



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appli 93 of 2007

MUSA KIPKORIRI ARAP BARINGILA.....APPLICANT

AND

MANSOOR NANDLAL.....RESPONDENT

**(An application for extension of time to lodge and serve record of appeal out of time
from the ruling of the High Court of Kenya Kericho (Kimaru, J) dated 21st July 2005**

In

H.C.C. P & A 12 OF 2004)

RULING

This is an application for extension of time brought under Rule 4 of the Court of Appeal Rules. The applicant Musa Kipkorir Arap Baringila seeks orders that this Court do extend time within which to lodge and serve the record of appeal out of time. The application is supported by the grounds set out in the body of the application. It is also supported by a long affidavit running into 27 paragraphs.

In his submissions before me, Mr. Njiraini the learned counsel for the applicant has given elaborate explanation as to what led to the delay. He also touched on the issue of the applicable law and faulted the learned Judge of the superior court in applying the Law of Succession Act (Cap 160 Laws of Kenya) when the applicable law should have been Moslem law. Mr Njiraini did this in a bid to show that the intended appeal had high chances of success. The reasons given for the delay were that the applicant's former advocate resigned from his previous firm without informing the applicant who also fell sick. Medical reports have been produced to confirm the applicant's state of health.

Mr Mbeche the learned counsel for the respondent has opposed the application mainly on the ground that there has been inordinate delay which has not been explained. He also pointed out that the medical reports produced were obtained in 2006 which would not explain what the applicant was doing before then. It was Mr. Mbeche's contention that the application has not been brought in good faith.

I have now considered the material placed before me by both sides and the submissions by counsel appearing. As it has been stated on many occasions **Rule 4** of this Court's Rules (under which the current application was brought) gives this Court unfettered discretion in granting or refusing to extend time. In **Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 Others [2003] KLR 733** the case of **Muchugi Kirigo v James Muchugi Kirigu & Another – Civil App. NO NAI. 356 OF 1996** was cited in which this Court stated in regards its discretion under **Rule 4:**

“Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal, is as is well known unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and that his opponent was prejudiced by it”

In the present application it has been shown that the dispute relates to the succession of the estate of one Manikil who was a Moslem. The applicant and the respondent are also Moslems. The main issue in the intended appeal will be what law would be applied in this dispute. I would not wish to express any view on this matter at this stage but suffice it to say that the intended appeal raises an arguable point.

There is then the question of conditions that must be satisfied in order to grant a stay. These were stated in **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI** – Civil application No NAI 251 of 1997 (unreported) as follows:-

“It is now well settled that the decision whether or not to extend 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”.

Bearing the above in mind, it is to be noted that there was a delay of about two years. This is certainly inordinate delay by any standards. Has this delay been explained? According to the applicant and his counsel “the delay was caused by change of advocates as the previous advocate resigned from his firm without informing the applicant. And to make the matters worse the applicant fell sick. I have considered the explanation given for the delay and in view of the medical reports produced it cannot be denied that the applicant has been and is sick. We have already considered the chances of the intended appeal succeeding. All I can say is that such an appeal would not be frivolous as it is arguable.

The estate is still intact and hence the respondent would not be prejudiced.

My evaluation of this matter is that the applicant indicated his intention to appeal right from the beginning when a notice of appeal was filed. The parties have been in Court seeking various reliefs. The applicant was somehow abandoned by his previous advocate. As if that was not enough, the applicant fell sick. Taking all these circumstances into account, I am satisfied that this is a proper case in which to exercise my discretion in favour of the applicant.

In view of the foregoing, this application is allowed and the applicant is to lodge and serve the record of appeal within 30 days from the date hereof. Costs of this application shall be in the intended appeal.

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

E. O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR