



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appli 6 of 2007

WILLIAM K. TOO APPLICANT

AND

SIMION K. LANGATRESPONDENT

(An application for extension of time within which to lodge and serve the notice of appeal and record of appeal out of time in the intended appeal from judgment and decree from the decision of the High Court of Kenya richo (Mr. Justice Luka Kimaru) dated 3rd November, 2006 in KERICHO H.C.C. NO. 5 OF 2003

RULING

This is an application by Notice of Motion dated 8th January 2007 seeking, in so far as is relevant, the following order:-

“3. That the Honourable court be pleased to extend time within which to lodge and serve the Notice of Appeal and record of Appeal in the intended appeal.”

The applicant is William Too who was represented before me by Mr. Obwatinya and the respondent is Simon K. Langat.

Mr. Obwatinya had included in the motion a prayer No .2 which was for a stay of execution of the judgment intended to be appealed against. He rightly abandoned that prayer as I, sitting as a single judge of appeal, have no jurisdiction to hear an application for stay (see **rule 52 (2)(b)** of the **Court of Appeal Rules.**)

The affidavit in support of the Motion was sworn by the applicant William Too on 8th January 2007.

Paragraphs 6, 7, and 8 of that affidavit appear to be the only paragraphs of any relevance to the application for extension of time. The rest of the affidavit relates to the abandoned application for stay of the judgment of the superior court.

There was also filed an affidavit by Mr. Obwatinya in support of urgency also dated 8th January, 2007. Paragraphs 3, 5 and 6 of this affidavit are as follows:-

3. That judgment was delivered herein on 3rd November 2006 but the same came to my notice on 30th

November 2006.

5. That the applicant has preferred an appeal and hence the need to seek extension of time within which to lodge and serve the notice of appeal and record of appeal in the intended appeal.

6. That I intend to file an appeal against the judgment to the High Court.

There is nothing in these affidavits explaining why the Notice of Appeal was not filed within 14 days of the delivery of judgment other than the statement by Mr. Obwatinya that the judgment was delivered on 3rd November 2006 “*but the same came to my notice on 30th November 2006.*”

There is no explanation as to whether this was because no notice was given to his firm of the delivery date. It could be that he simply did not bother to attend.

Mr. Obwatinya states in one affidavit that the applicant has proffered an appeal and in the other affidavit by Mr. Too it is stated that “*I intend to file an appeal.*”

In considering applications for extension it has been held in many cases that the matters relevant to the exercise of the judge’s unfettered discretion as a single judge are the length of the delay, the reason for the delay, and possibly, the arguability of the intended appeal. See **Leo Sila Mutiso vs. Rose Helen Wangari** Civil Appeal No NAI 255 of 1997.

On the arguability of the appeal all I need to say is that there appear to be issues that are arguable.

As to the reasons for the delay, in my view these have not been adequately explained.

The length of delay sought to be excused by the granting of an extension would appear to start from the delivery of the judgment on 3rd November 2006 and to end on the filing of the current application for extension which application was dated 8th January 2007 which is a period of 66 days.

The intervening Christmas Vacation does need to be taken into account to reduce this period of 66 days.

The Christmas vacation is from 22nd December to 13th January which is about 24 days. If this is then deducted from the 66 days the relevant length of delay is 42 days of six weeks.

A delay of this magnitude without any explanation is, in the circumstances of this case, such that I decline to exercise my unfettered discretion in favour of the applicant for an extension of time.

The application is therefore dismissed with costs.

Dated and delivered at Nakuru this 30th day of March, 2007.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR