REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: O'KUBASU, J.A. (IN CHAMBERS)

CIVIL APPLICATION 127 OF 2005 (KSM 12-2005)

BETWEEN

MUHUYU WANDABWA KHAMALA.....APPLICANT

AND

THE HON. THE ATTORNEY GENERAL

HENRY WANYONYI NAKHISA

JACKSON SEME.....RESPONDENTS

(An application for leave to file and serve notice of appeal and record of appeal out of time in and intended appeal from the Judgment and Decree of the High Court of Kenya at Kakame (Tanui J) dated 24th February, 1994
in
H.C.C.C. NO. 388 OF 1988)
****

R U L I N G

This is an application by way of notice of motion under ***Rule 4*** of the Court of Appeal Rules (the Rules) filed by the applicant, Muhuyi Wandabwa Khamala, in person. He is seeking extension of time in which to file and serve notice and record of appeal.

In his address the applicant stated that he was unable to file his appeal immediately after the appeal was struck out on 24th June, 2000 because he became sick and for some reason was arrested as a result of some interested party alleging that he (applicant) had committed a crime.

Mr. Jabane for the 1st respondent opposed the application on the ground that there was a very long delay, which has not been explained. He pointed out that the original judgment of the High Court was delivered on 24th March, 1994 and there was extension of time granted to the applicant in June, 1998. According to Mr. Jabane, the appeal was actually heard and determined on 24th March, 2000. From that year (2000) the applicant has done nothing until May this year when he filed the present application. For those reasons Mr. Jabane asked me to dismiss this application with costs.

The 2nd and 3rd respondent associated themselves with the submissions of Mr. Jabane by asking me to dismiss the application with costs.

The history of this dispute goes back to 1988 when one Philip Wandabwa, the father of the applicant herein filed a suit in the High Court of Kenya at Kakamega being High Court *Civil Suit No. 385 of 1988.* The applicant was given an irrevocable power of attorney on 20th April, 2000 for the purposes of civil matters pending in Kenyan Courts. The dispute between the applicant and the three respondents was heard and determined by Tanui J. who delivered his ruling on 24th February, 1994. In his judgment (dismissing the applicant's suit) the learned judge stated, inter alia:

> ***"Having perused the file I failed to see whether the plaintiff had complied with the provision of section 13A of the Government Proceedings Act. I also did not see any order of this Court directing that the case may be filed and all the steps in relation to the proceedings up to trial be taken at Kakamega as provided under section 14 of the said Government Act. The third difficulty I have come across in this suit is that there is no extension of time in case of disability. The plaintiff admitted that his parcel of land was compulsorily acquired in 1968. The second and the third defendants claim that the plaintiff gave the land in 1964. Even if the plaintiff was correct he would still be barred by the Public Authorities Limitation Act and the Limitation of Actions Act from instituting this case after twenty years, against the Government and the two individuals.***

For those reasons, I find that this suit does not have any merit and I therefore dismiss it with costs".

Being dissatisfied by that decision, the applicant preferred an appeal to this Court. The Notice of Appeal was dated 4th March, 1994 and lodged in the High Court at Kakamega on 28th March, 1994. The applicant sought extension of time and in granting the application Shah J.A. in his ruling delivered at Kisumu on 19th June, 1998 stated:

> ***"Mr. Karanja quite properly, is not objecting to the extension of time sought. It does not appear to me that the applicant's father has been let down by his advocates. I order that the record of appeal which would include a copy of the original notice of appeal be filed within the next 30 days. I order further that the appeal must be filed in the name of Philip Muyugu Wandambwa. If Mr. Muyuyi Wandabwa Khamala wants to argue the appeal for his father he will have to have a power of attorney from his father to enable him to do so. Costs of this application abide by the costs of the appeal".***

It was as a result of the above that the applicant sought and obtained a power of attorney from his father on 20th April, 2000.

The appeal finally came up for hearing and by its order dated 24th March, 2000, this Court struck out the appeal with costs. In striking out the appeal this Court was of the view that the appeal was defective in many respects and went on to observe as follows in that ruling of 24th March, 2000.

> ***"Accordingly the High Court had no jurisdiction to deal with it apart from the fact that it was filed some twenty years after the events complained of had taken place. Apart from these very basic flaws the decree in the record before us is uncertified, the notice of appeal is wholly defective and the consequence of all these must be that the appeal ought to be struck out. We accordingly order that it be struck out but with no order as to costs thereof".***

It must be observed that the appeal was struck out on 24th March, 2000 and application for extension of time was filed on 9th May, 2005; so that there was a delay of over five years. By this application the applicant is seeking this Court's discretion.

An application under ***Rule 4*** of the Rules gives this Court wide and unfettered discretion in granting or refusing to extend time. In ***Leo Sila Mutiso v. Rose Hellen Wangari***, Civil Application No. Nai. 251 of 1997 (unreported), this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal, stated:

> ***"It is now well settled that the decision whether or not to extend 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.***

The Court then continued:

> ***"Bearing these principles in mind and applying them to the instant case the appellant took almost three and half months to file the present application after the appeal was struck out for the second time. In our judgment with respect to the period of delay of almost three and a half months, in any view of it is substantial. In Samken Limited & Another v. Mercedes Sanchez Rev Tussel & Another Civil Application No. Nai. 21 of 1999 (unreported) this Court found a delay of about three months long. In Ravashdeh v. Lane (1988) E.G. 100 a delay was said to be much longer, it was six weeks in fact. In addition there is no explanation for delay. None is put forward in the affidavit of that applicant sworn in support of this application on 24th September, 1997".***

Pausing here for a moment, it should be pointed out that even a delay of six weeks, if not sufficiently explained, has been considered inordinate. In the present application we are dealing with a delay of slightly over five years. On the face of it, this is indeed a long delay. But what explanation has been given by the applicant? He said that he fell sick and then was arrested. Apart from what has fallen from his lips no documents were produced to show that he was indeed sick for all that time. When I asked him whether he was indeed jailed he changed his story and said that he was merely arrested and then released. The other aspect of this application that should be given due consideration is the chances of the intended appeal succeeding. The learned judge of the superior court found that the applicant's claim was time barred. Then in striking out the appeal, this Court was of the view that the procedure adopted by the applicant in the High Court was wholly defective. In its order of 24th March, 2000, this Court stated:

> ***"This appeal is defective in many respects. This matter appears to fall squarely under the provisions of section 75 of the Constitution and the provisions of the Land Acquisition Act. Under those provisions the High Court has only appellate jurisdiction and not original jurisdiction. The action was started by a plaint and that was clearly wrong. The learned Judge must at some stage realized the error and that must be why he ordered the parties to make written submissions without having actually received any evidence on the allegations in the plaint. The procedure adopted by the appellant in approaching the High Court was wholly defective and rendered the suit a nullity ab initio".*** **(underlining provided).**

From the foregoing it is clear that this Court declared the applicant's suit a nullity ab initio. That being the position the applicant's fate was sealed by that order of this Court.

Even if the applicant were to be granted an extension sought this would amount to a temporary victory which would be rendered futile once the intended appeal is filed. It is time the applicant was told in no uncertain terms that he has been flogging a dead horse. He should be rescued from further waste of time and resources.

This Court has unfettered and wide discretion under rule 4 of the Rules but this discretion must be exercised judicially. Justice must look both ways. The rules are meant to regulate administration of justice and they are not meant to assist the indolent nor to cheer up those bent on fruitless litigation.

In view of the foregoing, I am satisfied that this is not a proper case in which to exercise my discretion in favour of the applicant. Consequently, this application fails and the same is dismissed but with no orders as to costs.

Dated and delivered at Kisumu this 14th day of June, 2005.

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR