**REPUBLIC OF KENYA**
**IN THE COURT OF APPEAL OF KENYA**
**AT NAIROBI**
**Civil Appli 209 of 2006**

**KENYA WILDLIFE SERVICE …………...……….……..………….. APPLICANT**

**AND**

**DANIEL MUSILI NYEKI ………………………………………RESPONDENT**

**(An application for extension of time to lodge a notice of appeal in an intended appeal from the judgment and decree of the High court of Kenya at Nairobi (Aluoch, J.) dated 19th October, 2005**

**in**

**H.C.C.C. NO. 1278 OF 1996)**

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## RULING

This is an application under ***Rule 4*** of the rules of this court seeking extension of time to file and serve a notice of appeal. There is indeed a notice of appeal filed and served on the respondent and, according to the applicants, the filing ought to have been within time if they had been notified about the delivery of judgment by the superior court, but they were not. When they became aware of the judgment, they filed the notice of appeal within two days and served it within another five days. This application was therefore, according to counsel for the applicants, filed ex *abundanti cautella* after claims were raised by the respondent that it was filed one day late.

The matter goes back some 10 years in 1996 when the respondent sued the applicants who were his employers. He claimed, amongst other things, that he had been treated maliciously and discriminately when the employer appointed him as an acting Principal at Naivasha Training Institute and an Assistant Director, Conservation Education, which were World Bank assisted projects and refused to confirm him in those positions or pay him on the same terms as other employees in the same projects. He sought various declarations and an order that he should be paid his total emoluments for the two senior posts in accordance with World Bank salary scales. The case was fully heard before Mulwa J. but he retired before writing or delivering the judgment. Aluoch J. re-heard the matter and found in her judgment that there was discrimination as far as payment of acting allowances were concerned. She directed that the employer (the applicant here) do calculate and pay the respondent his emoluments for the period he acted as Principal and Assistant Director on the basis of the World Bank salary applicable at the time to senior staff under the project. From the records that decision was made on 19th October, 2005 but there is no *coram* to indicate who was present.

According to the typed proceedings produced by the respondent, who was acting in person in the superior court, he had written to the registrar on 8th March, 2005 seeking to have the matter mentioned on

16th March, 2005 in order to keep track of the file as it had taken long to type out proceedings recorded by Mulwa J. The following day however, the respondent appeared alone before the registry and the mention date of 16th March, 2005 was recorded. An order was made for notice to be issued to the applicants herein. No notice however was issued or served. In subsequent mentions on 13th April, 2005, 25th April, 2005, and 27th April, 2005 when an order was made that judgment would be delivered on 24th June, 2005, there was no appearance for the applicant. That is when the respondent was informed that judgment would be delivered on 19th October, 2005, but no notice was served on the applicant. As stated earlier there is no coram for that day to show how the judgment was delivered and in whose presence. The respondent then waited until 1st November, 2005 when he took a copy of the judgment to the applicants' offices for payment of his dues, which he subsequently calculated at over Shs. 11 million.

It was on account of those facts that learned counsel for the applicants Mr. Marenge Kagiri submitted that the judgment was delivered contrary to ***Order 20 rule 1*** of the ***Civil Procedure Rules*** since it was mandatory under that rule that notice be served on all parties. If notice had been served, he submitted, the applicants would have attended court and would have filed the notice of appeal immediately. As it is, the applicants only became aware of the judgment on 1st November, 2005 and filed the notice of appeal on 3rd November, 2005. Ordinarily that filing would have been one day late, but Mr. Kagiri submitted that it was not the applicant's fault that there was such delay.

In response, learned counsel now appearing for the respondent, Mr. Vincent Muia, submitted that it was the duty of the applicant to follow up the proceedings with the court and to check the progress of the matter periodically in the registry. That way, they would have become aware of the various mentions and the listing of the matter in the daily cause lists. At any rate, when they became aware of the judgment they took about 9 months before filing the application now before the court which they filed in order to pre-empt an application filed by the respondent in March 2006 for striking out the notice of appeal. In Mr. Muia's view, a notice of appeal remains on the record until it is struck out and the right procedure was therefore to wait until the hearing of the respondent's application and then file an application for extension of time if the notice of appeal was struck out. Finally, Mr. Muia submitted that there was no challenge to the judgment itself since the applicant has already proposed a payment of Shs.1.8 million on the basis of the judgment. All that remains to be ascertained is the amount payable to the respondent and that process is going on before the superior court. There is therefore no arguable ground of appeal and none has been exhibited in any draft memorandum of appeal.

To those submissions, Mr. Kagiri responded that the notice of appeal was clear that the whole judgment was being challenged and there was no admission of any part of it. It was not the law that the applicant in a matter of extension of time, must show the prospects of success of the intended appeal. He also submitted that there was no impropriety in seeking extension of time, even if that was necessary, pending the hearing of an application for striking out the notice of appeal.

I have considered the matter fully and I am satisfied that I should exercise my discretion in favour of granting the application. The discretion is unfettered, but of course it must be exercised on the basis of reason and some material on record, or as commonly put, judicially. There is no limit to the factors I ought to consider in such applications so long as they are relevant. Examples of the factors have been given in many decisions of the court and they include: the period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding 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 – see **Fakir Mohammed v Joseph Mugambi & 2 others Civil Appl. NAI. 332/04 (UR).**

On the face of it, the notice of appeal exhibited in the application before me was filed one day late although it was served on the respondent within five days of filing. I am persuaded however that the reasons given for the delay makes such delay only apparent. It is clear from the affidavit in reply filed by the respondent that there were various mentions of the case in the superior court made in the absence of the applicant but it is conceded that there were no notices served on the applicant to make any appearance on those occasions. The submissions made by Mr. Muia that the applicants, who were the defendants in

the matter, had a duty to keep checking the progress of the matter with the court may be a prudent way of conducting litigation but it has no basis in law. They could not be condemned for non-attendance when they were not served with any notice to do so. The converse is also true. More importantly, as correctly submitted by Mr. Kagiri, the law requires that all parties or their advocates be notified when the judgment in their dispute is due for delivery. That is ***order 20 rule 1*** of the ***Civil Procedure Rules***. There was no compliance with that procedure in this case and I am not prepared to condemn the applicants for their failure to file the notice of appeal within 14 days of delivery of the judgment as required under ***rule 74(2)*** of the rules of this Court. I accept the submission that they did not know about it until the respondent took a copy to them on 1st November, 2005 whereupon action was taken. The applicants did not, in my view act unreasonably in all the circumstances. That it took the filing of an application by the respondent to strike the notice of appeal for them to file the application before me, must be understood in this context. I would not in the circumstances hold the period of five months delay against them.

As for the objection raised that the applicants have not disclosed the grounds of appeal and that there was none that stood any chance of success, I need only reiterate what the full court stated in **Mwangi v Kenya Airways Ltd [2003] KLR 486**, thus:

> "**It is also clear that the third issue for consideration, namely, the chances the appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered. This is understandable because the "the chances of an appeal succeeding" is normally dealt with by this Court under the rubric of "an arguable appeal" or "an appeal which is not frivolous" and the full Court normally considers that issue under rule 5(2) (b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd [1959] EA 838 where Sire Owen Corrie, Ag. JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:**
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> "………. **It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application."**

It is worth noting that the case of ***Bhagwanji Shah*** was decided under ***rule 9*** which at the time required that "*sufficient reason*" be shown before extension of time could be obtained. Even if I had to consider that factor in this case, I am satisfied that the applicants have stated in their notice of appeal that they challenge the whole of the order directing that emoluments due to the respondent be calculated at World Bank salary rates. They also challenge the order made on payment of interest on such amount and the costs of the suit which they were ordered to pay. It would have been prudent to annex a draft memorandum of appeal but, in my view, the failure to do so is not fatal. There is material in the affidavit in support of the application to show what the intended appeal is about, and it is in the province of the full court to pronounce with finality whether it would succeed or not.

For those reasons, as stated earlier, I am inclined to exercise my discretion in favour of granting the application. Accordingly, I order that the time for filing and serving the notice of appeal dated and filed on 3rd November, 2005 be and is hereby extended to such time as will render the notice of appeal now on record validly filed and served. The costs of the application shall be in the intended appeal.

***Dated and delivered at Nairobi this 24th day of November, 2006.***

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**