



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: DEVERELL, J.A. (IN CHAMBERS)

CIVIL APPLICATION NAI 304 OF 2004

BETWEEN

- 1. JOYCE WAMUHU)**
- 2. P. NJOKI) APPLICANTS**
- 3. E. GITAU)**

AND

- 1. RUTH KALEKYE)**
- 2. THE COMMISSIONER OF LANDS).....**
RESPONDENTS

**(Application for leave to serve /send letter applying for
Proceedings and to file notice of appeal and the record of
appeal out of time in the High Court of Kenya at Nairobi
(Mr. Justice Rimita) dated 9th May, 2003
in
H.C. MISC. CASE NO. 61 OF 2003)**

R U L I N G

This is an application for extension of time made under rule 4 of the Court of Appeal Rules. The extensions sought are twofold:

- 1. That leave be granted to serve/send the letter dated 19th November 2002 applying for copies of proceedings on the Respondents out of time.***
- 2. There be extension of time to file and serve both the Notice of Appeal and the Record of Appeal.***

On 14th November 2002 the Senior Resident Magistrate (Mrs. N.A. Owino) delivered a Ruling, after hearing advocates for both parties, dismissing an application by the Plaintiffs for leave to amend the Plaintiff.

On 9th May 2003, in High Court Miscellaneous Civil Application 61 of 2003, the superior court (Rimita J.) made a ruling refusing an application by the applicants for leave to appeal out of time against the above subordinate court's ruling.

It is against that decision of the superior court against which the applicants wish to appeal to this Court. In order to do so the applicants seek in the current application the extensions of time set out above.

In considering this matter I will bear in mind the well-known passage often cited from the case of **Leo Sila Mutiso v. Rose Helen Wangari Mwangi Civil Application No NAI 251 of 1997** (unreported) reading as follows:

“It is now well 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 the court generally 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.”

The principal dates relevant to the current application are as follows:-

9th May, 2000 - *The Rimita J. ruling.*

12th May, 2003 - *The applicant’s letter to the deputy registrar of the High Court bespeaking copies of the proceedings the sending or serving of which was in doubt due to the disappearance of the court clerk employed by the applicant’s advocate.*

14th May 2003 - *The Notice of Appeal was filed. There is no copy of that Notice in the record of the current application but the filing of it on that date was not disputed by the respondent’s advocate Mr. Rustam Hira.*

10th February 2004 - *Respondents application to strike out the Notice of Appeal on the ground that the record of appeal had not been filed in time was filed.*

2nd May 2004 - *The strike out application, listed for hearing on 11th November 2004, was served on the applicants.*

1st November 2004 - *Applicant’s advocate’s letter to Rustam Hira enclosing draft order and requesting his approval. (It was not returned by Rustam Hira but was signed by the deputy registrar on 11th November 2004).*

11th November 2004 - *The notice of appeal was struck out.*

30th November 2004 - *The current Motion was filed.*

In paragraph 5 of the affidavit in support of the application the first applicant deposed that the proceedings were actually ready as early as 16th October 2003, but the applicants did not come to know that they were ready until they were served on 2nd May 2004 with the application to strike out the Notice of Appeal.

Mr. Hira relied heavily on the fact that it was not until 8 months later on 30th November 2004 that the current application was filed for which period there was no explanation. It was also apparent that, although it was claimed in submissions by the applicant’s counsel Mr. Muchangi Nduati that there had been oral reminders to the registry, there was no evidence of any oral or written chase up of the registry aimed at speeding up the process of production of the copies of the proceedings in the superior court. It is possible that the letter from the registry notifying the applicant’s advocates of the readiness of the proceedings was not received by the applicant’s advocates due to the omission of the post code but this would have come to light if the applicants had been diligent in chasing up the registry.

It was claimed in Paragraph 7 of the supporting affidavit that some unspecified part of the delay was caused by the proceedings not being certified when they were eventually ready. This however does not

help the applicants since it was unnecessary to ask for certified copies of the proceedings since the Rules do not require this.

I have come to the conclusion that there was at least 7 months of delay as to which there was no satisfactory explanation in this matter, which is inordinate.

As to the merits of the intended appeal, while it may have some chances of success, they are not sufficiently strong to have any influence on my decision. I note that the precise amendments sought in the inferior court do not appear to have been set out in the application to amend the plaint.

In the exercise of my discretion under rule 4 which is unfettered but not to be exercised capriciously, I consider this a clear case in which the extensions sought should not be granted.

Accordingly I hereby order that the applicant's application be dismissed with costs.

Dated and delivered at Nairobi this 27th day of May 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR