



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 101 OF 2008

WALTER KIRIMI M'MUGUNA APPLICANT

AND

LUQIAO TRAINING COLLEGE LTD RESPONDENT

(Application for extension of time to lodge and serve an appeal from a judgment and decree of the High Court of Kenya at Nairobi (Waweru, J) dated 4th May, 2007

in

H.C. Civil Appeal No. 633 of 2004)

RULING

In a plaint dated 22nd January 2002 filed in the Resident Magistrate's Court at Nairobi, the applicant herein, **Walter Kirimi M'Muguna**, claimed against the respondent, **Luqiao Training College Limited**, a total sum of Ksh.330,000/= being salary from March to November 2001, payment in lieu of leave, severance pay and one month's salary in lieu of notice. That claim was based on unlawful termination of employment. The learned trial Magistrate dismissed that suit. The applicant felt aggrieved and moved to the superior court by way of Civil Appeal No. 633 of 2004. That appeal was heard by a single Judge of the superior court who, in a judgment dated and delivered on 4th May 2007, dismissed it. At that time, the applicant was represented by a firm of advocates namely Kamau Kuria & Kiraitu Advocates. On 15th May 2007, the applicant, through his advocates, applied for certified copies of the proceedings and judgment. By a letter dated 16th March 2007, the court registry notified the applicant that copies of the proceedings and judgment would be supplied upon payment of court fees. The same copies were certified and were made available for collection on 9th January 2008. It is not clear from the record as to what happened between that date and 14th March 2008, but the certificate of delay was issued on 14th March 2008. There is no evidence on record as to why it took over two months from the date (9th January, 2008) when the proceedings and judgment were ready for collection to 14th March 2008 when the certificate was issued. One would have expected the certificate to be availed almost at the same time that the copies of proceedings and judgment were ready for collection. Be that as it may, the applicant did not do anything until 21st May 2008 when he filed a notice to act in person and filed this application dated 20th May 2008 in which he is seeking, on the main, two orders namely:

“2. That Honourable Court grants leave for the extension of time for the applicant herein to file and serve a record of appeal having filed and paid for the notice of appeal on the 16th May 2007.

3. That the costs of this application be provided for.”

The application is brought under **rules 4 and 5** of the Court of Appeal Rules (“**the Rules**”) and is premised on six grounds which are:

“1. That the failure to file the requisite record of appeal within time was quite inadvertent and excusable.

2. That the copies of proceedings and judgment were certified and available for collection much later than anticipated on the 9th January 2008.

3. That the time required for preparation and delivery of certified copies of the proceedings and judgment from the 15th May 2007 to 9th January, 2008 that is 239 days.

4. That the requisite certificate of delay to that effect was prepared and was ready for collection on the 14th March 2008.

5. That the applicant has an appeal with overwhelming chances of success.

6. That it is only fair and reasonable to allow this application.”

The affidavit in support of the application repeats the grounds I have reproduced hereabove except paragraph 9 which states:

“9. That any other further delay would have been caused by the said Advocate’s lethargy. I have since filed a notice to act in person and have served the same to the said advocate’s firm.”

The application is opposed and a replying affidavit sworn by one Kennedy Ochieng, an advocate in the firm of advocates representing the respondent, states in brief that the applicant’s application has not met the conditions required for granting the orders; that the copies of the proceedings and judgment were ready for collection on 9th January 2008 and the certificate was ready for collection on 14th March 2008, yet the appeal was filed over two months later and without any explanation for the delay; that there is no reason to blame the advocates for the applicant for lethargy as there is no evidence that the applicant was himself diligent in following up his matter with his advocates; that the appeal is not arguable and has no chances of success and that the delay is inordinate and inexcusable.

As I have stated above, this application is brought pursuant to **rule 4** of the Rules. The law as regards the principles that guide the court when considering an application under that rule is now well settled. First, the court in deciding such an application exercises unfettered discretionary powers. In the exercise of such discretionary powers, the court is bound to do so upon reason and not on its own whims, nor can the court exercise such discretionary powers capriciously. In order to ensure that the court exercises such powers judiciously, certain principles have emerged through several court decisions that would guide the courts. These are spelt out in such decisions as in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 255 of 1997** (unreported) where this Court stated, *inter alia*, as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay, secondly, the reason for the delay, thirdly (possibly), the chances of the appeal succeeding if the application is granted, and, fourthly, the degree of prejudice to the respondent if the application is granted.”

I may add that as the court, in deciding such an application, exercises discretionary powers, the matters to be taken into account by the court cannot be exhaustive in any way for to say so would be limiting the discretionary powers of the court and would thus render such powers inconsequential. Many other matters may still be considered but the above are the most common place matters to be considered in respect of applications under **rule 4** of the rules.

In this application, the decision the applicant seeks to challenge was delivered on 4th May 2007. The applicant and his advocates applied for proceedings on 15th May 2007. The proceedings were prepared and were ready for collection on 9th January 2008. That period of 239 days is covered by the certificate of delay and would not be visited as period of delay at all. It was not. However, from 9th January to the date the notice of motion was filed on 21st May 2008, there was a delay of 131 days which needed to be explained. Even if I were to go out of my way and say that between 9th January 2008 and 14th March 2008, the applicant was still waiting for the certificate of delay, although that would not be a reasonable excuse, still there is that delay between 14th March 2008 and 21st May 2008 – about 77 days which the applicant is, in law, bound to explain. Has he given any explanation for that delay. In my view, he has not. In his affidavit he apparently lumped all that period of delay together as further delay and he said such “further delay would have been caused by the said advocate’s lethargy”. He is thus not aware of how that delay was caused and who caused it. There is nothing to suggest that his advocates were responsible for the delay and if so, in what way. In my mind, the explanation required for the delay must be a reasonable explanation and no any allegation however weird can suffice. Hence, the applicant is not serious in his attempt to explain the delay beyond 14th March 2008 and says such other delay would have been caused by his said advocates. He is not definite on that allegation and I find it difficult to attach any seriousness to that allegation. I do agree with the respondent’s learned counsel and it is obvious that there has been no serious attempt to explain the delay after the certificate of delay was issued. That certificate only catered for the delay upto 9th January 2008. Although I am not convinced that the delay between 9th January 2008 and 14th March 2008 was properly explained, for I do not see any reason why the applicant could not proceed with filing the appeal since he had got copies of the proceedings and judgment, however, I do allow for that period. Having done so, I needed explanation for the delay between 14th March 2008 when the certificate of delay was issued and 21st May 2008 when this application was filed. Unfortunately, as appears above, none was offered.

I have also perused the record before me. There is no draft memorandum of appeal that would help me decide whether the intended appeal is, *prima facie*, arguable. Only a copy of the judgment of the superior court was annexed. Clearly, the applicant must be having the record of the magistrate’s court, as the matter in the superior court was a first appeal. He has not availed those proceedings and the trial court’s decision. He also says he got certified copies of the proceedings and judgment of the superior court, yet he has not cared to annex copies of the same in this application. The same would have helped to make an informed view of whether the intended appeal would be arguable. It is thus not possible for me to decide that aspect of the matter in the applicant’s favour. Lastly, I was not addressed on whether or not the respondent would be prejudiced if the applicant was granted leave to file and serve the appeal out of the time allowed by the Rules, but as the delay is not explained, and there is nothing to show the intended appeal is arguable, I find it difficult to allow the application, that aspect of prejudice notwithstanding.

The sum total of the above is that this application by way of notice of motion dated 20th May 2008 is hereby dismissed. Costs to the respondent. Orders accordingly.

Dated and delivered at Nairobi this 14th day of October, 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