



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civ Appli 88 of 2004 (NYR. 6/2004)

GATUMU RUBICHU.....APPLICANT

AND

NDAMBIRI WAMBUI RUBICHU.....RESPONDENT

(Application for extension of time to file an appeal from a judgment and decree of the High Court of Kenya at Nyeri (Juma, J) dated 12th July, 2001

in

H.C.C.A NO 61 of 1999)

RULING ON REFERENCE TO THE FULL COURT

A single member of the Court (TUNOI, J.A) was asked, under **Rule 4** of the Court’s Rules, to exercise his unfettered discretion conferred by that Rule and grant to the applicant Gatumu Rubichu leave to file an appeal out of time. Gatumu Rubichu had wanted to appeal against the decision of Juma, J made on 12th July, 2001. He lodged his notice of appeal on 26th July, 2001 and it was shown before the learned single Judge that the Deputy Registrar of the superior court at Nyeri had furnished the applicant with copies of the proceedings and Juma, J’s decision on 24th February, 2002. The certificate of delay was issued to the applicant on 23rd February, 2004. The motion to extend time was lodged in the Court on 20th April, 2004 and it was conceded that after obtaining the certificate of delay, the applicant took another fifty-four days before filing his motion. The learned single Judge considered the period between 24th February, 2002 when the proceedings were made available to the applicant and 23rd April 2004 when he received the certificate of delay. The Judge came to the conclusion that that delay of some two years was not explained to his satisfaction. It is to be remembered that any period of delay occasioned by waiting for a certificate of delay is not to be excluded under the proviso to **Rule 81 (1)** of the Rules. The period to be excluded under that proviso is the period certified by the Registrar of the superior court as having been required for the preparation and delivery to the appellant of the copy of proceedings. A certificate of delay cannot be treated as part of the proceedings which took place before the superior court. There was an attempt by the then advocates for the applicant to explain the long delay by an assertion that the proceedings supplied to the applicant’s advocates were misplaced in the advocates’ offices, but there was no explanation as to what followed the discovery of the misplacement and when the proceedings were eventually traced. The learned single Judge obviously rejected the attempted

explanation and Miss Mukuha who argued the applicant's motion before us did not suggest that in rejecting the purported reason for the delay, the learned single Judge took into account an irrelevant factor or that he failed to take into account a relevant factor or that he in any way misdirected himself on any point of law or fact; equally it cannot be contended and Miss Mukuha did not attempt to suggest that the decision of the single Judge is plainly wrong.

The same consideration must apply to the delay of 54 days after receipt of the certificate of delay. Once again, the learned single Judge rejected the applicant's explanation that that delay was due to the mistake of the applicant's advocates and that the applicant ought not to be made to carry the burden of the mistakes of his advocates. The nature of the alleged mistake, however, was not disclosed to the learned single Judge and his view was that even the delay of 54 days was, in the circumstances of the case, inordinate and was not satisfactorily explained to him. There was material from which the single Judge was entitled to come to that conclusion and there cannot be any basis for our interfering with the exercise of his unfettered discretion. He clearly exercised his discretion in a judicial fashion and that is all that was required of him under **Rule 4**. Mr Rakoro, learned counsel for the respondent Ndambiri Wambui Rubichu vigorously opposed the reference and supported the decision of the learned single Judge.

With respect to Miss Mukuha, the reference herein totally lacked any merit and must be and is hereby dismissed with the costs thereof to the respondent.

Those shall be our orders.

Dated and delivered at Nyeri this 26th day of October, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR