



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 249 OF 2008 (UR 159/2008)

ESPOSITO FRANCO APPLICANT

AND

AMASON KINGI JEFFAH 1ST RESPONDENT

AMINA KALE 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

(Application for extension of time within which to serve a Notice of Appeal and to file an appeal from the ruling/order of the High Court of Kenya at Malindi (Ombija, J.) dated 10th July, 2008

in

ELECTION PETITION NO. 1 OF 2008)

RULING

This is an application by way of notice of motion pursuant to **Rule 4** of the **Court of Appeal Rules** (the Rules) in which the applicant, **ESPOSITO FRANCO**, seeks orders that:-

- “1. The Honourable Court do extend time within which the applicant herein may serve the Notice of Appeal filed on 22nd July, 2008.**
- 2. That the Honourable court do extend time within which the applicant may file an appeal against the decision of Hon. Justice N.R.O. Ombija on 10th July, 2008.**
- 3. The applicant herein do serve the Notice of Appeal and file and serve the Record of Appeal within seven (7) days of this order.**
- 4. The costs of this application be provided for.”**

This application is brought on the following grounds:-

- 1. The Applicant’s previous advocate inadvertently forgot to serve the Notice of Appeal within the**

stipulated time and a litigant should not be punished for the mistake of his advocates.

2. The Applicant has been unable to file the record of appeal within the stipulated time by reason that the duly typed and certified proceedings in the superior court were not supplied to the applicant within the time stipulated for lodging the Record of Appeal.

3. It is in the interests of justice that the intended appeal be heard on its merits.

4. The intended appeal is not frivolous.

5. The Honourable court has discretion to grant the orders sought.”

In addition to the foregoing, there is an affidavit in support of the application sworn by the applicant in which the circumstances leading to the delay are explained.

When the application came up for hearing before me on 10th November, 2008, Mr. Cecil Miller and Mr. Peter Wena appeared for the applicant, while Mr. J. Weloba and Mr. J. Munyithya appeared for the 1st respondent. The 2nd and 3rd respondents were represented by Mr. G. Kithi.

In his submissions, Mr. Miller referred me to the draft Memorandum of Appeal in which the issue of service of the petition is raised. In his view the learned Judge of the superior court erred in refusing adjournment and hence this will be an arguable point as it goes to the root of the petition. He asked me to exercise my discretion in favour of his client as there was even a certificate of delay issued by the Deputy Registrar of the superior court. He reminded me that the 1st respondent would not be prejudiced as he is the sitting Member of Parliament for the Constituency.

In opposing this application, Mr. Weloba relied on the replying affidavit sworn by the 1st respondent. Mr. Weloba contended that the applicant was blaming his previous advocates but it was upon him (**the applicant**) to show that he did not condone the conduct of his previous advocates. Mr. Weloba took issue with the fact that no deposit was paid by the applicant and for that reason the petition was incompetent. He therefore asked me to dismiss the application.

On his part Mr. Kithi associated himself with the submissions of Mr. Weloba in asking me to dismiss this application.

As already indicated earlier at the commencement of this ruling the application is brought under **rule 4** of this Court's Rules. The law as regards the principles to be applied by the Court when considering an application brought under that rule is now settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise such discretion upon reasons and not on the whims of the Court. To guide the Court on what has to be taken into consideration when exercising that discretion, the case law has established certain factors that the Court has to consider as the guiding principles. These are first, the period of delay must be considered. Second the Court has to consider the reasons for such a delay. Thirdly, the Court would consider whether the appeal or the intended appeal is arguable that is that it is not frivolous. Fourthly, the Court is required to consider if the respondent(s) would be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in the exercise of its discretion.

In ***PATEL V. WAWERU & 2 OTHERS [2003] KLR 361*** at pp. 312-313 this Court had the following to say in respect of **rule 4** of this Court's Rules:-

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason of what was clearly an

inordinate delay. How does a single Judge exercise his discretion? In LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI – Civil Application No. NAI. 251 of 1997 this Court stated:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also 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.”

In this application the applicant has by way of an affidavit in support sought to explain the reasons that hindered him and his advocates to take appropriate steps. He blames his previous advocates for letting him down at his hour of need. Mr. Miller expounded on the reasons that led to the delay and why the application should be allowed. To support his arguments, Mr. Miller referred me to the certificate of delay issued by the Deputy Registrar of the High Court at Malindi. That certificate of delay states:-

“This is to certify and confirm that the firm of Kittony, Maina Karanja & Co., Advocates for the Petitioner herein ESPOSITO FRANCO;

- 1. Applied for certified copies of the proceedings on 22nd July, 2008.*
- 2. The proceedings were certified and ready for collection on 18th August, 2008.*
- 3. The time taken to prepare, type, proof read and certify the proceedings from 22nd July 2008 to 18th August 2008 is twenty eight (28) days.*
- 4. The certified copies of the proceedings were collected on 18th August 2008.”*

Having considered all that has been urged before me I am satisfied that sufficient material has been placed before me to enable me exercise my discretion in favour of the applicant. That being my view of the matter, the application dated 4th September, 2008 is hereby granted and the applicant is directed to serve the notice of appeal within **14 days** from the date hereof. He is to file and serve the record of appeal within **twenty one (21) days** from the date hereof. The respondents will have the costs of this application in any event.

Dated and delivered at Nairobi this 14th day of November, 2008.

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR