



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL
AT NAIROBI**

Civil Appli. Nai 70 of 2007 (UR 49/2007)

NGUGI GITONGAAPPLICANT

AND

ERIC KAGEMA KIGOTHO RESPONDENT

(Application for leave to file and serve notice of appeal out of time in an intended appeal from the order of the High Court of Kenya at Nairobi (Ang’awa, J) dated 12th March, 2007

in

H.C.C. Appeal No. 1105 of 2004)

R U L I N G

I have before me an application by way of notice of motion lodged in the registry on 3rd April 2007 in which the applicant is seeking one main order and that is the order:

“That this Honourable Court do grant the applicant leave to file and serve his notice of appeal out of time against the order of Hon. Mary Ang’awa J. made on 12th February, 2007.”

The applicant is also praying for an order that the costs of and incidental to this application abide the results of the said appeal. The grounds for the same application are as follows:

- “1. That the applicant filed an appeal No. 1105 of 2004 in the High Court.**
- 2. That on 12th February, 2007 the said Appeal was summarily rejected (dismissed).**
- 3. That Knowledge of the said dismissal reached the applicant’s lawyers on 26th March, 2007.**
- 4. That failure to file notice of appeal on time was due to a mistake or default of the High Court Civil Appeal’s registry as they did not promptly communicate with the lawyers for the applicant on the decision of the Judge of the superior court.**
- 5. That the applicant, as demonstrated in the affidavit of support herein, has an arguable**

appeal.”

The genesis of the entire application is the suit that the applicant apparently filed in the Chief Magistrate’s Court at Nairobi, Milimani Courts – Civil Suit No. 13345 of 2003. In that case, the proceedings of which are in the record, though the pleadings were not annexed, the applicant claimed damages from the respondent arising from a road accident which occurred on 26th June 1999 involving the applicant’s vehicle KAC 979Q and the respondent’s vehicle KZJ 303. The respondent denied liability and in turn filed a counter-claim. The learned Senior Principal Magistrate (Mrs. C. Meoli), after hearing the entire suit dismissed the applicant’s claim and allowed the respondent’s counter-claim. She entered judgment for the respondent against the applicant in the sum of Ksh.352,690/= with costs and interest. The applicant felt aggrieved by that judgment. He (through his advocates) filed Civil Appeal No. 1105 of 2004 in the superior court in which he set out four grounds of Appeal against that decision. These grounds were:

- “1. That the learned Magistrate erred in law by failing to find that from evidence on record its (sic) the appellant who had proved his case against the respondent.**
- 2. That the trial Magistrate erred in her reasoning and imported into the suit facts which were not proved by the respondent.**
- 3. That the learned trial Magistrate erred in finding in favour of the respondent when there was absolutely no corroboration of the respondent’s evidence.**
- 4. That the trial Magistrate erred in granting excessive damages.”**

That appeal was placed before the superior court (Ang’awa J.) pursuant to **section 79 B** of the Civil Procedure Act and that court summarily rejected it. The extracted order annexed to the record shows that it was summarily rejected on 12th February 2007. Be that as it may, on 12th March 2007, the Principal Deputy Registrar addressed a letter to Kanyi Koge & Co. Advocates informing the same firm of Advocates who were acting for the applicant that the applicant’s appeal was summarily dismissed. The applicant’s advocates aver that they received that letter on 26th March 2007. There is an advocate’s stamp on the same letter indicating that it was received by them on 26th March 2007. The next day, 27th March 2007, M/s Kanyi Koge & Co. Advocates wrote to the Deputy Registrar, High Court of Kenya stating as follows:

“RE: H.C.CA NO. 1105 OF 2004

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We refer to your letter dated 12th March 2007.

We regret to inform you that we received that letter on 26th March, 2007. We do not understand why that should happen in matters which have orders which affect the parties.

Kindly supply us with the proceedings in the suit.

We undertake to pay the charges.”

That letter was copied to Nyokabi Waiganjo & Co., the respondent’s advocates. On the same day, the applicant’s advocates also wrote another letter to the Deputy Registrar bespeaking a certified copy of the order made on 12th February 2007 for purposes of this appeal. That order was extracted and supplied to the applicant apparently on the same day 27th March 2007. This application was filed on 3rd April 2007. All the above are covered in the affidavit filed in support of this application sworn by Kanyi Gakuya, the learned counsel for the applicant.

The respondent opposed the application and filed a replying affidavit sworn by his learned counsel, Magdalene Nyokabi Waiganjo. In that affidavit, the deponent states that the respondent's advocates received the letter from the Deputy Registrar dated 12th March 2007 on 16th March 2007 and thus she states that the applicant's counsel is not being candid to the court when he states that his firm received that letter on 26th March 2007. In any event, the deponent states that the applicant could have filed a notice of appeal on 26th March 2007, the date he received the letter of summary dismissal from the court. Further, she states that if the applicant's counsel received the order on 26th March 2007, he needed not wait till 3rd April 2007 to file this application. Lastly, she stated in that affidavit that the applicant has not demonstrated that he has an arguable appeal as there is no draft memorandum of appeal annexed to the application and there was no compliance with **section 72 (1) of the Civil Procedure Act Chapter 21, Laws of Kenya** and the application is defective in substance.

Before me both learned counsel relied on their respective affidavits in their submissions and did not address me on any issues of law and indeed did not refer me to any authority.

The application is brought pursuant to **rule 4** of this Court's Rules. The law as to the principles that guide the court when considering such an application are now well settled and there are a myriad authorities on the same. One will suffice and that is this Court's decision in the case of **Leo Sila Mutiso vs. Rose Helen Wangari Mwangi – Civil Application No. Nai. 251 of 1997 (unreported)** in which this Court (Gicheru, Lakha and Bosire, JJ.A) stated, *inter alia*, as follows:

“Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiment or sympathy. It is now well 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; the reason for the delay, (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.”

The above are the guidelines I need to consider in this application. I however must point out that I am in law not limited to only the above. The list of matters to be considered is never exhausted and each case must be considered on its own circumstances.

In this case, the summary dismissal was, according to the order annexed, made on 12th February 2007. That in effect meant that a notice of appeal was to be filed by latest 26th February, 2007. It was not filed then. The delay that is to be explained is the period between 26th February 2007 being the last day when the notice should have been filed and 3rd April 2007 when this application was filed. The period between 26th February 2007 and 12th March 2007 was the period taken by the registry to communicate with the applicant. The applicant cannot be blamed for that delay. The registry wrote a letter to the applicant's counsel on 12th March 2007. The applicant says its counsel got the letter on 26th March 2007. The respondent's counsel challenges that on the basis that she got the same letter on 16th March 2007 and so the applicant's counsel cannot be telling the truth that he got it on 26th March 2007. While that Deputy Registrar's letter was received by Kanyi & Koge Advocates is a matter of fact, that the respondent's counsel got theirs on 16th March 2007 does not necessarily mean that the applicant's counsel also had to receive theirs on the same day. That would, in my view, with respect, be devoid of reason. On my part, I have before me the advocate's stamp on that letter showing that the applicant's advocates received it on 26th March 2007. I also note that the same advocates wrote to the deputy registrar complaining of that lateness in their letter of 27th March 2007. The deputy registrar never responded to that letter and so never denied the allegations. I have to accept that evidence together with the deponement of the applicant's advocate in the supporting affidavit. That the respondent's counsel got that letter ten days earlier is, in my humble view, no evidence that the applicant's counsel also received it that date. The evidence before me which is unchallenged show that that letter was received by the

applicant's counsel on 26th March 2007. That being so, the length of time the applicant made to explain is the time between 26th March 2007 and 3rd April 2007. I take judicial notice that that period according to the callender was composed of about six working days. Mrs. Waiganjo says the applicant should have filed the notice of appeal on 26th March 2007 when he got the letter from the Deputy Registrar informing him of the summary dismissal. In my mind, in so far as we do not know at what time that letter was received on that day, that date is out. It would have been unreasonable to expect the applicant to act so fast. He had not got the extracted order which would have been the official information of the Judge's action. She says further that he could have filed it on 27th March 2007. That would not have made any difference as the filing of the notice of appeal was already late in any event. I do not think the delay between 27th March 2007 when the applicant's counsel got the extracted order and 3rd April 2007 when this application was filed is inordinate. One must accept that the applicant's counsel needed instructions from his client and needed to assemble all the documents and prepare the record. In my mind, the short delay is explained to my satisfaction and in any case, it is not inordinate.

The next matter is whether the intended appeal is arguable. I have seen the memorandum of appeal that was before the superior court and which was summarily dismissed. I have perused the proceedings and judgment in the subordinate court and considering that the superior court was a first appellate court, I cannot say that the intended appeal against the summary dismissal of that appeal in the superior court is frivolous. To decide on whether the intended appeal is arguable the court looks at the whole record even if a draft memorandum of appeal is not annexed.

Lastly, I was not addressed on the issue of prejudice by the learned counsel. However, I see no prejudice to the respondent if this application is allowed so that the notice of appeal is filed.

The above being my view of the matter, I grant this application. The applicant is granted **TEN days** from the date hereof to file and serve a notice of appeal. I make no order as to costs. Order accordingly.

Dated and delivered at Nairobi this 25th day of April, 2007.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR