



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: DEVERELL, AG. J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 89 OF 2004 (NYR.8/2004)

BETWEEN

SAMUEL NDIRANGU.....APPLICANT

AND

PATRICK WACHIRA NDERITU.....RESPONDENT

(Application for extension of time to file notice and record of appeal out of
time from the judgment of the High Court of Kenya at Nyeri (Okwengu, J)

dated 26th March, 2004

in

H.C.C.A. NO. 88 OF 2001)

RULING

This is an application under rule 4 of the Court of Appeal Rules for an extension of time to lodge the notice of Appeal and memorandum and record of appeal in an intended appeal against the judgment of Lady justice H.M. Okwengu delivered on 26th March, 2004.

This judgment determined a first appeal from the judgment of the Nyeri Resident Magistrate Mr. W.K. Korir dated 22nd June, 2001 in **P.M.C.C. NO. 609 of 1995**. The intended appeal before this Court is therefore a second appeal.

The relevant event leading to the application for extension of time were as follows:-

26th March 2004	The delivery of judgment by Okwengu, J
10th April, 2004	Expiry of 14 days time limit.
22nd April, 2004	Notice of motion for extension

22nd April, 2004
out of time.

Notice of appeal signed but not lodged waiting leave to lodge

The length of the relevant delay was therefore from 10th April, 2004 to 22nd April which is 12 days.

The explanation offered by the applicant for that delay was that neither he nor his counsel was aware of the delivery of the judgment until after Easter in April 2004 (which would have been around 13th 14th April, 2004) when he made inquiries from his advocate who got his clerk to check the court record which disclosed that judgment had already been delivered on 26th March, 2004. These allegations of fact were contained in the applicant's affidavit dated 22nd April, 2004, in support of the motion but were not the subject of any affidavit from the applicant's advocate.

On the assumption that the applicant's version of these facts was correct I would be inclined to consider that the delay of only twelve days had been adequately explained to enable me in the exercise of my discretion to grant the extension sought.

However the respondent's learned counsel Mr. Kebuka submitted that the applicant's version of events was incorrect: the correct facts being set out in the replying affidavit of the respondent Patrick W. Nderitu sworn on 5th June, 2004.

According to the respondent the date originally set by the Judge for the delivery of the judgment was 17th February, 2004. On that date according to the respondent, the applicant's advocate was present in court. The Judge explained that the judgment was not ready and would, instead be delivered on 26th March, 2004.

During the hearing of the application the High Court file was perused by the court and the applicant and counsel for the respondent. The record in the Judge's written note showed that on 17th February, 2004 the applicant was represented by Mr. Nderi who had, according to the respondent, been the applicant's counsel throughout the hearing of the superior court first appeal. The record also showed that on 26th March, 2004 Mr. Nganga, advocate, was holding brief for the applicant herein when the judgment was delivered.

I have come to the conclusion, after taking into account both the lack of any affidavit from either *Mr. Nderi* or *Mr. Nganga* and the contents of the Judge's note, that the applicant's supporting affidavit was lacking veracity in asserting that neither he nor his advocates were aware of the delivery of the judgment on 26th March, 2004.

When seeking the discretion of the court to extend time it is incumbent upon the applicant be frank and truthful in its statement of the facts upon which it relies.

The respondent submitted that the intended appeal was not an arguable appeal. It is a second appeal and must therefore comply with the requirements of **Section 79 D and S.72(1)(a),(b) and (c)** of the Civil Procedure Act.

S.79 D provides that:-

“No second appeal from a decree passed in appeal by the High Court shall lie except on the grounds mentioned in section 72.”

S.72 (1) restricts second appeals from High Court first appeals to appeals on any of the following grounds:-

“(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”

The respondent argued before me that the grounds of appeal in the draft memorandum of appeal exhibited to the supporting affidavit of the appellant did not fall within the ambit of **S.72 (1)**. Each of the five grounds are expressed to raise points of law although some of them seem to be more issues of matters of fact than law.

I do not propose to take this issue into account in the exercise of my discretion.

The period of delay is not inordinate but the reasons for that delay have not been candidly explained by the applicant.

Having considered all the above factors and in the exercise of my discretion I hereby dismiss the application with costs.

DATED and DELIVERED at NYERI this 13th day of May, 2005

W.S. DEVERELL

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR