



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civ Appli 132 of 2006

NJAU NYANJUI THITU

JOEL MUNGAI NYANJUI APPLICANTS

AND

LAWRENCE KIMANI NYANJUI & 7 OTHERS RESPONDENTS

(Application for extension of time to file a Notice of Appeal, Record of Appeal and Memorandum of Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Hon. Lady Justice Martha Koome) dated 30th July, 2004

in

H.C.C.SUCCESSION CAUSE NO. 48 OF 1993)

RULING

This is an application by way of Notice of Motion brought under *Rule 4* of the Court of Appeal Rules (the Rules) in which the applicants, *Njau Nyanjui Thitu* and *Joel Mungai Nyanjui* seek the following orders:-

- “1. *That time be extended for the Applicants to lodge the Notice of Appeal, Memorandum and Record of Appeal against judgment and decree of Lady Justice Martha Koome, delivered on 30th July 2004 in High Court Succession Cause No. 48 of 1993 at Nairobi in the matter of the Estate of Nyanjui Thitu Kiarie.*
2. *That costs of and incidental to this application abide the result of the said appeal.”*

This application is brought on one main ground that the applicant’s previous appeal being *Civil Appeal No. 291 of 2004* was struck out on *26th April, 2006* by this Court for failure to include the certified decree in the record of appeal.

When the application came up for hearing before me on *25th January, 2007*, Mr. Nyende, the learned counsel for the applicants, more or less elaborated on the issue of the previous appeal having been struck out and hence making it necessary to file this application for extension of time. He pointed out that the previous appeal having been struck out on *26th April, 2006*, they filed this application on *11th May, 2006* which was within two weeks and in Mr. Nyende’s view, this was not inordinate delay. He further submitted that the two weeks period was required by the applicants to travel to Mombasa and get some money.

The application was opposed by Mr. Macharia, the learned counsel for the respondents. He submitted that there was no merit in the intended appeal as the learned Judge had distributed the estate equally.

This application was brought pursuant to the striking out of the previous appeal filed by the applicants herein. In striking out the previous appeal (*Civil Appeal No. 291 of 2004*) this Court stated:-

“The respondent has raised the issue that the record of appeal filed in Court does not include the certified copy of formal Order. Mr. Nyende learned counsel for the appellants stresses that the record was prepared by the appellants in person and it appears from Mr. Nyende’s version that the record was amended to include the certified copy of the Order. This however, was not done on the record filed in Court.

In the circumstances we have no alternative but to strike out the appeal as the missing document is a primary document. Furthermore it appears that the unfiled formal order is an Order and not a decree as it should be. We therefore hereby order that the appeal No. 291 of 2004 be and is hereby struck out with costs to the applicant/respondents.”

That order was made on the 26th April, 2006 which meant the applicants had to begin the appeal process afresh. That is why this application was filed. It is to be assumed that the applicants have now rectified the defects that led to the striking out of the earlier appeal.

It is now settled that in an application of this nature the Court is being asked to exercise its unfettered discretion but like any other judicial discretion, that discretion must be exercised upon reasons. The matters which fall for consideration in determining whether to grant an extension sought are *first the length of the delay, the reason for the delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.*

In *PATEL V. WAWERU AND 2 OTHERS* (2003) KLR 361 at pg. 362-3 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 the application before me, as already observed, the applicant had to start the appeal process afresh after the earlier appeal had been struck out. There was a delay of 14 days but an explanation has been given.

In *MUCHUGI KIRAGU VS. JAMES MUCHUGI KIRAGO AND ANOTHER* – Civil Application No. NAI. 356 of 1996 (unreported) this Court said:-

“Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

In view of the foregoing, I am satisfied that sufficient material has been placed before the Court to enable me exercise my discretion in favour of the applicants. I therefore allow the application and direct that the Notice of Appeal be filed within 7 days from today and the Record of Appeal be lodged and served within 21 days from the date the Notice of Appeal is filed. Costs of this motion shall be in the appeal.

Dated and delivered at Nairobi this 2nd day of February, 2007.

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR