



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 98 of 2005

NGÁNGÁ KINUTHIAAPPLICANT

AND

JOHN KAMBO NGUGIRESPONDENT

(An application for leave to file an application for reinstatement of Civil Appeal

No. 144 of 1997 in the High Court of Kenya Nairobi (Mr. Justice Shield) dated

17th January, 1994 In H.C.C.C. NO. 2224 OF 1980)

R U L I N G

This is an application by *Ngángá Kinuthia* in person by Notice of Motion dated and lodged on 18th April, 2005 seeking the following orders:-

- 1. That leave be granted to file an application for reinstatement of Civil Appeal No. 144/97 dismissed on 30th November 1998 for non-appearance of the applicant or his counsel.*
- 2. That the costs of this application be provided for.*

The application was supported by an affidavit sworn by *Ngángá Kinuthia* on 12th April 2005 in which he sets out the facts upon which he relies in support of the application as follows:-

“1. That I am the appellant in Civil Appeal No. 144/97 of this Honourable Court and therefore competent to swear this affidavit.

2. That my said appeal was filed by my advocate Martha Oiye on 27th June 1997.

3. That after waiting for more than a year without hearing anything about my said appeal, I approached my said advocate to find out the position.

4. That sometimes in the month of November 1998 I was informed by my said advocate Martha Oiye which information I verily believed to be true that my said appeal had been listed for hearing on 30th November, 1998 but the same has been taken out by consent for reasons beyond her control.

5. That further to the said information, my said advocate supplied me with a copy of the consent letter

for adjournment duly signed by both advocates for the appellant and respondent and upon verifying the same I found it was filed in the Court of Appeal registry on 26th November 1998 as shown by the Court rubber stamp thereon. (A copy of the same is annexed herein and marked N.K.1)

6. That since the year 1999 to 2001, she kept on telling me to wait for her letter of informing me the hearing date of the appeal after the same is listed for hearing by the Court of Appeal for hearing.

7. That sometimes in the year 2002 after waiting for the letter of informing me of the hearing date in vain, I decided to enquire the same from the offices of my said advocate situated in Agip House Nairobi. I was surprised to find the office closed and upon enquiring from her neighbours, I was informed that my said advocate Martha Oiyee was forced to close her office by the Law Society of Kenya on disciplinary action.

8. That from then on, I kept trying to trace my said advocate to get my appeal file but was not successful until 21st February 2005 when I decided to request the Deputy Registrar of the Court of Appeal to supply me a copy of the memorandum of appeal and the judgment of the superior court to enable me to proceed with further actions in my said appeal (a copy of the letter for the request is annexed herewith and marked N.K.11).

9. That when I appeared at the Court of Appeal registry on 24th February 2005, I was informed that there was an order dated 30th November 1998 for dismissed of my appeal for non-attendance on the said date.

10. I was very much surprised as this is the first time I came to know that my appeal had already been dismissed and my advocate Martha Oiyee refused to disclose it to me.

11. That a copy of the supplementary of the records of the appeal was made available to me on 24th March, 2005.

12. That I could not make this application for leave to file application for setting aside ex-parte judgment as I was informed in the Court registry that the Court of Appeal was on Easter vacation.

13. That had my advocate disclosed that my appeal had been dismissed within the allowed time for filing application for setting aside ex-parte judgment. I verily could have filed the same as the appeal was not dismissed due to a fault from me.

14. That I believe I have got good grounds in succeeding in the said appeal.

15. That I therefore pray for this Honourable Court to grant me leave to file my application for setting the ex-parte judgment dated 30th November 1998 out of time.”

The Notice of Motion stated in its heading that the application for leave to file an application for reinstatement of the Civil Appeal No. 144/97 was made under rule 4 of the Court of Appeal Rules (“the Rules”) which is in the following terms:-

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules or by any decision of the Court or of a superior court, for the doing of any act authorised or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The application before me appears to me to raise the following issues.

1. Do I as a single Judge of Appeal have jurisdiction to hear and determine an application to grant leave to the applicant to file an application in the Court of Appeal to “reinstate” an appeal which has been dismissed by this Court more than eight years ago?

I appreciate that I, as a single Judge, am not being now required to decide whether or not the dismissed appeal should be re-instated. I am merely required to grant or decline to grant, leave to the applicant to file an application to re-instate the dismissed appeal.

This then raises the issue whether the relief sought by the applicant is relief that falls within the ambit of *rule 4* which is the rule relied upon in the Notice of Motion. That rule empowers the Court to extend the time limited by the Rulesfor the doing of any act authorised or required by the Rules.

The application before me is not in my view an application to extend time: it is an application for leave to make an application to re-instate an appeal which, for whatever reason, has been dismissed.

This then raises the issue whether an appeal which has been dismissed in contradistinction to being set aside can ever be replaced by a fresh appeal in respect of which an extension of time to file has been granted.

The documents before me do not include any information as to the facts involved in the litigation leading up to the dismissed appeal which factual background might have been of some significance.

Mr. Mwihia learned counsel for the respondent wrote to the Deputy Registrar Court of Appeal (sic) on 25th April 2007 upon receipt of the Hearing Notice for the application informing the Court that the respondent, John Kombo Ngugi passed away in 2005. Mr. Mwihia informed me that he has received no instructions from any representative of the deceased's estate and therefore did not wish to be served with any further documents in relation to this matter.

In view of all of the above, I have come to the conclusion that, in so far as any leave to file an application for re-instatement of Civil Appeal No. 144 of 1997 is required, as to which I am not convinced, leave is hereby granted.

Dated and delivered at Nairobi this 27th day of July, 2007.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR