



IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 309 of 2007

NJUKI RABUTA APPELLANT

AND

FRANCIS NJERU RABUTA RESPONDENT

(An application for leave to file and serve the notice of appeal and the record of appeal out of time in an intended appeal against the whole of the judgment and decree of the High Court of Kenya at Embu (J. N. Khaminwa, J) daed 3rd October, 2007

in

EMBU H.C.C. C. NO. 67 OF 2002)

RULING

This is an application by way of Notice of Motion brought under **rule 4** of the Court of Appeal Rules (the Rules) in which the applicant **NJUKI RABUTA** seeks the following orders:-

- “1. THAT the Honourable Court do extend the time for filing and serving the Notice of Appeal and the Record of Appeal and leave be granted to serve Notice of Appeal and Record of Appeal within such extended time.**
- 2. The costs of this application be in the intended cause.”**

This application has been brought on the following grounds:-

- “(i) There has been an inevitable delay in pursuing the intended cause.**
- (ii) There is an arguable appeal and the applicant is desirous of pursuing (sic) the same.**
- (iii) The delay is cause (sic) by factors well beyond the control of the applicant.”**

Further to the foregoing grounds there was the supporting affidavit of the applicant in which he explains in greater details the circumstances that led to the delay in filing the notice of appeal and lodging the record of appeal.

The application came up for hearing in Chambers before me on 21st May, 2008 when Mr. J. Nderi

appeared for the applicant while Mr. H. Utuku appeared for the respondent. In his submission, Mr. Nderi relied on the applicant's, affidavit especially paragraphs 3, 4, 5 and 6. It was pointed out that the notice of appeal should have been filed on 17th October, 2007 and that this application was filed on 6th November, 2007 hence there was a delay of about three weeks. Mr. Nderi submitted that the applicant had made attempts by instructing the firm of Muriuki Njagagua Advocates which paid for the proceedings. The applicant then approached Mr. Nderi on 30th October, 2007 who had to file an application to come on record and having done so filed this application. It was Mr. Nderi's contention that there has not been inordinate delay as the circumstances of the delay have been fully explained. He was of the view that the intended appeal had merits as can be seen from the draft Memorandum of Appeal annexed to the application.

Mr. Utuku on his part opposed the application. He submitted that no certificate of delay had been attached to the application. He reminded me that this was a land dispute and that the respondent has been in occupation of three acres for a considerable period and he thought that the purpose of this application was to punish his client. Mr. Utuku went on to submit that a notice of appeal was a very simple document for which no instructions are needed. He asked me to dismiss the application since his client will be prejudiced if the application was granted.

As already indicated earlier in this ruling the application is brought under **rule 4** of this Court's Rules (the Rules). The law as regards the principles to be applied by the Court when considering an application brought under that rule is now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into as guiding principles. These are first the period of delay must be considered. Second the Court has to consider the reasons for such a delay. Thirdly, the Court would consider whether the appeal or intended appeal from which extension is required is arguable, that is that it is not a frivolous appeal. Fourthly, the Court is required to consider if the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations. Other matters such as problems relating to finances for mounting the appeal, conduct of advocates instructed by clients, the emotive land issues may in certain circumstances be relevant.

In **PATEL V. WAWERU AND 2 OTHERS (2003) KLR 361** at pg. 362-3 this Court had the following to say in respect of **rule 4** of this Court's Rules:-

"This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason of what was clearly an inordinate delay. How does a single Judge exercise his discretion? In LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI - Civil Application No. NAI. 251 of 1997 this Court stated:-

"It is now 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 the 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."

In the application before me the applicant has by way of affidavit given the circumstances that led to the delay. These have been emphasized by Mr. Nderi who specifically referred to the following paragraphs of the applicant's affidavit:-

"3. That my advocatse R.M. Mugo & Co. Advocates who were acting on my behalf did not lodge a Notice of Appeal as required by rule 74 as the said advocates I learnt were out of their chambers on leave and were expected back sometime after November 2007.

4. *That I made attempts to instruct M/S Muriuki Njagagua Advocates who not being familiar with the proceedings required the same to enable them lodge an Appeal. Annexed and marked B(i) and B(ii) are receipts for the proceedings made by M/S Muriuki Njagagua Advocates dated 5.10.2006 and 26.10.2007.*

5. *That it is not only 26.10.2007 that they were able to obtain the said proceedings but due to pressure of work, they were again unable to take up the matter and I had to instruct the present advocates which I did on 30.10.2007.*

6. *That the present advocates advised me that as a requirement of the law they had to 1st obtain leave of the High Court to come on record in place of M/S R.M. Mugo & Co. Advocates and they subsequently lodged the annexed application marked C on 5/11/2007.*

Having considered what has been urged before me and bearing the guiding principles in matters of this nature I am of the view that sufficient material has been placed before the Court to enable me exercise my discretion in favour of the applicant as the delay has been sufficiently explained and this being a land dispute it is only proper that the applicant should be allowed to pursue his right of appeal to the highest Court in the land.

In view of the foregoing, I allow the application and order that the notice of appeal be filed within seven (7) days from the date hereof and the record of appeal be lodged thirty (30) days from the date the notice of appeal is filed. I further order that the costs of this application which I assess at Kshs.5,000/= be awarded to the respondent which should be paid within 30 days from today in default execution to issue.

Dated and delivered at NYERI this 23rd day of May, 2008.

E. O. O’KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR