IN THE COURT OF APPEAL OF KENYA

AT NYERI

CIVIL APPLI 121 OF 2005

PETER KINYARI KIHUMBA …...………......………………….. APPLICANT

AND

GLADYS WANJIRU MIGWI ……………………….……….. 1ST RESPONDENT

JAMES KIHUMBA MIGWI ……………….………………… 2ND RESPONDENT

(Application for extension of time to file notice of appeal and record of appeal out of time from the ruling and order of the High Court of Kenya at Embu (Lenaola, J.) dated 31st January, 2005

in

H.C.C.C. NO. 50 OF 2002)

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R U L I N G

The application before me seeks an order under ***Rule 4*** of the rules of this Court for extension of time within which a notice of appeal may be filed and served. It also seeks enlargement of time for filing a record of appeal to challenge a decision of the superior court. It is not clear when the decision of the superior court was made but the applicant swears it was on *3rd January, 2005* although the application alludes to *31st January, 2005*. The application was not filed until *15th April, 2005*.

As I stated in ***Fakir Mohamed v. Joseph Mugambi & 2 Others***, *Civil Application No. NAI. 332/04 (NYR.32/04) (UR):-*

"*The exercise of this 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. 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.NAI.8/2000 (ur) and* ***Murai v. Wainaina***

***(No** 4) [1982] KLR 38.”*

The delay in seeking the orders as is evident above is about four months and unless it can be explained, I would be entitled to make a finding that there was inordinate delay, unless there are other factors which would outweigh that consideration. The explanation offered is in the affidavit of the applicant himself and all he says, without citing the source of his information, is that his advocate went on a tour overseas between *January and March, 2005* and the employee advocate he left in charge of the office also left in January. No one else, he says, was able to deal with the matter and therefore he waited for his advocate. The advocate was Mr. A.P. Kariithi who appeared before me to urge the application but he swore no affidavit in support of the information stated by the applicant about him. He gave no reason for failure to do so although he was the reason given for the delay.

Mr. Kariithi merely stated from the bar that he left for the United States on *15th January, 2005* and returned on *16th March, 2005*. In that event he would have been in the country on *3rd January, 2005* when the applicant swears the ruling was delivered and ought to have taken action to file a notice of appeal. Even if the ruling was not delivered on *3rd* as the applicant states, but on *31st January, 2005*, there is no explanation why the mechanical and simple action of filing a notice of appeal had to be delayed in excess of four months. The applicant himself does not say he was incapable of filing one or he could not instruct another advocate to do so. If Mr. Kariithi was back in the country in March, then again he did nothing in the matter for more than one month before filing this application or since then, and there is no explanation offered for the delay.

With respect, I think the applicant and his Counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they make is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matters. Instead the applicant and his advisers exhibited undesirable nonchalance, which I am not inclined to countenance. The respondents acquired a vested right in the judgment made in their favour and will suffer prejudice if it was reopened on the flimsy grounds advanced by the applicant.

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 because the respondent’s counsel advanced spurious grounds for non-attendance at the hearing of the application and the advocate instructed to attend made no effort to assist the Court. She said nothing in reply to the submissions made in the matter.

Dated and delivered at Nyeri this 12th day of May, 2006.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR