



IN THE COURT OF APPEAL OF KENYA

AT NAKURU

CIVIL APPLI 124 OF 2006

ECHFAN MWARIRI KAMAU APPLICANT

AND

JAMES TOBIAS OKONJO

JOSEPH ODINGO

AGOLA

KENYA COMMERCIAL BANK.....RESPONDENTS

(An application for extension of time to file and serve a Notice of Appeal arising from a ruling of the High Court of Kenya Nakuru (Mr. Justice D. Musinga) dated 30th September, 2005 H.C.C.C. NO. 64 OF 2003)

RULING OF THE COURT:

Echfan Mwariri Kamau, the applicant herein, had asked a single member of this Court

“.....to extend time within which the Notice of Appeal may be filed and served”

and that

“consequently the appellant be allowed to challenge the judgment on (sic) delivered by Justice Musinga in High Court Appeal No. 64 of 2003”.

This motion was heard by Githinji, JA and by his Ruling dated and delivered at Nakuru on 28th September, 2006, the learned single Judge dismissed the application for extension of time. Of course, the applicant appears to have always been not represented - he addressed us for some considerable time on his own - and it is obviously difficult for him to understand why the learned single Judge refused to extend the time for him. Unfortunately for the applicant we are ourselves satisfied that the learned single Judge was bound to dismiss the application for extension of time.

The applicant had previously filed a notice of appeal on 21st October, 2005. The applicant himself

thought there was something wrong with that notice and having obtained the concurrence of the other parties the applicant withdrew the notice of appeal on 15th December, 2005. Thereafter, nothing was heard from the applicant until 22nd April, 2006, some five months later, when he filed the present motion. The affidavit in support of the motion was brief. It stated thus:-

1. *THAT, I am applicant herein hence competent to swear this affidavit.*
2. *THAT, I am applying for extension to file and serve Notice of Appeal arising from Nakuru High Court Appeal No. 64 of 2003 by Justice D. Kimaru whereby the said Appeal was dismissed.*
3. *THAT I timeously filed notice of appeal on 17th October, 2005 whereby I noticed topographical (sic) error and rectified using pen. Annexed herewith is said Notice of Appeal marked "EMK1."*
4. *THAT I have learnt that the said Notice of Appeal is incompetent because of alteration.*
5. *THAT I filed notice of intention to withdraw Notice of Appeal dated 17th October, 2005. Annexed herewith is Notice of Intention to withdraw Notice of Appeal marked "EMK2."*
6. *THAT I further sought consent to withdraw the said Notice of Appeal from the respondents which annexed herewith marked "EMK3."*
7. *THAT the mistake made by me was not intentional and it is in the interest of Justice that the prayers for extension of time be granted.*
8. *THAT I swear this affidavit in support of this application.*
9. *THAT whatever is deponed to herein above is true to the best of my knowledge, information and belief."*

It is abundantly clear from this affidavit that the applicant thought all he was required to do was to explain to the single Judge why he (i.e. the applicant) had withdrawn his previous notice of appeal. That was obviously wrong. The notice of appeal was withdrawn by the consent document dated 15th December, 2005. The present motion was brought nearly five months later and the applicant offered not a word in explanation for the period between the 15th December, 2005 and the 22nd April, 2006. In those circumstances, it is not surprising that the learned single Judge held that:-

"..... the applicant has not explained the delay of about 5 months in filing the application, which is inordinate having regard to the fact that an application for extension of time is a simple application which can be prepared and lodged within a few days."

Add to this conclusion the other legal difficulties set out in the Ruling of the single Judge and which would face the applicant in his intended appeal, and we are, like the learned single Judge, satisfied that the motion for extension of time was for dismissal and was rightly dismissed. There is accordingly no basis upon which we can interfere with the learned Judge's exercise of discretion. This reference fails and we order that it be and is hereby dismissed with costs to the 1st and 3rd respondents.

Dated and delivered at Nakuru this 28th day of September, 2007.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR