



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLI 229 OF 2006

TUMBA NYANGAAPPLICANT

AND

JULIE TRAYNER RESPONDENT

(Application for extension of time within which to lodge and serve a Notice of Appeal from the Ruling of the High Court of Kenya at Nairobi (Visram, J) dated 17th May, 2005

in

H.C.C.A. NO. 47 OF 2005)

R U L I N G

I have before me an application by way of Notice of motion expressed to have been brought under “**Rules 4, 41, 42(1) and 85 (2A)** of the Court of Appeal (Amendment) Rules in which the applicant, **Tumba Nyanga**, seeks the following orders:-

- “(a) The time fixed for lodging of a notice of Appeal and for service of the same on the intended Respondent be extended.***
- (b) The Record of Appeal be filed and served within the next 30 days after the expiry of the period granted in (a) above.***
- (c) The Honourable Judge do direct that a translation of PWEX4 being applicant’s exhibit of two (2) copies of a passport may be excluded from the Record of Appeal.***
- (d) That costs be in the cause.”***

The application is premised on the following grounds:-

“1 The Notice of Appeal was lodged on 18th May, 2005 and served upon the Respondent on 26th May, 2005 being the 8th day upon its being lodged and outside the statutory 7 day period under Rule 76(1) of the Court of Appeal Rules.

2. Upon duly obtaining a Certificate of Delay dated 21st December, 2005, the Applicant/Appellant filed and served the Record of Appeal being C.A. No. 329 of 2005 on 23rd

December, 2005 upon the Respondent's Counsel.

3. On the 9th February 2006, the respondent filed an application seeking to strike out the said Notice of Appeal and Record of Appeal for amongst other reasons that the Notice of Appeal had been served outside time and certain exhibits/translations were excluded.

4. The Applicant only discovered that the Notice of Appeal had been served too late by one (1) day upon service of the said application by the Respondent herein.

5. That upon the application of Respondent (herein) the Record of Appeal were struck out on 27th July, 2006 when the applicant (herein) conceded to the application.

6. The said late service was an unintentional miscalculation on the part of the applicant's advocates (herein) and ought to not adversely be visited on the innocent Applicant.

7. It is not necessary to include a translation of the copies of a passport are not relevant to the appeal to be preferred or the parts referred to at the trial are either in English and or their contents in a foreign language are duplicated/translated on the same face of the exhibit in English.

8. It is only fair and just that the Application herein be allowed lest the Applicant suffers irrecoverably and unnecessarily.”

When the application came up for hearing on 7th December, 2006, Mr. Mugambi, the learned counsel for the applicant, more or less repeated the grounds set out above and went on to rely on three authorities on the issue of extension of time.

In opposing the application Mr. Chigiti, the learned counsel for the respondent, started by submitting that prayer (c) of the application could only be placed before the Registrar or a Judge of the High Court pursuant to **rule 85(3)** of this Court's Rules. It was Mr. Chigiti's contention that the applicant had not placed before the court sufficient material to enable the court exercise its discretion in favour of the applicant. Mr. Chigiti brought to the attention of the court the fact that the applicant had not been candid as it had been claimed that the applicant did not understand English while the proceedings indicated that the applicant addressed the court in English.

From the material placed before me, it would appear that there can be no dispute that an earlier notice of appeal and record of appeal were struck out on 27th July, 2006 which meant the applicant had to start the appeal process afresh. That being the case the applicant then filed this application on 22nd August, 2006. As regards the period from the time the notice of appeal and record of appeal were struck out to the filing of this application, the applicant's explanation for the delay was that as the applicant was a businessman who travels in and out of Kenya it took time to trace him.

In this application, we are dealing essentially with **rule 4** of this Court's Rules. It is now settled that an application under **rule 4** of the Court's Rules, a single Judge of this Court is called upon to exercise his unfettered discretion but like any other judicial discretion, that discretion must be exercised upon reasons. The matters which are to be considered whether to grant an extension of time are first the length of the delay, the reason for the delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In **PATEL V. WAWERU AND 2 OTHERS (2003) KLR 361** at pg. 362-3 this Court had the following to say in respect of **rule 4** of this Court's Rules:-

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason of what was

clearly an inordinate delay. How does a single Judge exercise his discretion? In LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI – Civil Application No. NAI. 251 of 1997 this Court stated:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

In this reference it has been shown a delay of almost fifteen months was not explained to the satisfaction of the learned single Judge. We asked Mr. Goswami severally to explain to us the delay but he failed to do so. The Rules of the Court must be complied with. As was said in RATMAN V. CAMARASAMY [1964] 3 ALL ER 933 by Lord Guest at p. 935:-

The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. 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 time table for the conduct of litigation.”

In the present application, as already observed, the applicant had to start the appeal process afresh after the earlier notice and record of appeal had been struck out. There was a delay of about thirty days in bringing this application. An explanation has been given why there was that delay.

In MUCHUGI KIRAGU VS. JAMES MUCHUGI KIRAGO AND ANOTHER – Civil Application No. NAI. 356 of 1996 (unreported) this Court said:-

“Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

In view of the foregoing, I am satisfied that sufficient material has been placed before the court to enable me exercise my discretion in favour of the applicant. However, before I conclude this ruling I must deal with **prayer (c)** in this application which is to the effect that:-

“The Honourable Judge do direct that a translation of PWEX4 being applicant’s exhibit of two (2) copies of a passport may be excluded from the Record of Appeal.”

That prayer is not for this Court in view of the provision of **rule 85(3)** of the Court of Appeal Rules which states:-

“A judge or registrar of the superior court may, on the application of any party direct which documents or parts of documents would be excluded from the record. Application for such direction may be made informally.”

In view of the above, I decline to grant **prayer (c)** of this application. The other prayers are granted and hence I direct that the applicant is to file the notice of appeal within **seven (7) days** from the date hereof and the record of appeal to be lodged and served within **thirty (30) days** from the date the notice of appeal is filed. Costs of this application which I assess at **K.Shs.5,000/=** to be paid to the respondent within **30 days** from the date hereof and in default execution to issue.

Dated and delivered at Nairobi this 15th day of December, 2006.

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR