



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL(APPLI.) NO. 125 OF 2008

DICKSON DANIEL KARABA APPLICANT/APPELLANT

AND

JOHN NGATA KARIUKI 1ST RESPONDENT

JAMES KARIUKI GITAU

(RETURNING OFFICER FOR

KIRINYAGA CENTRAL CONSTITUENCY)..... 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

(Being an application for leave to serve Notice of Appeal out of time in an appeal from the ruling and order of the High Court of Kenya at Nyeri (Kasango J.) dated 28th May 2008

in

H.C.ELECTION PETITION NO.1 OF 2008

RULING

The applicant Dickson Daniel Karaba was the petitioner in an election petition against the election of one John Ngata Kariuki, on 27th December 2007, as the Member of Parliament for Kirinyaga Central Constituency. That petition was on 28th May 2008 struck out by Kasango J. for reasons which are not relevant here. He was aggrieved, and on 30th May 2008 he lodged a Notice of Appeal declaring his intention of appealing against that decision. Service of that notice was allegedly effected one day out of time, but the issue of service was not raised until the record of appeal had been filed. The 1st respondent in the appeal, John Ngata Kariuki, moved this Court by motion for an order striking out the appeal as incompetent citing late service of the Notice of Appeal as a ground for seeking the order. That motion was filed on 18th July 2008, and it was not until it was served on Mr. Wamae, counsel on record for the applicant/appellant that it dawned on him that the appeal had a problem. He moved quickly to file the application before me dated 28th July 2008. It was filed under a certificate of urgency.

In the application the applicant seeks an order extending the time for serving a notice of appeal for such period as to include the date when his notice of appeal was served on the 1st respondent. Incidentally the affidavit in support was sworn by the applicant himself, but in that affidavit he does not explain the delay in serving the notice of appeal.

In his submissions before me, Mr. Wamae, attempted to orally give the reasons for the delay, but that is not in accordance with the rules of this Court.

Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, Civil Application No. NAI. 255 of 1997, sets out the principles which guide the Court in exercise of its discretion under **rule 4** of this Court's Rules, under which the application before me was brought. Chief among those is the need for the applicant to explain the reason for the delay in taking the essential step on record. The applicant is the party in breach. He does not have an unqualified right to an extension of time. The Court must have material upon which to act to exercise its powers in his favour. The exercise of those powers being discretionary it was incumbent upon him to place the material before this Court upon which I would have addressed my collective mind.

What has the applicant stated in his affidavit in support of the application before me? First, he introduces himself as the appellant, and therefore competent to swear the affidavit. Then he proceeds to state that he instructed his counsel to file this appeal and did his part to facilitate the filing of the appeal; that he was shocked when he learnt that a notice of appeal regarding his appeal had not been served timeously, and unless he is granted the extension prayed for he stands to suffer great financial loss and the aspirations of his constituents who hitherto have supported him shall be frustrated. He then makes reference to the grounds of appeal and confirms the truth thereof. Nothing was stated in that affidavit to explain the delay in serving the notice of appeal.

Mr. Wamae's oral explanations for the delay, even if they were to be accepted, fall short of what would be accepted as a basis for exercise of judicial discretion. His explanation was that failure to serve the notice of appeal in time, was by oversight. He said that there were intervening holidays which contributed to the delay, that he went away on leave after taking all the other essential steps, but on his return he was served with a motion to strike out the notice of appeal. He added that he had a new clerk, and that partly contributed to the delay.

It would have been prudent for Mr. Wamae to state all that he said in an affidavit. He has not explained why he failed to do so. Mr. Mari for the 1st respondent took issue with this omission, and submitted that no good reason has been advanced in support of the application.

I have considered those submissions and also the submissions of Mr. Arusei for the 2nd respondent who largely adopted the submissions of Mr. Mari, and in my view the delay has not been explained. I cannot call this a case of negligence on the part of counsel, because legally the reasons for the delay in serving a Notice of Appeal, are not before me. Mr. Wamae's oral statements are not on oath and are not in the nature of evidence to be acted upon. The applicant has not blamed his advocates as such, so authorities relating to mistakes of counsel have no application here. I cannot infer that counsel was to blame.

Notwithstanding that the delay has not been explained, the delay itself is so short that a denial of an extension will not be in the interests of justice. I have come to that conclusion considering the nature of the litigation. The litigation relates to Parliamentary elections and my view is that in circumstances as those disclosed in this application the short delay of one day is not inordinate and is excusable.

Accordingly in exercise of my discretion I extend the time as prayed. I will however order that the applicant pays the costs of the application to both the 1st and 2nd respondents. Order accordingly.

Dated and delivered at Nairobi this 31st day of October 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR