



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**Civil Appli 317 of 2006 (NYR 16/06)**

**JOHNSON KABAKA M'TURUCHIU .....1<sup>ST</sup> APPLICANT**

**JUSTUS MWONGERA M'TURUCHIU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SOLOMON KIRIMI M'NJAU ..... 1<sup>ST</sup> RESPONDENT**

**M'MARETE M'NJAU ..... 2<sup>ND</sup> RESPONDENT**

**JEREMIAH MUGAMBI ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH NTEERE NJAU ..... 4<sup>TH</sup> RESPONDENT**

**PETER KIRIGIA NJAU ..... 5<sup>TH</sup> RESPONDENT**

*(An application for extension of time to file and serve a notice of appeal and a record of appeal out of time in an intended appeal from the order of the High Court of Kenya Nakuru (Onyancha, J) dated 30<sup>th</sup> November, 2004*

**In**

**H.C. Succession Cause No. 36 of 1983)**

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**RULING**

This being a motion under Rule 4 of the Court’s Rules, I have an unfettered discretion to extend or not extend the time as I am being requested to do by the two applicants Johnson Kabaka M’Turuchiu and Justus Mwongera M’Turuchiu who would appear to be brothers. Of course, the wide discretion conferred on a single judge by Rule 4 is to be exercised, not on caprice, not on like or dislike, not on sympathy but on reason based on time-tested principles established by the Court itself. But in the exercise of the jurisdiction, a single judge is entitled to take into account any matter relevant to the exercise of the discretion and in **MWANGI VS. KENYA AIRWAYS LIMITED**, [2003] KLR 48, the Court, having set out four matters which a single judge should take into account when exercising the discretion under **Rule 4** went on to hold that:-

**“The list of factors a court would take into account in deciding whether or not to grant an extension**

**of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”**

The important point being made in this passage is that apart from the length of the delay, the reason for the delay, the possible consideration of the chance of the appeal succeeding and the degree of prejudice to a respondent if time is extended, a single judge is perfectly entitled to consider any other factor outside these four, so long as that other factor is relevant to the matter at hand.

The decision the two applicants intend to appeal against was delivered by Onyancha, J. on 30<sup>th</sup> November, 2004. The applicants were not satisfied with the decision and I understand they required leave of the Judge to enable them appeal to this Court. Such leave was obtained on 31<sup>st</sup> October, 2005 and on 17<sup>th</sup> November, 2005 a notice of appeal was lodged in the High Court of Kenya at Meru. **Rule 74(4)**, however, provides that:-

**“When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”**

So that even if the applicants were seeking leave of the learned Judge to enable them appeal to this Court, that did not prevent them from filing a notice of appeal which should have been filed around 14<sup>th</sup> or 15<sup>th</sup> December, 2004. When I asked Mr. Ringera, learned counsel for the applicants, why the notice of appeal was not filed until 17<sup>th</sup> November, 2005, his answer was that as laymen the applicants were not aware of the provisions of **Rule 74 (4)**. They, however, appear to have been perfectly aware that they required the leave of the Judge to enable them appeal and even after getting that leave on 31<sup>st</sup> October, 2005, they did not lodge the notice of appeal until 17<sup>th</sup> November, 2005.

Having lodged their notice of appeal on 17<sup>th</sup> November, 2005, the applicants were required to lodge their record of appeal within sixty days from that date. Upto now, no such record has been lodged and apart from asking me to extend time for lodging the notice of appeal they also ask me to extend time for lodging the record of appeal. This motion in which they ask me to make the extensions was itself lodged in this Court on 2<sup>nd</sup> October, 2006, nearly one year from the date when the notice of appeal was lodged in Court. What is the explanation for that delay? Listen to what Johnson Kabaka M’Turuchiu, the 1st applicant says on behalf of his co-applicant:-

**“6 THAT we were unable to lodge an appeal within the stipulated time due to financial constraint.**

**7. THAT in a bid to raise funds for filing the appeal we organized a fundraising meeting which was scheduled for 18<sup>th</sup> March, 2006 – annexed and marked JKMV is a copy of the invitation.**

**8. THAT we managed to raise a modest sum to meet court filing fees and incidental costs.**

**9. THAT the said period lapsed while we were looking for funds and I believe that the said delay is excusable.**

**10. THAT we are now ready to file the appeal if we are allowed to do so.”**

**In FRANCIS MWAI KARANI VS. ROBERT MWAI KARANI**, Civil Application No. NAI 246 of 2006 (unreported) a decision delivered by me on 11<sup>th</sup> May, 2007, I extended time for the applicant therein and there the applicant had sworn as follows:-

**“5. THAT time to file the appeal will elapse on 30<sup>th</sup> day of August, 2006 and I have not been able to raise the filing fee for the appeal.**

**6. THAT I humbly request this Honourable Court to enlarge time to enable me file my appeal, which has high chances of success.**

**7. THAT it is not my wish to be late in filing my appeal but because of financial constraints since I have children in school who need fees.”**

In extending time for **KARANI**, I took into account the fact that the motion for extension of time was lodged one day after time lapsed while the supporting affidavit was itself sworn a day before time expired. In granting leave, I said:-

**“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot be and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well-known one that lack of financial resources is generally not a basis for extending time.”**

The factor which weighed with me in that application was that **KARANI** did not sit and wait for over one year as these applicants have done, but moved to the Court a day after time for appealing had lapsed.

That is not the position with these applicants. They knew that time was running against them but that did not seem to bother them much. They had filed their notice of appeal late on 17<sup>th</sup> November, 2005 and they were still planning for a meeting to raise funds on 18<sup>th</sup> March, 2006 nearly five months from the date they lodged their notice of appeal. I suppose they held their fund-raising meeting as scheduled but once again, they did not come to Court until 2<sup>nd</sup> October, 2006, some six or so months from the date of the fund-raising. These lengthy delays are, in my view, not explained to my satisfaction.

And why is lack of resources not generally a reason for extending time?

The answer lies in **Rule 112** of the Rules which is in these terms:-

**“If in any appeal from a superior court in its original or appellate jurisdiction in any civil case the Court is satisfied on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the court may by order direct that the appeal may be lodged –**

**(a) without prior payment of fees of Court, or upon payment of any specified amount less required fees;**

**(b) without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 104, and may order that the record of appeal be prepared by the registrar of the superior court without payment therefor or on payment of any specified sum less than the fee set out in the second schedule, conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or property he may recover in or in consequence of the appeal.”**

This rule provides for parties who consider themselves too poor to afford filing fees and such like things and if they satisfy the Court that they cannot raise the necessary fees or part of it or the security for costs or part of it and the Court is of the view that the intended appeal is not without reasonable chances of success, either the whole fees or the whole of the security for costs or parts of them can be waived and the record of appeal will be prepared by the registrar of the superior court without requiring payment of the charges therefor.

Onyango Otieno, J.A dealt with the same situation in the case of **JOSEPH MAINA NJOROGE & TWO OTHERS VS. PAUL CHEGE MUHAHI**, Civil Application No. NAI 316 of 2006 (unreported). There it was sworn that:-

**“The applicants were in dire financial strains for over two years and were thus unable to raise fees for filing their appeal on time.”**

In rejecting that application, the learned single Judge remarked as follows:-

**“In this case, the applicants hired a firm of advocates. Paragraph 4 of their affidavit clearly states that on 26<sup>th</sup> November, 2004, they instructed Muthui Kimani, Advocates to file notice of appeal, and that was done. Thereafter there is no evidence as to what they or their advocate did in furtherance of their urge to proceed with the appeal till one year and eleven months later. There is no evidence that they applied for proceedings, and obtained the same. There is no evidence that they made any attempt to seek funds for the appeal or that failing the same they filed the appeal in person. Rule 112 of the Court’s Rules is very clear. It provides precisely for a situation such as the applicants allege they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the Court to lodge the same appeal without payment of such fees or security.**

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The learned single Judge then reverts to my remarks in KARANI VS. KARANI (supra) and continues:-

**“Such a situation is already provided for in our laws by way of Rule 112 of this Court’s Rules. I do not accept the applicants’ explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”**

While I entirely agree with the reasoning of the learned Judge, I would, nevertheless, add that the presence of **Rule 112** does not bar a single Judge from considering the circumstances under which the issue of lack of funds arises and how a particular applicant has dealt with the issue (i.e. of lack of funds). That is what I did in KARANI VS. KARANI, supra. The present applicants do not come anywhere near the circumstances in KARANI VS. KARANI. They have been late at every stage of the proceedings and like in the case of JOSEPH MAINA NJOROGUE & 2 OTHERS VS. PAUL CHEGE MUHAHI, (supra) the applicants made no attempt at all to avail themselves of the provisions of **Rule 112**.

I am aware that the matter involves land. But I am equally aware that there have been previous decisions of subordinate courts and the High Court on the subject matter and with respect to Mr. Ringera, the applicants might have to have those decisions set aside before they can stand a reasonable prospect of succeeding in their intended appeal. It is unreasonable to think that by a side-wind, those previous decisions might be over-turned in the intended appeal.

My final view on the matter is that the notice of motion dated 14<sup>th</sup> September, 2006 and lodged in this Court on 2<sup>nd</sup> October, 2006 must fail. I order that it be and is hereby dismissed with the costs thereof to the respondents. Those shall be my orders.

Dated and delivered at Nyeri this 16<sup>th</sup> Day of May, 2007.

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**