REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appli 346 of 2005

CEASARY MURIUKI …….…….. APPLICANT

AND

1. CATHERINE MICERE)

2. EDITH NYAWIRA) …….....…….. RESPONDENTS

(Application for extension of time to file record of appeal out of time in an intended appeal from

a judgment of the High Court of Kenya at Embu (Lenaola, J) dated 20th May, 2005

in

H.C.C.A No. 7 of 2000)

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R U L I N G

Succession Cause No. 26 of 1999 was heard by subordinate court and that court gave judgment in favour of the applicant, Ceasary Muriuki. The respondents felt aggrieved and filed Civil Appeal No. 7 of 2000 at the superior court at Embu. The learned Judge of the superior court (Lenaola, J) after hearing the appeal delivered judgment on 20th May, 2005 in which the decision of the subordinate court was reversed and the present respondent's appeal was allowed together with costs of the appeal and costs of the proceedings in the subordinate court. The applicant felt dissatisfied and sought leave of the superior court to appeal to this Court from the same decision. The applicant also sought by way of a separate application, an order of stay of the order dated 20th May, 2005 pending the hearing and determination of the then intended appeal. The learned Judge of the superior court heard the application for leave to appeal and dismissed it in a ruling he delivered on 18th October, 2005. About two months after the ruling of the superior court on the application for leave to appeal was delivered by the superior court, this application was filed. To be precise, it was filed on 19th December, 2005. It is seeking orders as follows:

"**1. That this Honourable Court be pleased to extend to the applicant the time within which to apply for leave to appeal from the decision of I. Lenaola J. dated the 20th May 2005; the application for leave to the High Court having been refused on the 18th October 2005.**

2. That this Honourable Court be pleased to grant leave to the applicant to file his intended

appeal to this Court from the decision of the Hon. Justice I. Lenaola given at Embu on the 20th May, 2005.

3. That the costs of this application be provided for."

The application is based on four grounds namely; that the applicant had already filed Notice of Appeal on 31st May, 2005; that appeal only lies to this Court from the said decision with leave; that the applicant had applied for such leave but the same was refused on 18th October, 2005 and the reasons in the affidavit which was sworn by M.G. Njage, counsel for the applicant. That affidavit in support of the application which was sworn by the learned counsel for the applicant stated mainly that the judgment in the appeal filed in the superior court by the respondents in this application was delivered on 20th May 2005; the applicant applied for leave to appeal and that application was refused in a ruling delivered on 18th October 2005; that that ruling was delivered in the absence of the applicant; that counsel did not see the applicant till 17th November, 2005 when the applicant turned up in the counsel's office and the counsel explained to the applicant the purport of the ruling; that the applicant thereafter instructed the counsel to proceed to file an appeal in this Court. The same instructions were received on 14th December, 2005, about 27 days after the applicant had seen his counsel; and that the counsel believes there are substantial questions of law that required the hearing of this Court.

The respondents opposed the application and filed a replying affidavit sworn by the second respondent, Edith Nyawira. In that affidavit, the respondents contended that no appeal lies to this Court from the decision of the superior court on its appellate decision on a matter under **section 50 of the Law of Succession Act Cap 160** and that being so, any leave granted would be granted in futility; and that in any case no explanation was offered as to why the application was not made in time by the applicant himself.

Mr. Njage, the learned counsel for the applicant, readily conceded that the second prayer seeking leave to file the intended appeal cannot be considered by me, sitting as a single Judge. That was correct and the submission proceeded only on the first prayer.

Rule 39 of this Court's Rules provides for application for leave to appeal in civil matters. It states at **rule 39(b)** as follows:

"**(b) Where an appeal lies with leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal."**

(underlining supplied)

In the matter before me, application for leave to appeal had been made to the superior court and refused as I have stated hereinabove. That in effect means that the application for leave should have been filed within fourteen days of such refusal. That refusal was delivered on 18th October, 2005 and so the application for leave to appeal should have been made latest by 31st October, 2005. The delay period is therefore computed from that date, 31st October, 2005.

The law as regards the principles to be applied when considering an application for extension of time as is before me which is premised under **rule 4** of this Court's Rules is now well settled. There are many decided cases on the same but the decision in the case of **Major Joseph Mweteri Igweta vs. Muhura M'Ethare & Attorney General – Civil Application No. Nai. 8 of 2000 (unreported)** gives what, in my view, is a full summary of the principles to be considered. This Court stated in that case *inter alia* as follows:

"**The application made under rule 4 of the Rules is to be viewed by reference to the underlying**

principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal), the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance to them."

It will be clear from the above passage that several matters are to be considered before a court exercises its discretion on whether to grant or to refuse to grant an application such as is before me, but more emphasis is made on the need to ensure that the provision as to compliance with time limits is complied with. That in effect means that where there is delay, the same delay must be explained to the satisfaction of the court so that when considering other matters, the court is satisfied that there are reasons for the delay. In my view, the reasons for the delay, even if they do not meet the acceptance of a particular Judge hearing the matter, must nonetheless be reasonable for the court to be satisfied and to act of them.

In this application, the affidavit in support of the application is unfortunately not sworn by the applicant. It is sworn by the learned counsel for the applicant. I say this is unfortunate because, the deponent says at paragraph 8 that the refusal for leave by the superior court was delivered on 18th October, 2005, in the absence of the applicant and that the applicant did not see his counsel until 17th November, 2005, but he does not state who was present when the ruling was delivered. It does not state how the applicant came to know the ruling had been delivered and when he knew of the same. It does not state why the applicant, if he knew of the date of the ruling, did not see his counsel immediately after the ruling was delivered. Further, it states that the applicant having seen his counsel on 17th November, 2005, and having had the ruling refusing leave to appeal explained to him, went away and never instructed his counsel till 14th December, 2005, about 27 days later. No explanation is given as to why the applicant never instructed his counsel to proceed and apply for leave in this Court immediately or to take appropriate steps. All these are matters that could only be explained by the applicant himself, if he had sworn an affidavit to that effect. As it stands, there is no explanation of the delay between 31st October, 2005 being the latest date on which the application for leave should have been legally made to this Court and 17th November, 2005 when the applicant was seen by his counsel. There is no explanation on the delay between 17th November, 2005 when the applicant was seen by his counsel and 14th December, 2005 when he instructed his counsel to proceed with the matter and there is no explanation for the delay between 14th December, 2005 when instructions were given to the counsel and 19th December, 2005 when this application was filed. In fact, there is no explanation as to whether the counsel, if he was present when the ruling was delivered on 18th October, 2005 (and he is silent on that), did inform the applicant of the position and why the applicant delayed in giving instructions or why the applicant did not take interest in seeing his counsel immediately after the ruling was delivered. All these loose ends leave me with no power to make any informed decision in favour of the applicant. Mr. Njage stated from the bar that his counsel was financially incapacitated. That might have been so, but why was it not spelt out in the supporting affidavit and if it were so, why did his client not swear to that effect? That would have been a matter dealing with resources and would have been considered if it had been brought before the court in a proper manner. However, it was a mere allegation from the bar by a counsel and thus could not be replied to by the respondents. In any case, it was no more that hearsay.

I do agree that the legal points that the applicant would have wanted the Court to decide were weighty but it is clear to me that the delay has not been explained and in fact no attempt has been made to explain it at all. That being the case, justice demands that I grant no indulgence. In the case of **Kenya Tea Development Authority vs. Microfilm Equipment Ltd. & Anor – Civil Application No. Nai. 221 of 1999 (unreported)** O'Kubasu, J.A stated, following the case of **Munyua vs. Njoroge (1999) LLR 2807 (GAK),** *inter alia* as follows:

"**Where there is no explanation there is no indulgence."**

In this matter before me, there is no explanation for the delay and I find it difficult in the circumstances to grant any indulgence.

In the result, the application dated 19th December, 2005 and filed on the same day is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 26th day of May 2006.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR