



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPLI Nai 303 OF 2005

JERUSHA WAIRIMU KAMAUAPPLICANT

AND

JOSEPHAT MBURU MONDO THIRESPONDENT

(Application for extension of time within which to appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Eldoret (Justice Jeanne Gacheche)

dated 11th May, 2004

in

H.C.C.C. NO. 8 OF 2004)

RULING

This is an application by way of Notice of Motion stated to have been brought under **Rules 4, 76 and 81** of the *Court of Appeal Rules* in which the applicant, **Jerusha Wairimu Kamau** seeks orders that:-

- “1. The Honourable Court be pleased to extend the time to appeal out of time.**
- 2. That the costs of the application be provided for.”**

This application is brought on the following grounds:-

“a) Certified copies of proceedings were applied for

on 11th May, 2004.

b) That upon lodging the application for the said certified proceedings with the Deputy Registrar it took between 11th May, 2004 to 26th May, 2005 to have the proceedings typed and certified.

c) That the certificate of delay as issued by the Deputy Registrar covers the period up to 26th May, 2005.

- d) *That the certificate of delay was executed on 11th August, 2005.*
- e) *That an appeal cannot competently be filed using the certificate as time lapsed before the certificate of delay could be secured by the appellant.*
- f) *That the copies of certificate of delay be obtained before 11th August, 2005.*
- g) *That the delay in filing Memorandum of appeal and Record of appeal within the prescribed period of Sixty days was not occasioned by the applicant and or due to an omission and or fault on her part.*
- h) *That the delay to release the certificate of delay was occasioned by the superior court.*
- i) *That it is for the interest of justice and fairness that the time within which to file Memorandum of appeal, prepare Record of appeal and serve the same upon the Respondent be extended.*
- j) *That it is only fair and just that the orders prayed for be granted.*
- k) *That since the certificate of delay covers the period up to 26th May, 2005 the appeal ought to have been filed by 27th July, 2005.”*

During the hearing of the application on 22nd February, 2006, Mr. Momanyi, who appeared for the applicant, emphasized the grounds set out above and went on to state that they were willing to pay the costs of the application. He also reminded me that the dispute herein relates to agricultural land.

Mr. Kathili, who appeared for the respondent, opposed the application on the ground that the applicant did not comply with **rule 81(2)** of the Court of Appeal Rules. He was of the view that there was a long delay which had not been explained.

It is now settled that in an application under **rule 4** of this Court’s Rules, the Court is being called upon to exercise its unfettered discretion. The matters which are to be considered whether to grant an extension of time are first the length of the delay, the reason for that 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 & 2 Others** (2003) KLR 361 at pp. 362 –3 this Court had the following to say in respect of **rule 4** of this Court’s 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 for 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 (unreported) 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”.

And in **POTHIWALLA V KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY LTD & 31 OTHERS** [2003] KLR 74 I had the following to say on **rule 4**:-

“I think, it is now settled that an application of this nature (under rule 4 of this Court’s Rules) the Court is being asked to exercise its unfettered discretion and that for an applicant to succeed he must

satisfy the Court that the delay was not inordinate and that the delay has been sufficiently explained. The other issue to be considered is whether the intended appeal is arguable. Lastly, the applicant has to show that no prejudice would be caused to the respondent if the application to extend time is allowed. This discretion, like any other judicial discretion must be exercised judicially.

In MUCHUGI KIRAGU V JAMES MUCHUGI KIRAGU & ANOTHER - Civil App. NO. NAI 356 of 1996 this Court had the following to say as regards this Court's 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, I have considered the grounds upon which the application was brought, the affidavit in support thereof as sworn by the applicant and the submission by counsel appearing for the parties, and taking into account the fact that the dispute relates to agricultural land, it is my view that this is a proper case in which to exercise my discretion in favour of the applicant.

For the foregoing reasons, this application is allowed and the applicant is to file the record of appeal within **30 days** from the date of this ruling. Costs of this application shall be in the appeal.

Dated and delivered at Eldoret this 24th day of February, 2006.

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR