IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appli 301 of 2007
NJIRU KIRIRAGIA …….. APPLICANT

AND

SILVESTER NJIRU NJERU ……..……..RESPONDENT

(An application for extension of time to serve a notice of appeal and to file an appeal from the judgment of the High Court of Kenya at Embu (Mr. Justice I. Lenaola) dated 11th July 2005

in

H.C.C. C. NO. 65 OF 2002)

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R U L I N G

I have before me an application by way of Notice of Motion dated 24th July 2007 in which the applicant Njiru Kiriragia is seeking orders against the respondent Sylvester Njiru Njeru as follows:-

"***(a) That this Honourable Court be pleased to extend time for the applicant to file and serve the Notice of Appeal upon the respondent, and to file an appeal from the judgment of the High Court of Kenya at Embu (Mr. Justice I. Lenaola) dated 11th July, 2005 in Civil Case Number 65 of 2002.***

(b) That the Notice of Appeal lodged in Court on 15th July, 2006 be deemed as valid and properly filed and the same be served upon the respondent within such period as will be ordered by this Honourable Court.

(c) That costs be provided for."

Five reasons are given for the application. These are that the applicant was not satisfied with the decision of the superior court delivered on 11th July, 2005 in Civil Case No. 65 of 2002; that he applied for proceedings and lodged Notice of Appeal on 15th July 2005; that the Court file was misplaced in the High Court Registry and as a result the Notice of Appeal could not be served upon the respondent within time provided by the Rules of this Court; that the delay in serving the Notice of Appeal and filing appeal was not as a result of the fault of the applicant and that the applicant, being a peasant was not able to raise money to apply for extension of time immediately being supplied with copies of proceedings. In the affidavit in support of the Notice of Motion, the applicant states that High Court Suit No. 65 of 2000 at Embu was decided on 11th July 2005, that the applicant felt aggrieved by that judgment and intended to appeal. Further he stated that he filed Notice of Appeal timeously on 15th July, 2005 and also sought in a letter dated 15th July 2005 copies of proceedings; that as the Court file was misplaced at the Court Registry, he was not able to serve the respondent with the copy of the Notice of Appeal; that proceedings

were ready and certified on 3rd October 2006, and were supplied to the applicant on 5th October 2006; that the Notice of Appeal was not served upon the respondent in time as the Court file went missing till 24th October, 2005 when it was traced and by that time, time for service had lapsed; that upon being supplied with copies of the proceedings the applicant was unable to file the record of appeal because of financial problems as he is a peasant and had to sell some of his livestock and other properties to raise money and that exercise took a long time as buyers were not readily available.

The application is opposed by the respondent who in his replying affidavit filed on 13th May 2008 maintains that the applicant has not explained the delay in filing the application before the Court from 5th October 2006 when he was supplied with proceedings to 12th October, 2007 when this application was filed; that the delay of over one year to file application for extension is inordinate; that the applicant has not stated when the Court file got lost and when it was traced; and that the application has no merit.

Mr. Muyodi, the learned counsel for the applicant in his submission before me mainly highlighted the contents of the supporting affidavit and urged me to allow the application while Mr. Kathungu the learned counsel for the respondent opposed the application stating from the Bar that the subject Notice of Appeal was served upon the respondent on 28th October 2005 and so what the applicant should have sought was validation of that service and not extension of time to file and serve Notice of Appeal upon respondent as there is already Notice of Appeal filed and served except that it was served out of time. On prayer (b) in the Notice of Motion, Mr. Kathungu observed that that prayer was not available as Notice of Appeal sought to be deemed as valid was not filed on 15th July 2006 but was filed on 15th July 2005. Thus his argument was that no such Notice of Appeal allegedly filed on 15th July 2006 existed. He also argued that there was nothing to show the applicant was following up the question of preparation of proceedings on the matter and lastly that in any case the period from 5th October 2006 when copies of proceedings were supplied to the applicant to 12th October, 2007 when this application was lodged, represents inordinate delay which has not been properly explained. He was also of the view that the intended appeal is not arguable.

I have considered the Notice of Motion, the record, the judgment of Lenaola J, the annexed draft Memorandum of Appeal, the submissions by the learned counsel for the parties and the law. The application is brought pursuant to ***rule 4*** of the Court of Appeal Rules (the Rules). The law as regards the principle to be applied by this Court when considering applications brought under ***rule 4*** of the Rules is now well settled. A summary of it is contained in the observations by Lakha JA (as he then was) in the case of ***Major Mweteri Igwate vs Muhura M'Ethare & Attorney General*** - Civil Application No. NAI. 8 of 2000 (unreported) where the learned Judge stated as follows:-

"***The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation of the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini appeal) the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might in particular be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance to them."***

The above factors are not in any way exhaustive. In the case of ***Kagai Kimomori Watatua vs. Ngatia Kareko*** Civil Application No. NAI. 77 of 2005, Waki JA stated:-

"***The discretion under rule 4 is unfettered and there is no limit to the number of factors that the Court will consider."***

It is now well established as Waki JA, rightly said that in deciding such a matter under ***rule 4*** of the Rules of this Court, the Single Judge is exercising his unfettered jurisdiction but he is doing so on behalf of the entire Court. Such an exercise for discretion must be upon reason and must not be capriciously done or

done on the whims of the single Judge.

In the matter before me, the judgment, the appellant intends to appeal against was delivered on 11th July, 2005. Notice of Appeal was filed in time and is still in the record. I cannot therefore extend time to file it as that would mean two valid Notices of Appeal meant to support one appeal. That would not in law be proper. Thus the first part of prayer (a) seeking extension of time for the applicant to file Notice of Appeal cannot be sustained. The second prayer seeking extension of time to serve the same Notice of Appeal would have been a proper prayer but a new twist was introduced from the bar when Mr. Kathungu told me and it was not controverted, that the Notice of Appeal filed on 15th July 2005 had been served upon the respondent on 28th October 2005. Strictly, what the applicant should have sought in that situation is validation of that service. I note that that is what the applicant was trying to do in prayer (b) but unfortunately, as Mr. Kathungu points out, the Notice of Appeal alleged in that prayer does not exist. It seems to me that this was a typing error and what the applicant wanted to be deemed as valid and properly filed is the Notice of Appeal of 15th July 2005. It is unfortunate, that Mr. Muyodi did not find it fit to apply to amend that prayer. I will however, in the interest of justice accept the error as a typing error and decide the matter on substance rather than on technicality. However, still the applicant is not seeking the correct orders as he is not stating anywhere that the Notice of Appeal filed on 15th July 2005 had ever been served when in fact it had been served. Thus, I am in the dark as to the period that I need to validate. I will now consider the application to file appeal out of time.

I will also consider the delay of service of the Notice as well. The applicant says the file got lost immediately after he filed Notice of Appeal. Certificate of Delay annexed and dated 28th October 2005 confirms that the file was misplaced in the High Court Registry. That certificate says the Notice of Appeal was collected on 24th October, 2005. Mr. Kathungu confirms that the respondent was served on 28th October 2005, only four days after it was collected from the Court after the file was traced. I do not think that period of 4 days was inordinate. I will accept that the Notice of Appeal was served immediately after the file was traced. The effect of that is that I do order that the Notice of Appeal filed on 15th July 2005 only four days after judgment and served four days after the file resurfaced was properly filed and is deemed to have been served in time.

That takes care of the Notice of Appeal. I have ordered that it is deemed to have been properly filed and served. That leaves me with the record of appeal. That record of appeal should have been filed within sixty (60) days from 15th July 2005. it was not so filed as the file got lost. It is not stated when the file was traced. I will however, give the benefit of doubt to the applicant as regards the period of delay from 15th July 2005 to 5th October 2006 when the applicant admits that he received the copies of the proceedings. This application was filed on 12th October 2007, one year one week later. The reasons for that delay is that the applicant being a peasant was unable to raise funds to mount the appeal and was still raising money through the sale of some of his livestock and other properties. Other than that allegation, there is no proof that he took the whole one year selling his properties to raise funds for the appeal. He has not stated when he finally raised that money. He has not stated the amount he required particularly after he had paid for and obtained proceedings which would have been one of the expensive parts of the requirements for mounting an appeal. He has not stated why he could not, after obtaining proceedings file Record of Appeal in person. The law allows that and advocates are mere agents to help the parties but ideally parties can proceed in person on appeals. He has not stated why he could not seek to file the appeal as a pauper by leave of the Court in case raising Court fees was a problem to him. I have anxiously considered the entire matter and I do not find it easy to accept that the applicant, and for that matter any person needed a whole one year to raise funds for such an appeal and that in case raising funds posed a problem, one would sleep on his rights such as that of approaching the Court in person for a whole one year. I am not satisfied as to the explanation given for the delay.

I have perused the judgment of Lenaola J against the draft memorandum of appeal. I would not be prepared to state at this stage that the merit of the intended appeal are so compelling that I would be forced to ignore the inordinate delay which has not been explained to my satisfaction. On the question of prejudice, I am not persuaded that the respondent who got his judgment about three years ago should be

subjected to further delays only because the applicant took no action for over one year having received proceedings. I will end with what this Court said in the case of ***Mutiso vs. Mwangi*** (1999) 2 EA 231. It stated:-

"***In our judgment, with respect, the period of delay of almost three and a half months, on my view of it, is substantial. In Samkan and Another vs. Tussel and Another (1999) LLR 898 (CAK) this Court found a delay of about three months long. In Ravasdeh vs. Lane (1988) 40 Eh 100, a delay was said to be much longer, it was six months in fact. In addition there is no explanation for the delay……***

Whilst the discretion under rule 4 of the Rules is unfettered, it must like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy."

The explanation given for delay of one year and one week is not satisfactory, much as I agree that this is a land matter between half brothers.

The result is that the application lacks merit. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 22nd day of May, 2008.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR