



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPLI 291 OF 2006 (KSM 56/06)

SIUMA JACOB MUKALAMA.....APPLICANT

AND

1. THE CHAIRMAN MALAVA LAND DISPUTES TRIBUNAL

2. DANIEL MUSAMALA MUKALA

3. LOICE WANYITIKHA MUKALAMA.....RESPONDENTS

(An application for extension of time within which to lodge Notice and Record of Appeal out of time from the ruling of the High Court of Kenya

kamega (Kariuki, J) dated 5th May, 2006

in

H.C. MISC. APPL. NO. 112 OF 2001)

RULING

This is an application by Siuma Jacob Mukalama (the applicant) under rule 4 of the Court of Appeal Rules (the Rules) seeking an extension of time to file and serve a Notice of Appeal and Record of Appeal out of time.

There was also a prayer in the motion that service of the notice of appeal on the 2nd respondent Daniel Musamala Mukalama be dispensed with. In the affidavit in support of the motion sworn by the applicant, there is paragraph 3 stating:-

“That service upon the first respondent be suspended(sic) as they never took part in the proceedings in the superior court.”

Mr W. Athung’a, learned counsel for the applicant, in his submissions in support of the application agreed that the length of delay sought to be excused was about five months from 5th May 2006 to 5th October 2006. His explanation for that delay, which he described as not inordinate, was that it was necessary for an application to be made to allow new counsel to come on record. The reason for the

necessity of change was not stated by Mr Athung'a who was the new counsel, during his submissions. In the affidavit in support of the application the applicant deponed that he did instruct his original advocates on record to appeal against the decision. No date is given for this instruction. The applicant then stated in the affidavit that his then advocates did not file the Notice of Appeal in accordance with these instructions. Again there is no date given for the decision to change advocates. The applicant does say that the time for filing the Notice of Appeal had expired at the time when he instructed the present advocates for the appellant namely M/s Athung'a & Co. It follows that the new advocates were instructed sometime, not identified after, 19th May 2006.

The application for extension of time was filed on 4th October 2006. I am of the view that the evidence as to why the application was not filed much earlier than it was has not been adequately explained by the applicant.

It would have been expected of the new advocates to have acted speedily to file the application for extension.

In the much cited well known case of **Leo Sila Mutiso v Rose Helen Wangari Mwangi Civil Application No Nai 255 of 1997 (unreported)** this Court Stated:-

“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 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 present case before me the length of delay was about five months which in this context is a substantial period within which to take the simple step of giving notice of appeal as a preliminary to the reasons for the delay as outlined above are not in my view at all convincing. The factor of the chances of the appeal succeeding which may possibly be taken into account in the exercise of my discretion was covered in the supporting affidavit of the applicant dated 4th October 2006 in paragraph 9 which states:-

“That my intended appeal has overwhelming chances of success, annexed hereto and marked SJM3 is a photostat copy of the draft memorandum of appeal.”

The ruling, intended to be the subject of appeal delivered by G.B.M. Kariuki J. on 5th May 2006, arose out of a Notice of Motion dated 11th January 2002 seeking an order of certiorari to quash the decision of Kabras Land Disputes Tribunal in respect of three pieces of land.

The learned Judge, in the said ruling struck out the grounds of opposition which had been relied on by the applicant herein before the learned Judge. Having struck out the grounds of opposition as being inappropriate in Judicial Review proceedings and in the absence of a statement and affidavit verifying the statement in accordance with **Order LIII** the learned Judge treated the application as being unopposed and dismissed it. The result was that the decision of the Tribunal stood.

I have considered all of the above factors in the process of the exercise of my unfettered discretion and have decided that the application for extension of time should be dismissed with costs.

It is hereby so ordered.

Dated and delivered at Kisumu this 13th day of June 2007.

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR