



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Crim Appli 1 of 2008 (NYE,1/08)

ALBERT MAGU MUSA.....APPLICANT

AND

REPUBLIC.....REPOUDENT

(Application for extension of time to file Notice of Appeal out of time from an order of the High Court of Kenya at Nyeri (Ang'awa, J) dated 19/9/1993

in

H.C.CR.A. NO. 112 OF 1995)

RULING

The motion before me is made under **rule 4** of the rules of this Court and it seeks an order for extension of time to lodge a notice of appeal against the decision of the superior court made on 14th September, 1993 in Nyeri HCCR.A 112 of 1993. The application was filed on 11th January, 2008 and it will be apparent at once, that the application comes about 15 years late. Nevertheless, the discretion I have to exercise under **rule 4** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. The guidelines for the exercise of such discretion are now clear and I may remind myself, thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider to long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors: See MUTISO V MWANGI, Civil Application No. Nai. 255 Of 1997 (Ur), MWANGI VS KENYA AIRWAYS LTD [2003] KLR 486, MAJOR JOSEPH MWERERI IGWETA VS MURIKA M’ETHARE & ATTORNEY GENERAL, Civil Application No. Nai. 8 of 2000 (UR) and MURAI VS. WAINAINA (NO. 4) [1982] KLR 38”. - See Fakir Mohammed vs JOSEPH MUGAMBI & ANOTHER C.APP. NAI. 332/04 (unreported).

The genesis of the matter was the prosecution of the applicant before the Resident Magistrate’s court at Kerugoya in Criminal Case No. 890 of 1991, on three counts: obtaining land registration by false pretences contrary to **Section 320** of the Penal Code; uttering a false document contrary to **Section 353** of the Penal Code; and forgery contrary to **Section 349** of the Penal Code. After his trial, he was found

guilty on all three counts and was sentenced to serve 2 years in jail on the first count, 8 months on count 2 and 10 months on count 3, all jail terms to run concurrently. He was reminded of his right of appeal within 14 days from 16th April, 1993.

Subsequently, on 29th April, 1993 the applicant filed an appeal before the superior court at Nyeri, being HCCR.A. NO. 112 of 1993. The appeal was filed by the firm of M/s Nyawira Gitonga & Co. Advocates who had also represented the appellant before the trial court. On 14th September, 1993, the superior court examined the record of appeal under **section 352** of the Criminal Procedure Code and made the following order.

“I certify that I have perused the record and am satisfied that the appeal has been lodged without any sufficient ground for complaint. Appeal summarily rejected S. 352(2).”

The applicant now says that the order of dismissal was neither served on him nor his counsel on record. He did not receive any notice of it either. He also blames his erstwhile Advocates M/s Nyawira Gitonga & Co. for misinforming him about the existence of the appeal and ultimately closing down their offices and disappearing without trace until he was forced to instruct fresh Advocates in November, 2007. He narrates some of his woes in his affidavit in support of the application as follows:-

“4. That when I came from jail I went to my advocate’s office who informed me that the appeal was on course and that she would inform me when the same would be coming up for hearing and I kept on visiting my advocate’s offices and she would keep giving me the same information;

5. That on or about October, 2003 I went to my said advocate’s office and found the said offices closed without any information of my said advocate’s whereabouts;

6. That being unable to trace my said advocate I lodged a complaint on 28/10/03 against the said advocates with the Advocates Complaint Commission which complaint was terminated on 30/8/07 by the said commission without the said advocates replying to the same or being traced; annexed and marked “AM3” are Photostat copies of the complaint lodged and the Advocates Complaints Commission’s correspondence.

7. That being unaware of my advocates whereabouts of my (sic) and file held by the said advocates, on or about September, 2007. I went to the Nyeri High Court Registry to enquire about the status of my appeal and was informed that it had been summarily rejected by court on 14/9/93 by the Honourable Lady Justice Ang’awa and I obtained a copy of the order dismissing the appeal which I annex hereto as annexure “AM4”

8. That I was not notified of the said dismissal of my said appeal as I was in jail and my advocates neither informed me that she had been notified of the same.

9. That I immediately embarked on searching for an advocate to take up my matter in Embu, Kerugoya and Nyeri but none of the lawyers I saw was willing to take up this matter due to the time lapse.

10. That in November, 2007 I got my advocates on record whom I instructed to file this application which had to be done after obtaining various documents relating to my criminal matters in the subordinate court and the High Court Registries as I did not have my files on the matters as my former advocate still has the files.”

It will be noted from the affidavit that the applicant does not say when he left jail and when he subsequently visited his erstwhile advocates. It will also be apparent that between October, 2003 and September, 2007, a period of 4 years, he never bothered to visit the court registry to find out the position regarding his appeal. He swears that he only found out about the dismissal in September, 2007. For the next two months until November, 2007, he was busy looking for new advocates and when he found and instructed his current advocates, it took another two months to file the application now before me.

I have examined the affidavit and the annexures put forward to explain the delay of 15 years. The affidavit is vague on when the appellant left jail and why he never visited the court registry as soon as he found out that his advocate at the time was not readily available. He swears that he only did so in September, 2007, but, among the annexures to the supporting Affidavit is a letter dated 6th October, 2004 from the Complaints Commission which was addressed to his advocates with a copy to him. The Complaints Commission indicate in the said letter that the applicant had furnished them with records showing that his appeal was rejected on 14th September, 1993. According to paragraph 6 of the supporting affidavit, the applicant complained to the Commission in October, 2003 and furnished the documents referred to in the Commission's letter. Logically therefore the applicant had those documents in his possession and in particular, he had the document informing him that his appeal had been dismissed on 14th September, 1993. He had those documents in the year 2003 when he lodged his complaint or at least in the year 2004. When the attention of counsel for the applicant *Mr. Maari* was drawn to the annexure which flew in the face of the sworn assertion made in paragraph 7 of the Supporting Affidavit he offered the lame explanation that the applicant did not have the documents despite the contents of the letter. I do not believe the applicant or his advocate. I take the view that the applicant has taken a dishonest and less than candid path in seeking an equitable remedy. In that event equity, as usual, will frown upon such attempts. I find on the facts laid before me that the delay of 15 years is not properly explained and is inordinate.

Mr. Maari further urged me to find that the intended appeal has overwhelming chances of success and he drew my attention to the draft annexed to the application and the Memorandum of Appeal laid before the superior court. That may well be so, but it is not in my province as a single judge to decide on the success or otherwise of the appeal. It is a factor that I may possibly consider, amongst others, but it does not override other factors. A good appeal ought to be filed timeously and in accordance with the law otherwise it may cause undue prejudice to other parties who have a legitimate expectation that the litigation had come to an end when no appeal was filed. Take this particular case. I am told by the applicant's counsel that the orders issued by the trial court affecting the land the subject matter of the charge facing the applicant and for which he was convicted were effected. As correctly observed by learned Senior Principal State Counsel *Mr. Orinda* who strenuously opposed the application, it was not made in good faith and is an afterthought.

For those reasons, I dismiss the application with costs to the respondent.

DATED and DELIVERED at NYERI this 16th day of MAY, 2008.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR