



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIV APPLI 220 OF 2006

KITTS MBATI MUKONYOLE APPLICANT

AND

LEVI NDOMBI MUKONYOLE RESPONDENT

(Application for extension of time within which to file and serve a Notice and Record of Appeal from the ruling of the High Court of Kenya at Kakamega (Hon. Justice G.B.M. Kariuki) dated 18th May, 2006

in

H.C.C.A. NO. 31 OF 1998)

RULING

This is an application by way of Notice of Motion brought under **rule 4** of the *Court of Appeal (the Rules)* in which the applicant, **Kitts Mbatu Mukonyole**, is seeking the following orders:-

“(a) THAT time limited for filing and serving by the applicant of the Notice and Record of Appeal be enlarged.

“(b) THAT the costs of and incidental to this application be borne by the applicant.”

This application is brought on the following grounds:-

- “1. The applicant is desirous of challenging the decision of his lordship Justice G.B.M. Kariuki delivered on 18/5/2006.**
- 2. It is the applicant’s former Advocates M/S. J.J. MUKAVALE & CO. ADVOCATES who caused the delay to file the notice of Appeal in time and/or advising the applicant properly or at all despite having received instructions well within time.**
- 3. The matter of the proposed appeal is a portion of land and the appeal raises serious and arguable issues of law.**
- 4. The respondent’s inconvenience can be compensated by costs”.**

In addition to the foregoing, the applicant swore an affidavit in support of this application.

When the application came up for hearing before me on 29th November, 2006 Mr. Munyendo, the learned counsel for the applicant, more or less repeated what had been stated in the supporting affidavit. He pointed out that the applicant had relied on his previous advocates who failed to file the notice of appeal within time. He said that there was a delay of only three days. Mr. Munyendo further submitted that the respondent would not be prejudiced by granting of this application since the orders of the superior court have not been executed.

In opposing this application Mr. Shitsama, the learned Counsel for the applicant, relied on his own replying affidavit. He pointed out that the appeal arose from the proceedings under ***Land Disputes Tribunal Act*** and that in his view, the applicant had no right of appeal to this Court. Mr. Shitsama further submitted that there was no explanation for the delay of two months which the applicant took before filing this application.

It is now settled that in an application under ***rule 4*** of this 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 with reason. 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 pp.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 for 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 that 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, it has been explained that the applicant relied on the services of his previous advocates who unfortunately failed to file the notice of appeal within the prescribed time. It was then left to the applicant to personally rush to Court and file the notice of appeal. But by the time the notice of appeal was filed the applicant was out of time – *he was late by three days.*

The ruling to be appealed from was delivered on 18th May, 2006. This application was filed in this Court on 9th August, 2006. Mr. Shitsama submitted that there was no explanation given for the two months delay. It must, however, be noted that the applicant was somehow abandoned by his previous advocates and that is when he turned to Mr. Munyendo. The new counsel needed to study the matter before filing

the application for extension of time.

It was submitted that the applicant required leave to file an appeal to this Court. But **Order XLII** of the Civil Procedure Rules provides that an appeal shall lie as of right from **Order XLIV rule 3** of the Civil Procedure Rules. I would however refrain from commenting on the competence of the intended appeal preferring to leave the matter for determination by the full court.

In the present application there was a delay of only three days. The applicant, through his counsel, has explained to my satisfaction the cause of the delay.

In **MUCHUGI KIRAGU V. JAMES MUCHUGI KIRAGU & 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 the present application, it has been shown that the respondent would not be prejudiced if this application were to be granted as prayed.

I have carefully considered the background to this matter and I am satisfied that sufficient material has been placed before me to warrant the exercise of my unfettered discretion in favour of the applicant. For these reasons, this application is allowed and the notice of appeal which was filed is deemed to have been validly filed within the time as extended by this Court. I further order that the record of appeal be lodged and served within thirty **(30) days** from the date hereof. Costs of this application which I assess at **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 Kisumu this 1st day of December, 2006.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR