 9. J. N. KAMUNGE**
- 10. PHILIP M. KAMAGA**
- 11. GEORGE KHOJALA**
- 12. MUSA ETIKO**
- 13. HENRY WEST**
- 14. KAREN LANG'ATA DISTICT ASSOCIATIONRESPONDENTS**

(Application for extension of time to file and serve notice of appeal and record of appeal out of time in an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Lady Justice Mugo) dated 24th day of November, 2004

in

RULING

The applicant seeks two orders under **Rule 4** of the Court of Appeal Rules, namely:

- “1. That the applicant be granted leave to file and serve a Notice of Appeal out of time.**
- 2. That the applicant be granted leave to file and serve the record of appeal within such extended time.**

On 25th July, 2004, the 2nd, 5th – 12th respondents herein filed an application in the superior court seeking the dismissal of the applicant’s suit *H.C.C.C. No. 15 of 2000* for want of prosecution under **Order XVI Rule 5** of the Civil Procedure Rules. The application was served on the applicant’s advocates who filed a lengthy replying affidavit explaining the delay in the prosecution of the suit as having been occasioned partly by the expectation that the State would resolve the matter amicably and partly because Dr. Kamau Kuria, the advocate was engaged for a long time in the **Judicial Commission of Inquiry into the Goldenberg Affair** (commission of inquiry) as an assisting counsel. The applicant’s counsel did not however attend on the hearing date to oppose the application. The application was therefore heard *ex parte* and allowed by the superior court on 24th November, 2004. The applicant thereafter, on 8th December, 2004 filed a notice of appeal signifying its intention to appeal against the ruling and order dismissing the suit. The applicant, indeed, lodged *Civil Appeal No. 289 of 2005* on 16th November, 2005. However, on 9th December, 2005, the respondents made an application for striking out both the notice of appeal and the record of appeal on the ground that the appeal was filed out of time as the appellant had not copied the letter bespeaking the proceedings to the respondents’ advocates. The applicant’s counsel admitted the mistake in the replying affidavit and further conceded the application in court on 19th July, 2007 as a consequence of which the notice of appeal and the appeal were struck out on 19th July, 2007. The present application was filed 7 days later on 26th July, 2007.

The 1st, 2nd, 5th to 12th respondents oppose the application on the grounds contained in the lengthy affidavit sworn by their counsel, Kenneth Kiplangat. The respondents’ counsel states, in the replying affidavit in effect that; the fact that Dr. Kamau Kuria was involved in the Commission of Inquiry is not an excuse for failure to prosecute the suit; that the applicant took no action for 3 years from 20th August, 2001 when its application for injunction was dismissed by the superior court and June, 2004 when the respondent’s application for dismissal of the suit for want of prosecution was filed; that for 17 months between 9th December, 2005 when respondents filed the application for striking out the notice of appeal and the record of appeal and 19th July, 2007 when the application was allowed, the applicant took no action to correct the defect which made the appeal to be struck out; that the intended appeal has no merit as applicant has not at any stage in the superior court asserted any legal right which has been accepted by the superior court and even failed to show a *prima facie* case for grant of an interlocutory injunction and, lastly, that the respondents will suffer serious prejudice if the appeal is re-activated.

The 13th and 14th respondents similarly oppose the application on the grounds contained in the affidavit of their counsel, Stephen Musalia Mwenesi who states, *inter alia*, that, the court would be acting in vain if it allowed the application as the error which caused the notice of appeal and the appeal to be struck out (i.e. failure to copy letter bespeaking the proceedings to respondents’ advocates) still persists; that the applicant has not made an application in this Court for extension of time to serve the letters; that the applicant’s case has no merit in view of the pronouncement of law in the ruling of Visram J dated 20th August, 2001 and that the application if allowed would be prejudicial to the interest of 13th and 14th respondents who were concerned about increased radioactivity in their residential area.

It is trite that an appellant whose appeal has been struck out for being incompetent has the right to

apply under **Rule 4** of the Court of Appeal Rules for extension of time to lodge a competent appeal and that in considering such an application for extension of time, the Court exercises its unfettered discretion although the Court is guided by well established principles (see Mwangi v Kenya Airways Ltd [2003] KLR 486).

Regarding the merits of the intended appeal, I bear in mind that the applicant intends to appeal against the ruling and order of the superior court dated 24th November, 2004 dismissing the applicant's suit for want of prosecution and not against the long and learned ruling of the superior court (Visram J) dated 20th August, 2001 dismissing the applicant's application for injunction. I also bear in mind that in dismissing the applicant's suit for want of prosecution, the superior court was exercising its judicial discretion. The respective advocates for the respondents have in their respective affidavit and submissions referred to the merits of the applicant's entire suit which suit stands dismissed. In doing so, they have, with respect, strayed for the superior court was not called upon to rule on the merits of the suit. Rather, the superior court only exercised its jurisdiction to strike out the suit for want of prosecution regardless of its merits.

It follows therefore, that the court should confine itself only to the merits of the intended appeal against the ruling and order of 24th November, 2004 dismissing the applicant's suit for want of prosecution. Whether the intended appeal has merits depends on whether Mugo Ag. J. (as she then was) in dismissing the suit for want of prosecution exercised her discretion judicially. Dr. Kamau Kuria deposes in support of the present application that he had explained in paragraphs 28 – 32 of his affidavit sworn on 22nd July, 2004 and filed in the superior court his duties as Assisting Counsel in the Commission of Inquiry which prevented him from prosecuting the suit. He has annexed the affidavit filed in the superior court to this application. The applicant has also annexed the memorandum of appeal filed in *Civil Appeal No. 289 of 2005* (the struck out appeal) which contains 20 grounds of appeal on the basis of which the applicant asserts that the Judge exercised her discretion wrongly. Having studied the replying affidavit, which was filed in the superior court, the ruling of the superior court and the grounds of appeal, I am satisfied that the intended appeal is arguable. Indeed, the applicant had filed *Civil Appeal No. 289 of 2005* in good time which appeal was struck out because of a procedural error.

I would be usurping the jurisdiction of the appeal court if I were to consider whether or not the delay caused by the engagement of Dr. Kamau Kuria in the Commission of Inquiry and the further delay of 3 years referred to are excusable as those are the matters which would arise in the appeal if filed.

The present application was filed without inordinate delay after the appeal was struck out. It is apparent that the *Civil Appeal No. 289 of 2005* was struck out on 19th July, 2007 and the present application was filed on 26th July, 2007. The one week's delay is negligible. I am asked to consider the delay of 17 months when the application to strike out the appeal was pending in court without any action by applicants counsel to rectify the procedural error.

In my view, it would be wrong to blame the applicant for the delay caused by the court to complete the legal process.

It is further contended that the applicant has not rectified the error which caused the previous appeal to be struck out and that the court would be acting in vain if it allowed the application. It is true, however, that the previous appeal was struck out essentially because it was lodged out of time, the time required by the court to supply the proceedings having been included in the computation of time as the applicant had not copied the letter requesting the proceedings to the respondents' advocates as required by the rules. Firstly, the procedural defect was superseded by the order striking out the notice of appeal and the appeal, and secondly, if leave to file both the notice of appeal and the record of appeal out of time is to be granted the applicant will not be required to apply for proceedings afresh. It will only be required to lodge the notice of appeal and fresh record within the time specified by the Court.

Lastly, I am not satisfied that the respondent will suffer undue delay if the application is allowed other than the anxiety caused by delay in the finalization of the suit. That inconvenience can adequately be compensation by an award of costs.

On my analysis of all circumstance attendant to the applicant's case, it is just that the applicant should be allowed to lodge a competent appeal. I therefore allow the application and extend time for filing and serving a notice of appeal by **14 days** from date hereof and time for lodging and serving the record of appeal by **30 days** from date hereof. The applicant shall pay the costs of this application to the respondents.

Dated and delivered at Nairobi this 8th day of February, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR