REPUBLIC OF KENYA

IN THE COURT OF APPEAL

CIVIL APPLICATION 266 OF 2005

SAMWEL ONDIEKI……..…….....……APPLICANT

AND

SAMWEL MAGETO…….……RESPONDENT

(*Application for extension of time to serve notice of appeal and lodge a record of appeal out of time from the judgment of the High Court of Kenya at Kisumu (Birech, C.A.) dated 12th June, 2002*

in

H.C.C.C. NO. 485 OF 1994)

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R U L I N G

Although both counsel had drawn up and signed a consent letter for adjournment of the application before me, I rejected the consent as it was presumptuous that the adjournment would be given as a matter of course. I saw no reason to adjourn the matter which has been pending since September, 2005 and I proceeded to hear it. Only the applicant's counsel was present with his client.

The application seeks an order under *rule 4*:-

"(a) That leave be granted to extend time to file and serve notice of appeal and lodge record of appeal out of time and in the alternative the notice of appeal filed on 19.07.02 be deemed as duly filed and served within time."

The discretion sought under *rule 4* is, of course, unfettered. It cannot however be exercised on whim or caprice. As I stated in *FAKIR MOHAMMED VS. JOSEPH MUGAMBI & 2 OTHERS* Civil Application NO. Nai. 332/04 (Nyr. 32/04 UR):-

"The exercise of the Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. No. Nai. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR

486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. No. Nai. 8/2000 (UR) and Murai vs. Wainaina (No.4) [1982] KLR 38"

The application before me will therefore be examined under those principles.

The decision intended to be challenged was delivered by the superior court on 12.06.02. It is not clear whether any notice of appeal was filed timeously thereafter because there is conflicting information in the application that one was filed either on 19.06.02 or 19.07.02. Most probably it was the latter date because the applicant swears that he instructed his advocates to prefer an appeal on 10.07.02. The notice of appeal itself, if any was filed, is inexplicably not exhibited with the application. Be that as it may, the applicant then says he next returned to his advocate's office on 20.05.05 only to find that the appeal had not been filed. There is no explanation at all as to why the applicant never returned to his advocate's offices between 10.07.02 and 20.05.05 which is about 3 years or why there was total inaction by counsel. As opposed to mistakes or even negligence of counsel, which in explained circumstances may be pardoned, total inaction is not excusable and the client's recourse may well be against the advocate himself. That is not the end of the matter. After realizing that the appeal had not been filed in May, 2005, the applicant did nothing about it for another 4 months when he filed this application. There is again no explanation made in the affidavit for such delay but I am informed by learned counsel for him *Mr. Okenye*, from the bar, that the applicant had no money to file the application. The straight answer to such plea of poverty is in *rule 112* of the rules of this Court which provides relief for indigent members of our society. It cannot be an excuse for failure to comply with the rules of court. There must be some other reason on which I can properly base the exercise of my discretion or otherwise the applicant is not deserving of such discretion. As this Court stated in *First American Bank of Kenya Ltd & Anor vs. Grandways Venture Ltd Civil Appl. No. Nai.173/9 (UR):-*

"In Savill v. Southend Health Authority [1995] 1 WLR 1254, Balcombe LJ, having considered various authorities, stated as follows at 1259:-

"I have to say that the authorities are not all entirely easy to reconcile. I prefer to go back to first principles and to the statement made by Lord Guest in the Ratnam case….. that in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. He went on to say, and it is worth repeating: "if the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation"……. Nevertheless, there must be some material on which the court can exercise its discretion. There was no such material before the judge. In my judgment, therefore, it cannot be said, as this court would have to say, that in exercising his discretion to refuse to extend the period of time for appeal in the case he was acting contrary to principle. It seems to me that he was acting in accordance with the principles laid down by Lord Guest. I would dismiss the appeal".

In the instant case there is no affidavit in support by the advocate who allegedly committed the mistake. Nor is there any material by way of any explanation. As a matter of common sense, though not making it a condition precedent, the court will want to take into account the explanation as to how it came about that the applications found themselves with an appeal that was incompetent. If the omission was deliberate and not due to accident the court would in our vie, be unlikely to grant an extension. But, again, with respect, there was no material before the learned single Judge. Nor was there any material before her to show that the omission was the result of any inadvertence or accident to enable her to exercise her discretion.

We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the court to satisfy the court that despite their default,, the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants have not discharged."

In the absence of any explanation, as is evident in the affidavit in support of the application, and in the absence of any affidavit from the advocate who allegedly failed to act on instructions, I cannot but find the period of delay in seeking extension of time inordinate.

The chances of the appeal succeeding is a relevant factor to consider. Sadly however, no material has been placed before me to weigh such chances and *Mr. Okenye* says he will disclose the material when I give him an opportunity to file the appeal. But that is putting the cart before the horse! All I have before me are four grounds of appeal the seriousness of which I can only accept from counsels' own understandable view of the matter. I do not attach considerable weight to that factor. I need only consider one more relevant factor which I think weighs against the grant of this application. That is the prejudice likely to be visited on the respondent. On the face of it there is a judgment in favour of the respondent which is sought to be challenged after four years of inaction by the applicant. The right to enjoy the fruits of judgment is as hallowed as the right of appeal and a breach of either for no good reason would be prejudicial.

For those reasons I am not inclined to exercise my discretion in favour of the applicant and I dismiss the application. I make no order as to costs.

DATED and DELIVERED at KISUMU this 31st day of March, 2006.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR