



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION) NO. 317 OF 2007

PETER LUKA NDUTU.....APPLICANT

AND

DANIEL WAMBUA NDAVI.....RESPONDENT

(Application for extension of time to file and serve a notice of appeal and lodge an appeal out of time from a ruling of the High Court of Kenya at Nairobi (Kasango, J) dated 8th July, 2004

in

H.C.C.S. NO. 56 OF 2004)

RULING

PETER LUKA NDUTU, the applicant, asks me under **rule 4** of the Rules of the Court to exercise my discretion in his favour and grant him leave to file and serve a notice of appeal and also, a record of appeal out of time.

The applicant, according to his affidavit in support of the application and the submissions of his learned counsel *Mr. Musyoki*, avers that the omission and the delay in filing and serving the notice of appeal within the time prescribed by the Rules was not of his own making but that of his counsel who failed to lodge the necessary documents.

The judgment the subject matter of the intended appeal was delivered on 8th July 2004 by *Kasango, J*. It is common ground that the applicant consequent thereto did not file a notice of appeal, but instead chose to engage in what the learned Judge, *Emukule, J* termed:

“----- a rather circuitous and convoluted route sought by the concurrent application, a multiplicity of orders, which in my considered judgment the defendant can only obtain through an appeal, and not a court of concurrent jurisdiction.”

Despite this fitting advice, the applicant’s counsel took no step to mount an appeal and allegedly have passed over the brief to a different counsel without the knowledge of the applicant.

On 16th August, 2005 the new advocate (and the applicant says without his consent) filed an

application in this court on 16th August, 2005 seeking similar orders as sought herein. However, that application being Civil Application No. Nai. 239 of 2005 was withdrawn on 6th June, 2006.

In my view, I cannot agree with the applicant that he was unaware that all his advocates had not carried out his instructions by seeking extension of time to lodge an appeal. It was within his knowledge that his advocates were reluctant to appeal on his behalf despite advice. In this regard he cannot blame them solely. He, too, is to blame. Further, it was not proper for him to keep away from his said advocates for too long. It is the duty of every litigant to keep in constant touch with his advocate.

Again, the applicant has not offered any explanation as to why his new advocate took 17 months to file this application. I agree with *Mr. Kimuli* that the delay herein is inordinate and has not been explained.

The applicant has been guilty of laches at every stage since the decision of *Kasango, J* was delivered and all these have not been explained to my satisfaction.

In view of the rampant, persistent and unexplained delays, I am of the view that this is not a proper case for me to exercise my discretion in favour of the applicant. In reaching this conclusion, I have also considered the possible prejudice that may be caused to the applicant if the application succeeds.

I dismiss the application with costs.

DATED and DELIVERED at NAIROBI this 17th day of April, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR