



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: O'KUBASU, J.A. (IN CHAMBERS))
Civil Application NAI 362 of 2004

BETWEEN

SIMON TOWETT MARITIM APPLICANT

AND

JOTHAM MUIRURI KIBARU RESPONDENT

*(Application for leave to lodge and serve Notice of Appeal and Record of appeal
out of time from the Judgment of the High Court of Kenya at Nakuru (Lady Justice Ondeyo)
dated 7th July, 2003*

in

H.C.C.C. NO. 253 OF 1996)

RULING

This is an application by way of Notice of Motion stated to have been brought under “**Rules 4, 42, 74 and 76** of the Court of Appeal Rules” in which the applicant, Simon Towett Maritim is seeking the following orders:-

“1. THAT time within which to lodge and serve notice and record of appeal from the decision of the superior court in NAKURU H.C.C.C. No. 253 of 1996 be extended as this Honourable Court may deem fit.

2. THAT costs of and incidental to this application abide the result of the intended appeal.”

The application is based on various grounds stated therein and on the applicant’s affidavit running into 19 paragraphs in which the applicant sets out the reasons why there was a delay in filing the notice of appeal and the record of appeal. There is then a long replying affidavit of 32 paragraphs sworn by the respondent, **Jotham Muiruri Kibaru**.

This application was argued with considerable force by both Mr. Oduor for the applicant, and Mr. Kahiga, for the respondent.

From the material placed before me, it would appear that there can be no dispute that there was a long delay of about seventeen (17) months. It is also admitted that soon after the judgment of the superior court was delivered the Court file went missing. Efforts were made to reconstruct a skeleton file. The applicant changed his advocates and the new firm of advocates did not move with speed in putting things in place. All this contributed to the delay in taking essential steps. Each counsel put in a number of authorities in support of his respective position in 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 face, 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.

The above passage has been quoted with approval by this Court in **GRINDLAYS BANK INTERNATIONAL (K) LIMITED VS. GEORGE BARBOUR** Civil Application No. NAI. 257 of 1995 and **TRADE BANK LIMITED (IN LIQUIDATION) VS. L.Z. ENGINEERING CONSTRUCTION LIMITED AND ANOTHER** – Civil Application No. NAI. 282 of 1998”.

The foregoing is appropriate summary of the authorities cited in this application.

In the present application there was a delay of about seventeen (17) months. The applicant was not informed of the outcome of his case immediately the judgment was delivered by the superior court. The court file of the superior court went missing. There was the issue of the applicant changing his advocates and the new firm of advocates had to start the process of coming on record and hence had to make the necessary applications. The dispute herein relates to land which as we are told by Mr. Oduor for the applicant, is an emotive issue.

In **MUCHUGI KIRAGU VS. JAMES MUCHUGI KIRAGU 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.”

I have carefully considered the background to this matter and bearing in mind that the dispute has its origin in the infamous land clashes of 1992, I am of the view that this matter ought to be finally determined by the highest court in the land. For these reasons, this application is allowed and the applicant is ordered to file his 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 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 NAKURU this 30th day of September, 2005.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR