



REPUBLIC OF KENYA

FESTUS NGOLUA MIBURI..... APPLICANT

AND

ABDALLA CHULLU

UNIFREIGHT CONVEYORS (K) LIMITED RESPONDENTS

(Application for extension of time to lodge record of appeal in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 2nd May, 2002

in

H.C.C.C. NO. 1348 OF 2000

R U L I N G

This is a motion under rule 4 of the Court of Appeal Rules, in which Festus Ngolua Miburi, (the applicant) prays for an order extending the time within which to lodge a record of appeal. The motion which bears the date 17th May 2004, was filed in court on 19th May 2004, almost one year after the expiry of the period within which the record of appeal should have been filed.

In his affidavit in support of the aforesaid motion the applicant gave three reasons for his failure to take the essential step of lodging a record of appeal, namely lack of funds, sickness and being fully occupied as “a witness in the investigations and hearing of the Tribunal appointed to investigate the conduct of judges, particularly the Honourable Justice Waki (as he then was)”.

In an application under rule 4, aforesaid, the court exercises discretionary jurisdiction and is guided by principles which have evolved over time. Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997, summaries those principles thus:

“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; 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.”

The applicant intends to appeal against the quantum of damages awarded to him by the superior court (Ang'awa, J.) in a damages case. The decision of the superior court was given on 2nd May 2002. The applicant filed a Notice of Appeal timeously, and applied for copies of proceedings and judgment within the 30 days stipulated in the Rules of this Court, and when he collected the same on 2nd May 2003 a

certificate of delay dated 15th May 2003, was prepared, but was not collected until about 3rd July 2003. The time certified therein as necessary for the preparation and delivery to the applicant of copies of proceedings was from 15th May 2002 to 2nd May 2003, a total of 334 days.

By dint of the proviso to rule 81 of the Court of Appeal Rules, the time between 15th May 2002 and 2nd May 2003, is normally excluded from computation of the time for lodging a record of appeal.

According to the record time ran from 3rd May 2002 to 14th May 2002, a total of eleven days. Copies of proceedings were supplied on 2nd May 2003. So the period between 14th May 2002 and 2nd May 2003, is excluded from computation. So time resumed running from 3rd May 2003. By end of May 2003, there were a total of 40 days. If one adds twenty more days to bring the total to sixty days, we come to 20th June 2003, as the last day the record of appeal should have been filed. Even if we were to exclude the eleven days of May 2002, the last day the appeal should have been filed was 2nd July, 2003, but it wasn't.

In paragraph 12 of the supporting affidavit the applicant depones that in or about May 2003 his then advocates requested for funds from him to enable them prepare and file a record of appeal. He was unable to raise the money in time because, as he has deponed, he was unemployed and was *“heavily involved as a key witness in the investigations and subsequent hearing by the Tribunal appointed to investigate the conduct of Judges, particularly the Honourable Justice Waki (as he then was) as a result of which I could not pursue the intended appeal.”*

If I pause there for a moment, it would appear to me that the main reason why the record of appeal was not filed in time is because the applicant got his priorities wrong. He became engrossed in proceedings before a Judicial Tribunal and paid little if any attention to his intended appeal. He was able to borrow money to meet expenses for preparing copies of proceedings and judgment, and he has not stated that he tried to borrow further but was not as lucky as before. Lack of funds, in the circumstances of this matter, is clearly not a good enough reason. Besides, the applicant did not move the court for leave to sue as a pauper. The law does seem to recognize the fact that some litigants may not be able to raise funds to pursue their legal rights. He was represented by counsel who promptly notified him of the need to furnish funds for his intended appeal. He did not address his mind to the issue as he says, until after he had finalized his evidence before the Judicial Tribunal investigating the conduct of certain Judges. This is what he has deposed on that:

“15. That it was only after I finished giving evidence at the said tribunal that I was able to obtain funds from friends and I am now ready and able to pay for the filing of the Record of Appeal”

It should be noted that judicial proceedings have a timetable, which timetable can only be upset where compelling reasons exist. It does not depend on what each litigant regards as his priorities. The applicant has not stated why he could not borrow money earlier and leave his advocates to proceed with the preparation of the record of appeal in his absence.

The length of the delay is inordinate, and has not been fully explained. The applicant did not consider his intended appeal as a priority issue and I am not inclined to exercise my discretion in his favour. It is even clear from his own affidavits that his alleged sickness, apart from incapacitating him from getting gainful employment, did not directly deter him from taking the essential step of lodging a record of appeal.

In the result I decline to exercise my unfettered judicial discretion in favour of the applicant and dismiss his application but with no order as to costs, as the respondents though served, neither filed any replying affidavit nor attended the hearing of the motion. Order accordingly.

Dated and delivered at Nairobi this 20th day of April, 2007

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR