



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION 124 OF 2007

KINORO TEA FACTORY.....APPELLANT

AND

LAWRENCE GITONGA

JAMES MUTIRIA

SYLVIA NJUE MUTIRIA.....RESPONDENTS

(Application for extension of time within which to lodge the Record of Appeal in the intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ang'awa, J) dated 2nd November, 2005 In H.C.C.C. NO. 1153 OF 2002)

RULING

Before me is an application by way of Notice of Motion brought under *Rule 4* of the Court of Appeal Rules (the Rules) in which the applicant *KINORO TEA FACTORY LIMITED* seeks the following orders:-

- “1. The time for lodging and serving the Notice of Appeal and Record of Appeal in the intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi [the Hon. Lady Justice M. Ang’awa] dated 2nd November, 2005 in HCCC No. 1153 of 2002 be extended.*
- 2. The time within which the said Notice of Appeal and Record of Appeal are to be lodged and served be stated.*
- 3. The costs of this Application be provided for.”*

This application is brought on the following grounds:-

- “a. the record of appeal filed by the applicant on 9th June, 2006 was struck out on 1st February, 2007.*
- b. The applicant had hitherto filed an application for extension of time being Civil Application No. Nai. 26 of 2007 dated 9th February, 2007 which its lawyer had to withdraw on 23rd May, 2007 when it came up for hearing as it became manifest that the omission in failing to seek extension of time for filing a Notice of Appeal rendered that application futile.*

- c. *The applicant is still desirous of pursuing the intended appeal which raises important issues of law, has high chances of success and involves a substantial amount of money.*
- d. *This application has been brought without undue delay and the granting of the orders sought herein will not cause any prejudice to the respondents not remediable by costs.*
- e. *It is fair and just that the time for filing the Notice of Appeal and Record of Appeal be extended.”*

There is then a supporting affidavit sworn by *Timothy Wamiti* who is the counsel on record for the applicant. In that supporting affidavit *Mr. Wamiti* gives a detailed explanation as to what led to the delay.

The application which came up for hearing before me on 17th October, 2007 generated very strong arguments from both sides backed with relevant authorities *Mr. Timothy Wamiti* appeared for the applicant while *Mr. Nelson Kaburu* appeared for the respondents.

In his submission *Mr. Wamiti* stated that he was relying on the grounds set out of the application and on his own affidavit. It was his contention that there had been no delay as the application was brought ten days after an earlier application was withdrawn. He went on to elaborate that the first appeal had been struck out on the ground that certain primary documents had been excluded from the record of appeal, which in his view ought not be visited on the litigant as the mistake was by counsel. Finally, *Mr. Wamiti* referred me to the draft Memorandum of Appeal stating that the respondent will not be prejudiced if the court granted the application.

The application was vehemently opposed by *Mr. Kaburu* who started his submission by telling me that litigation must have an end. He reminded me that the litigation arose out of an accident which occurred in the year 2000 and since then the respondents have not got the fruit of this litigation. *Mr. Kaburu* contended that the mistakes leading to striking out the appeal were as a result of misreading of the rules of the court which in his view was designed to delay the matter.

Mr. Kaburu was of the view that the intended appeal was frivolous and for that reason the applicant should not be overburdened by false hopes.

As I have already stated each counsel relied on relevant authorities.

It is now settled that an application under *rule 4* of the Rules, a single Judge of this Court is called upon to exercise his unfettered discretion, but like any other judicial discretion that discretion must be exercised upon reasons. The matters to be considered whether to grant an extension of time are first the length of delay, the reason for the delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In *PATEL V. WAWERU AND 2 OTHERS* (2003) KLR 361 at pp. 362-3 this Court had the following to say in respect of *rule 4* of the Rules:-

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason of what was clearly an inordinate delay. How does a single Judge exercise his discretion? In LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI – Civil Application No. NAI. 251 of 1997 this Court stated:-

“It is now 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.”

I must be guided by the foregoing principles. What are the facts leading to this application? It is not in dispute that the ruling of the superior court to be appealed from was delivered on 2nd November, 2005. The applicant, through its counsel expressed its desire to appeal against that ruling. A notice of appeal was filed followed by a record of appeal. The appeal was filed in this Court on 9th June, 2006. However, before that appeal could proceed to hearing it was struck out on 1st February, 2007 by the order of this Court which stated:-

“Learned counsel for the appellant Mr. Timothy Wamiti concedes that the appeal filed on the 9th June, 2006 should be struck out on some of the grounds laid out in the notice of motion taken out by the respondents dated 22nd June, 2006 and filed on 6th July, 2006. In the event, we order that the appeal be and is hereby struck out. Costs of the application and of the main appeal to the respondents.”

In view of the foregoing order of this Court the applicant had to start the appeal process afresh. Hence an application for extension of time being *Civil Application No. Nai. 26 of 2007* dated 9th February, 2007 was filed. It is important to note that the applicant’s counsel filed that application soon after the earlier appeal had been struck out. That *Civil Application No. Nai. 26 of 2007* was withdrawn on 23rd May, 2007 when I made the following order:-

“Mr. Wamiti the learned counsel for the applicant seeks to withdraw this application. Mr. Kaburu, the learned counsel for the respondent, asks me to strike out the application.

In my view the order that commends itself to me is that this application be withdrawn with costs to the respondents. It is so ordered.”

One week after the foregoing order the present application was filed in this Court on 31st May, 2007. The delay that is to be considered is the period from the time the first appeal was struck out to the time the application for extension of time was filed. It is appreciated that in this current application an earlier application was withdrawn but nevertheless the applicant moved with haste when this application was filed. *Mr. Kaburu’s* submission as regards the merits of the intended appeal may be relevant but what is before me is an application for extension of time pursuant to *rule 4* of the Rules. I agree that in some instances the intended appeal would appear clearly hopeless and in such cases granting an extension would be giving the applicant what could be described as false hopes – see *AMINA MOHAMED & ANOTHER VS. JACKSON GEOFFREY MWAWAZA AND OTHERS* – *Civil Appl. No. Nai. 192 Of 1999* (unreported).

In *KUWINDA RURINJA & COMPANY LIMITED V. KWINDA HOLDINGS LIMITED & OTHERS* – *Civil Application No. Nai. 243 Of 1998* (unreported) this Court said:-

“In the present reference it is to be noted that the appeal was struck out on 29th September, 1998 and the application for extension of time was filed on 16th October, 1998 – within a period of two weeks. Clearly there was no delay in filing that application for extension of time. We would observe that since the applicant had already been penalized for its counsel’s mistake by the entire appeal being struck out what the learned single Judge ought to have done was to consider whether there was inordinate delay from the time the application for extension of time was filed.”

In that case (*Kuwinda Rurinja*) this Court said further that:-

“With respect to the learned Judge, we are of the view that the learned single Judge did not consider the events which took place after the striking out of the appeal but went into the merits of the intended appeal, and in his zeal to bring this litigation to an end almost determined the intended appeal. This was a misdirection which resulted in his improper exercise of his discretion the consequence of which is an injustice to the applicant.”

The foregoing passages clearly answer *Mr. Kaburu’s* submissions and as there could be no

question of inordinate delay in bringing this application it must follow that I have to exercise my discretion in favour of the applicant.

In view of the foregoing this application is allowed and the applicant is to file and serve a notice of appeal within seven (7) days from the date hereof and lodge and serve the record of appeal within thirty (30) days from the time the notice of appeal is filed. I further order that the costs of this application which I assess at Shs.10,000/= to the respondents within 30 days in default execution to issue.

DATED and DELIVERED at NAIROBI this 26th day of OCTOBER, 2007.

E.O. O’KUBASU

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JUDGE OF APEPAL

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

DEPUTY REGISTRAR