



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPLI. NAI 57 OF 2008 (KSM. 4/2008)

SAMSON GETANGITA NKWEGE

JULIUS RANGE NKWEGE

JOSEPH MWITA NKWEGE APPLICANTS

AND

ANISON NYAHIRI MUHINDI RESPONDENT

(Application for extension of time to serve the record of appeal out of time from the ruling and order of the High Court of Kenya at Kisii (Lady Justice Gacheche) dated 10th July, 2007

in

H.C.C.C. NO. 24 of 2006)

R U L I N G

The applicants seek extension of time under *Rule 4* of the Court of the Appeal Rules for service of the record of appeal and a further order that the record already served be deemed to be properly served.

The record of appeal relates to an appeal from the ruling and order of the superior court (Gacheche J) dated 10th July, 2007 wherein the superior court made a finding that the applicants had disobeyed a court order and committed each to serve 4 months imprisonment.

On 5th March, 2008, this Court (Waki, J.A.), on application, extended time for filing and serving a notice of appeal and for filing and serving a record of appeal and ordered that the notice of appeal be filed and served within 7 days and that the record of appeal be filed and served within 14 days of service of the notice of appeal.

The applicants filed and served the notice of appeal within the time ordered by the Court. More specifically, the notice of appeal was served on 10th March, 2008. According to the court order, the applicants had 14 days within which to file and serve the record of appeal. The last day for doing so was 24th March, 2008. But 24th March, 2008 happened to be Easter Monday, a Public Holiday, and excluded

day under *Rule 3 (b)* of the Court of Appeal Rules. By that rule, the applicants were entitled to file and serve the record of appeal on the next following day, that is on 25th March, 2008.

The applicants, indeed, filed the record of appeal on the 25th March, 2008. The record of appeal has, thus, been filed within the time ordered by the Court. That day, (i.e. 25th March, 2008) was also the last day for service of the record of appeal.

The record of appeal was not however served until 31st March, 2008 thereby necessitating the present application which was filed on 1st April, 2008.

The respondent's counsel upon being served with the application for extension of time filed a separate application – *Civil Application No. Nai. 5 of 2008*, on 7th April, 2008 seeking an order to strike out the record of appeal on the ground of late service of the record of appeal.

The application is supported by the affidavit of George Shane Okoth, the applicants' advocates who practices at Homa Bay. He has explained the difficulties he encountered in the preparation and filing of the record of appeal which includes absence of a certified copy of the order of the superior court given on 10th July, 2007 which is the subject matter of the appeal and which order was certified on 18th March, 2008; the lack of binding services in Homa Bay and the long Easter Holidays from 21st March until 24th March, 2008. According to him, the record of appeal was ready for filing on 20th March, 2008.

The respondent opposes the application on the grounds contained in the replying affidavit of Joseph Mboya Oguttu, who deposes, among other things, that the delay of 7 days in serving the record of appeal has not been explained and therefore, inordinate and that if the application is allowed, the respondent will suffer undue prejudice as the effect would be to defeat the respondent's pending application to strike out the record of appeal.

I have considered the application. Before this Court extended the time in favour of the applicant by the order dated 5th March 2008, the Court must have been satisfied, *inter alia*, that the intended appeal against the order of the superior Court dated 10th July 2007 committing the applicants to prison for disobedience of Court orders was not frivolous. The intendment of the order of the superior court extending time was obviously to give the applicants a chance to appeal against the order of committal. The applicants have filed and served the notice of appeal within the time limited by the order of this Court. The applicants have further lodged an appeal within the time limited by this Court. Moreover, the applicants have served the record of appeal albeit late by 7 days. Upon serving the record of appeal they filed the present application promptly on 1st April, 2008 for extension of time for service already effected. The applicants advocate has in my view, given reasonable explanation for the delay of 7 days. It is true that an order allowing the application would pre-empt the respondent's pending application for striking out the appeal. The respondent's application was however filed when this application was pending. This is one of the cases where an order for costs would adequately compensate the respondent.

I conclude therefore the delay of 7 days in serving the record of appeal was short and excusable.

Accordingly, I allow the application, extend the time for serving the record of appeal to 31st March 2008 and order that the service effected on 31st March 2008 be deemed as served within time.

The applicants to pay the costs of this application to the respondent which I assess at shs.5,000/= within 30 days.

Dated and delivered at Kisumu this 20th day of June, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR