



IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO. 196 OF 2006

SEBASTIAN BEN ADUORDI APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Kihara J) dated 14th July, 2006

in

H.C. MISC. APPL. NO. 72 OF 2006)

JUDGMENT OF THE COURT

This appeal is from the ruling and order of the superior court (Kihara Kariuki J.) dated 14th July, 2006 whereby the superior court dismissed the appellant's application dated 23rd January, 2005. By the dismissed application, the appellant sought leave to appeal out of time from the judgment of the subordinate court in *Chief Magistrate's Civil Case No. 721 of 2003*.

In the suit in the subordinate court the appellant had claimed that he was unlawfully dismissed by the respondent as a clerical officer and had sought various reliefs including reinstatement to his job. The subordinate court made a finding that the contract of employment was lawfully terminated and dismissed the suit with costs on 16th June, 2005. On 27th January, 2006 the appellant filed a notice of motion in the superior court *Miscellaneous Civil Application No. 72 of 2006* under **Section 3A** and 79G and **95 Civil Procedure Act** and **Order XLIV Rules 5** and **L Rule 1 Civil Procedure Rules** for leave to file appeal against the decision of the subordinate court out of time.

The application was supported by the affidavit of Francis Etole, advocate for the appellant in which he deponed that the applicant by a letter dated 20th July, 2006 applied for proceedings for purposes of filing an appeal; that the certified copy of the proceedings and judgment were not supplied until 14th October, 2005 and that the delay in filing the appeal was occasioned by the delay in the issuance of proceedings and judgment. The superior court dismissed the application on 14th July, 2006 holding in part:

“With respect, proceedings are not required for filing of the appeal, all the decree or order sought to be appealed from and Rule 41 1 A (CPA) allows even that decree to be filed subsequently after the filing of the memorandum of appeal”. (sic).

The appellant appeals against the ruling of the superior court on six grounds. In grounds Nos. 1, 3, 4 and 5 the appellant is in effect complaining that by dismissing the application, the superior court erred in law in failing to give the appellant a chance to be heard in the appeal. Those grounds are not relevant.

In ground 2 the appellant states:

“The Hon. Judge erred in law (sic) by not considering the appellants application for appeal out of time as the attached certificate of delay”. (sic).

The appellant submitted before us that the Judge did not consider that the appellant had filed a certificate of delay; that delay in obtaining proceedings was occasioned by the trial magistrate who was on leave and by the appellant’s failure due to impecuniosity to raise money to pay for the proceedings.

Mr. Cherogony for the respondent submitted, among other things, that the appellant did not advance any reasons to explain the delay and that the appellant requested for proceedings after the expiry of 30 days from the date of judgment.

By **Section 79G** of the Civil Procedure Rules the appellant was required to file the appeal against the decision of the subordinate court within a period of thirty days from the date of the decree excluding from the period of 30 days any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order. However, by proviso to that section, the superior court had discretion to admit the appeal out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time.

This is an appeal from a discretionary order. This Court would not interfere with the exercise of the discretion by the superior court unless it is shown that the learned Judge of the superior court misdirected himself in some matter and as a result arrived at the wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been miscarriage of justice (see ***Mbogo v Shah*** [1968] EA 93).

The appellant does not in the grounds of appeal say that the learned Judge of the superior court exercised his discretion wrongly. The learned Judge considered the reasons for delay in the supporting affidavit and was satisfied that they did not amount to good and sufficient cause for not filing the appeal in time.

The learned Judge further took into account the fact that the appellant did not require copies of the proceedings and judgment to file a competent appeal. Indeed, by **Order XLI Rule 1A Civil procedure Rules** the appellant only required a certified copy of the decree of the subordinate court. That rule further allows the filing of a certified copy of the decree even after the filing of the memorandum of appeal.

The application for leave to appeal out of time was filed on 27th January, 2006 – approximately seven months after the date of delivery of the judgment of the subordinate court and three months after the appellant had obtained the proceedings and judgment on 14th October, 2005. The application for copies of proceedings and judgment was even made after 30 days from the date of judgment. That inordinate delay was not sufficiently explained.

In the circumstances, we are satisfied that the learned Judge of the superior court exercised his discretion judicially and arrived at the correct decision.

This appeal has no merit. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 9th day of May, 2008.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR