



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 248 OF 2008 (UR 158/2008)

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 file an appeal from the ruling/order of the High Court of Kenya at Malindi (Ombija, J.) dated 24th April, 2008

in

ELECTION PETITION NO. 1 OF 2008)

RULING

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

- “1. The Honourable Court do extend time within which the applicant herein may serve the Notice of Appeal filed on 2nd May, 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 24th April, 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.”***

When this 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. Munyiya appeared for the 1st respondent. The 2nd respondent was represented by Mr. G. Kithi.

In his submissions, Mr. Miller relied on the grounds set out in the application and the affidavit of the applicant. Apart from emphasizing the grounds and the affidavit in support of the motion, Mr. Miller contended that a litigant should not be punished for mistakes of his advocates. He went on to submit that the proceedings were ready and collected on 20th August, 2008 and that this application was filed on 5th September, 2008. In his view there was no delay. He concluded his submission by reminding me that the 1st respondent **AMASON KINGI JEFFAH** was the sitting Member of Parliament for Magarini Constituency and hence he (**the 1st respondent**) would suffer no prejudice if this application were to be allowed.

Mr. Weloba opposed the application. He started by submitting that the orders sought were discretionary and hence for the applicant to succeed it was upon him to place sufficient material and reasons as to why there was a delay. He particularly took issue with the fact that there was no affidavit from the previous advocates. He complained that there was unexplained delay of about three months. He further pointed out that even if the application was allowed the petition was incompetent since there was no application for extension of time in which to pay the deposit.

On his part Mr. Kithi associated himself with the submissions of Mr. Weloba. He submitted that the length of the delay has not been explained. It was similarly his contention that the intended appeal has no chances of success as it was not arguable. He therefore asked me to dismiss this application.

I have now heard the submissions from counsel appearing in this application. The starting point is that in an application under **rule 4** of this Court's Rules, a single judge is being called upon to exercise his unfettered discretion and that this discretion, like any other judicial discretion must be exercised judicially. The principles to be applied in an application of this nature are well settled. In **PATEL V. WAWERU & 2 OTHERS [2003] KLR 361** this Court set out these principles as follows:-

“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.”

From the material placed before me, it would appear that there are two main reasons which led to the delay in taking the essential steps in this matter. In the first place, the applicant, (*and his advocates*) contend that the previous advocate inadvertently forgot to serve the Notice of Appeal within the stipulated

period. And secondly the applicant was unable to file the record of appeal within the stipulated time for the reason that ***“the duly typed certified proceedings in the superior court were not supplied to the applicant within the time stipulated.”***

On the issue of delay it is to be noted that there was a Certificate of Delay signed 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.”*

From the foregoing it is clear that the certified copies of proceedings were collected on 18th August, 2004. This application was filed in this Court on 5th September, 2008.

I have considered the foregoing and the issue of the previous advocates. In my view this is a proper case in which I should exercise my discretion in favour of the applicant since clearly the 1st respondent stands to suffer no prejudice as he will continue to be the Member of Parliament for Magarini Constituency even if this application is allowed.

In view of the foregoing this application is allowed – the applicant is 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 applicant is to pay to the respondents the costs of this application.

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